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Giving Direction to Discretion

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GIVING DIRECTION TO DISCRETION:

50 YEARS OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL
TORT CLAIMS ACT AND THE DENIGRATION OF SAFETY

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I. INTRODUCTION

COMMON LAW AND SOVEREIGN IMMUNITY

The English common law established the fundamental principle that the government is not liable for its mistakes, misdeeds, or errors that cause injury to others.1 The doctrine of sovereign immunity, the concept that “The King Can Do No Wrong,” precludes litigation against the sovereign; i.e. governmental entities and employees. By way of illustration, even if the government is negligent in designing, constructing, maintaining, operating, inspecting, repairing, licensing, or regulating a facility, no liability will attach. Even if the injury occurred on government land, during government operations, or otherwise by a government employee acting within the scope of employment, the victim will not have a cause of action against the government.

The Supreme Court adopted the doctrine in 1821 for suits against the United States.2 Sovereign immunity is therefore based in the United States on the common law rather than as a constitutional doctrine3 in suits involving the federal government. 4

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1 In general, see I.M. Gotlieb, Tort Crimes Against the United States, 30 GEO. L. J. 462 (1992). For a historical purview of sovereign immunity, see Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1 (1963). Professor Jaffe traces the doctrine back to the year 1268. Id. at 2.

2 Chief Justice Marshall stated in dicta in Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 411-12 (1821): “No suit can be commenced or prosecuted against the United States.” See also, The Siren, 74 U.S. (7 Wall.) 152, 154 (1868); Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868). The Supreme Court was concerned that without sovereign immunity the Government would be unable to function because of the threat of litigation.

3 Nestor M. Davidson, Note, Constitutional Mass Torts: Sovereign Immunity and the Human Radiation experiments, 96 COL. L. REV. 1203, 1218 (1996). For example, in United States v. Lee, 106 U.S. 196 (1882), the descendants of Robert E. Lee sued the government over land they owned in Virginia that the government seized and converted into Arlington National Cemetery. The Court allowed a Takings claim to proceed. However, it accepted the rule that the government could not be sued without its consent, but expressed doubt about the justification for the doctrine.
The strength of sovereign immunity is such that the federal government is only liable for tortious conduct to the extent that Congress, through specific statutory enactments, has waived the immunity; no liability exists against the United States unless Congress has authorized it. A corollary interpretation is that any waiver of sovereign immunity must be unequivocally expressed. If therefore an ambiguity exists regarding the extent of a waiver, then the waiver shall be interpreted narrowly in favor of immunity. In other words, waivers are construed strictly in favor of the sovereign, as are conditions attached by Congress to a waiver. Thus, a practical, and inevitable, consequence of sovereign immunity is that the government may escape legal responsibility for injuries that would be compensable if caused by a private party.

The effect of sovereign immunity is that a lawsuit against the federal government needs to be addressed first in terms of immunity. The question of tort liability arises only after the immunity issue is resolved. Absent a specific Congressional waiver, the issue of negligence does

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4 However, a constitutional basis exists in the U.S. Constitution for state sovereign immunity. In response to the Supreme Court decision in Chisolm v. Georgia, 2 U.S. (Dallas) 419 (1793), which allowed a state to be sued in federal courts, the 11th Amendment was adopted. It bars suits against the States from being brought in federal courts: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects or any Foreign State.” U.S. Const., Amend. 11. Conversely, the Supreme Court opened up a cause of action against the federal government for violations of the United States Constitution. See Bivens v. 6 Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).


6 Dalehite v. United States, 346 U.S. 15, 30,31 (1953)


11 Allen v. United States, 816 F.2d 1417, 1424 (10th Cir. 1997).
not arise. Indeed, sovereign immunity serves as a jurisdictional bar to law suits against the United States unless it waives immunity and consents to suit.\textsuperscript{12}

The Supreme Court in a series of decisions has emphasized immunity through the discretionary function exception to the detriment of safety. We shall see how the effect of these decisions has been to reverse Congress’ intent of waiving sovereign immunity. We shall look especially at the areas of public lands and inspections to see how negligence is rewarded, and safety marginalized. The problems of public land management and safety inspections illustrate the haphazard application of the discretionary function exception. Both areas entail substantial negligence liability for private parties under the common law, but the law is substantially less clear when the federal government is involved.

\section*{II. THE FEDERAL GOVERNMENT AND SOVEREIGN IMMUNITY}

\subsection*{A. THE FEDERAL TORT CLAIMS ACT}

To a greater or lesser degree, all jurisdictions have abrogated sovereign immunity. On the federal level, Congress enacted the Federal Tort Claims Act in 1946\textsuperscript{13} to impose liability in cases of negligence. The Act waives sovereign immunity for acts of negligence “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.”\textsuperscript{14} Liability therefore applies if a private individual would be liable under similar circumstances.

\footnotesize{\textsuperscript{12} United States v. Sherwood, 312 U.S. 584, 586-7 (1941); United States v. Shaw, 309 U.S. 495, 501 (1940).}

\footnotesize{\textsuperscript{13} 28 U.S.C. § 2671 et seq.}

\footnotesize{\textsuperscript{14} 28 U.S.C. § 1346(b). Since liability depends upon a violation of the law of the state where the tort occurred, breach of a federal statute or regulation does not per se give rise to a cause of action under the Federal Tort Claims Act. See Davis v. United States, 536 F. 2d 758 (8th Cir. 1976); Fullmer v. United States, 34 F. Supp. 2d 1325 (D. Utah 1997); Cuyler v. United States, 37 F. Supp. 2d 1099, 1102 (N.D. Ill. 1999), Pate v. Oakwood Mobile Homes, Inc., 374 F. 3d 1081 (11th Cir. 2004) (OSHA Regulations). The test is not whether a local}
Pursuant to the Federal Tort Claims Act, individual federal employees acting within the scope of employment are not personally liable for any negligence they may have committed. Only the federal government may be held liable in a court of law.\(^1\)

Several exceptions exist to the statute.\(^2\) For example, the statute does not waive sovereign immunity for causes of action based in strict liability,\(^3\) misrepresentation,\(^4\) intentional misconduct,\(^5\) strict liability based upon a trespass,\(^6\) or interference with contract rights.\(^7\)

Sovereign immunity is therefore waived only for acts involving negligence. No waiver exists for government would be liable, but whether the federal government would be liable if it were a private individual. Appleton v. United States, 69 F. Supp. 2d 83, 96 (D.D.C. 1999). If though state law imposes negligence per se for a violation of statute, then liability may be imposed. See e.g. Janitscheck v. United States, 48 Fed. Appx. 809 (9th Cir. 2002).

\(^1\) See 28 U.S.C. § 2679(d)(1): “Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States . . . . and the United States shall be substituted as the party defendant . . . .” See Webb v. United States, 24 F. Supp. 2d 608 (W.D. Va. 1998). Depending upon the jurisdiction, state employees may be liable. See e.g. Ezell v. Christian County, Kentucky, 245 F. 3d 853, 857 (6th Cir. 2001) (Even though sovereign immunity shielded the county from liability, the county road engineer may be personally liable for failure to see the county’s roads were maintained in accordance with the law, and by failure to supervise in a non-negligent manner the maintenance of the roads.).


\(^4\) 28 U.S.C. §2680(h). This exception applies to both intentional and negligent misrepresentations, as well as to both affirmative acts and omissions of material facts. McNelly v. United States, 6 F.3d 343, 347 (5th Cir. 1993). Reliance on false and inaccurate information can be viewed as misrepresentation and thus not subject to liability. Muniz-Rivera v. United States, 326 F.3d 8, 13 (1st Cir. 2003).

\(^5\) 28 U.S.C. §2680(k); United States v. Shearer, 473 U.S. 52 (1985). In response to the Supreme Court decision of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), which created a constitutional cause of action against federal law enforcement officers, Congress amended the Federal Tort Claims Act to include the intentional torts of assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution when committed by federal law enforcement officials. 26 U.S.C. § 2680(h). The Federal Government may also be liable if its negligence enabled the commission of an intentional tort by a government employee. Sheridan v. United States, 487 U.S. 392 (1988) (Government was negligent in allowing an off-duty, intoxicated serviceman to leave a hospital with a loaded rifle.) See also Fair v. United States, 234 F.2d 288 (5th Cir. 1956). On the other hand, a claim was dismissed alleging negligence against the government for failure to protect two federal witnesses murdered by a contract killer. Piechowicz v. United States, 885 F.2d 1207 (4th Cir. 1989).

\(^6\) Dalehite at 45.

\(^7\) 28 U.S.C. § 2680(h).
claims arising in a foreign country.\textsuperscript{22} The Supreme Court has also construed the statute to exclude liability for the acts of independent contractors unless the government controls the physical conduct of the contractor, that is, supervises the “day-to-day” operations of the contractor,\textsuperscript{23} and has also created an independent immunity for claims arising out of military service.\textsuperscript{24}

The Act has weathered sixty years of extensive litigation. As Dean Zillman has noted, few statutes reach a half-century mark, only slightly amended, with the primary purpose intact.\textsuperscript{25} Considering the thousands of cases filed pursuant to the Act, the absence of a legislative response would seemingly indicate widespread satisfaction with the Act. Yet, appearances are deceiving. One exception, involving the exercise of discretionary functions, has engendered great controversy.\textsuperscript{26} As Professor Seamon has commented,\textsuperscript{27} this exception protected the United

\begin{footnotesize}
\begin{enumerate}
\item 28 U.S.C. § 2580(k).
\item Logue v. United States, 412 U.S. 521, 527 (1973); United States v. Orleans, 425 U.S. 807 (1976). The basis for the independent contractor exception is that the waiver applies to acts or omissions of any “employee” acting within the scope of his office or employment. 28 U.S.C. § 1346(b). Section 2671 defines “employee of the government” to include “officers and employees of any federal agency.” By way of example, a patient was injured when an elevator in a naval hospital suddenly dropped two floors. Presumably, elevator maintenance would not be a discretionary act. However, the navy had contracted out the maintenance, repairs, inspection, and testing of the elevator to an independent contractor. The hiring of an independent contractor is a policy determination protected by the exception. See e.g. Hostetler v. United States, 97 F.Supp.2d 691 (E.D. Va. 2000). If an independent contractor is in charge, then the government has no duty even if it notices a hazardous condition. Id.; Williams v. United States, 50 F.3d 299 (4th Cir. 1995); Talkington v. General Elevator, Inc., 967 F. Supp. 890 (N.D.W.Va. 1997). The discretionary function exception protected the Department of Energy in delegating safety responsibilities to a private contractor at the highly contaminated Oak Ridge Nuclear Facility. Harper v. Lockheed Martin Energy Systems, Inc., 73 F.Supp. 2d 917 (E.D. Tenn. 1999).
\item Feres v. United States, 340 U.S. 135 (1950) (generally referred to as the “Feres Doctrine.”).
\end{enumerate}
\end{footnotesize}
States against liability for exposing people to radiation,28 asbestos,29 Agent Orange,30 and HIV contaminated blood.31 We can add pollution,32 lead paint exposure to infants,33 and munitions to this list.34

B. DISCRETIONARY FUNCTIONS

A major statutory exception to The Federal Tort Claims Act is the exercise of discretion. This provision protects the United States from:

[A]ny claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or regulation, whether or not


29 Lively v. United States, 870 F.2d 296 (5th Cir. 1989); \textit{contra see} Dube v. Pittsburgh Corning, 870 F. 2d 790 (1st Cir. 1989) (asbestos).

30 In Re “Agent Orange” Prod. Liab. Litigation, 818 F.2d 194 (2nd Cir. 1987).

31 C.R.S. v. United States, 11 F. 3d 791 (8th Cir. 1993).

32 Courts have recognized the discretionary function exception in protecting government failure to warn of detected environmental hazards. \textit{See e.g.}, Lockett v. United States, 938 F 2d. 630 (6th Cir. 1991) (PCB’s); Wells v. United States, 851 F. 2d 1471 (D.C. Cir. 1988), \textit{cert. denied} 488 U.S. 1029 (1989) (lead contamination); Bacon v. United States, 810 F. 2d 827 (8th Cir. 1987) (dioxin); Cisco v. United States, 768 F 2d. 788 (7th Cir. 1985) (hazardous wastes); OSI, Inc. v United States, 285 F.3d 947 (11th Cir. 2002) (hazardous wastes). Aragon v. United States, 950 F.Supp. 321 (D.N. Mex. 1996)(Pollution and toxic waste deposits at military bases); Abreu v. United States, 468 F.2d 20 (1st Cir. 2006) (Pollution and contamination by the military from live fire exercises on Vieques Island, Puerto Rico; Shea Homes Limited Partnership v. United States, 347 F. Supp. 2d 144 (N.D. Cal. 2005) (methane gas); \textit{see also}, Montijo-Reyes v. United States, 436 F. 3d 19 (1st Cir. 2006).


34 Loughlin v. United States, 393 F. 3d 155 (D.C. Cir. 2004) (failure to warn of …, including chemical weapons, negligently disposed of in District of Columbia neighborhood).
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.35

By its very words, the discretionary function test excludes liability even if the act is
negligent or wrongful.36 The exception is not pierced by a showing of negligence, because such a
holding would effectively nullify the exception.37 Cases, which fall within the exception, are
dismissed for lack of jurisdiction because the discretionary function exception is a limitation on
the waiver of sovereign immunity.38

Confusion exists over which acts are discretionary within the meaning of the statutory
exemption, and which acts are subject to liability. An inability appears in many of the cases to
articulate clear standards and distinctions, which would categorize activities as discretionary or
non-discretionary. This confusion is understandable because Congress provided no definition,
and few clues, as to the meaning of “discretionary function.”39 The task has therefore fallen to
the judiciary to add gloss to a highly ambiguous phrase. Six decades of litigation have failed to
provide a clear distinction between actionable torts and immune discretion.40 Professor Reynolds

36 Dalehite v. United States, 346 U.S. 15, 33 (1953); General Public Utilities Corp. v. United States, 745 F.2d 239,
245 (3d Cir. 1984), cert. denied 469 U.S. 1228 (1985). The issue is not therefore whether the government agency,
or its employees, was negligent in failing to adequately protect the public. Allen v. United States, 816 F.2d 1417,
1421 (10th Cir. 1987) (fallout from atomic testing).
37 See Cassens v. St. Louis River Cruise Lines, 44 F.3d 508, 515 (7th Cir. 1995).
38 Irving v. United States, 909 F.2d 598, 600 (1st Cir. 1990); Rosebush v. United States, 119 F.3d 438, 442 (6th Cir.
1997).
39 In the analogous area of government contracts, the Supreme Court characterized discretionary decisions as
involving “the balancing of technical, military, and even social considerations, including specifically the trade-off
40 Cf. FDIC v. Irwin, 916 F.2d 1051, 1053 (5th Cir. 1990).
wrote forty years ago that the discretionary function exception “caused most of the difficulty which now surrounds application of the Act.”\textsuperscript{41} This statement is equally true today.\textsuperscript{42}

A resolution is critical because at some point every act of government involves a choice, a judgment, a decision, a conscious act, by a person. The decision may be as momentous as licensing a nuclear facility, recognizing some risks exist, or as mundane as a postal driver exceeding the speed limit. If discretion is construed literally to encompass any and every conscious decision by a government employee, then the Federal Tort Claims Act would be a nullity.\textsuperscript{43} The exception would swallow the rule.\textsuperscript{44} Conversely, if applied too narrowly, critical decisions may be compromised by government employees’ fear of having to respond in court to civil suits.\textsuperscript{45}

The problem in attempting to draw a line between discretionary and non-discretionary acts often leads to seemingly inexplicable distinctions. For example, two early medical malpractice cases illustrate the difficulties in drawing a line. One case found liability when a

\textsuperscript{41} Osborne M. Reynolds, Jr., \textit{The Discretionary Function Exception of the Federal Tort Claims Act}, 57 Georgetown L.J. 81, 82 (1968).

\textsuperscript{42} A judge in 1978 similarly wrote: “Rather than a seamless web, however, we find the law in this area to be a patchwork quilt.” Blessing v. United States, 447 F.Supp. 1160, 1167 (E.D. Pa. 1978). Justice Scalia recognized in his 1991 concurring opinion in Gaubert v. United States that the “lower courts have had difficulty in applying” the exception. Gaubert v. United States, 499 U.S. 315, 335 (1991) (Scalia, concurring).

\textsuperscript{43} Professor Reynolds posits that any decision, every decision, involves some discretion. If read literally therefore, there would be few matters that fail to fit the exception. \textit{Reynolds}, supra n. 37 at 87: “Every government function involves some discretion. Officials of the United States are constantly applying statutes, rules, directives, or individual instructions, all of which are subject to interpretations involving the use of discretion.” \textit{Id.} at 120. \textit{See also} Hugh C. Stromswold, \textit{The Twilight Zone of the Federal Tort Claims Act}, 4 AM. U.L. REV. 41, 46 (1955), noting that the discretionary function exception would if “pushed to the only well-defined boundary, . . . exempt the entire federal structure since all federal activity is to some extent traceable to basic policy decisions. . . .” \textit{Cf.} Coulthurst v. United States, 214 F.3d 106, 110 (2nd Cir. 2000) (“[A]lmost every act involves some modicum of discretion.”).

\textsuperscript{44} \textit{Cf.} Gotha v. United States, 115 F.3d, 176, 179 (3d Cir. 1997).

sergeant’s wife was admitted to an Army hospital, and given an injection of a wrong drug, resulting in permanent paralysis from the waist down.\textsuperscript{46} The Court of Appeals held that once the hospital admitted her, the Government assumed the non-discretionary duty of using due care in her treatment.\textsuperscript{47}

Conversely in \textit{Denny v. United States},\textsuperscript{48} two years earlier, the Army failed to promptly dispatch an ambulance when a woman entered labor. The Court of Appeals held the Army’s duty was discretionary because the regulations providing for medical attention for wives and other dependents of officers were conditioned on “wherever practicable.”

Another court might hold the design of a structure is protected by the discretionary function exception, but errors in construction are not.\textsuperscript{49} Yet, in the real world, design plans are often theoretical constructs in which all sorts of judgment calls must be made in the actual construction to make the theory fit the actuality.\textsuperscript{50}


\textsuperscript{47} In this respect, the FTCA incorporates the basic common law principle that even if there is no duty to act initially, once you begin to act, you must act reasonably. \textit{See} Indian Towing Co. v. United States, 350 U.S. 61 (1955). This duty is often referred to as the “Good Samaritan Doctrine,” Raymer v. United States, 660 F.2d 1136, 1143, and is found in Section 324A of the \textit{RESTATEMENT OF TORTS}. A.L.I. \textit{RESTATEMENT (SECOND) TORTS} \textsection{324A}.

\textsuperscript{48} 171 F.2d 365 (5th Cir. 1948), \textit{cert. denied} 337 U.S. 919 (1949).

\textsuperscript{49} Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1031 (9th Cir. 1989). However, discretion during construction might not be based on policy judgments, contrary to the court’s assumption, but on technical, scientific or engineering factors. Allegedly inadequate design decisions by the Army Corps of Engineers are analyzed in terms of engineering malpractice rather than discretion. Alabama Electric Cooperative v. United States, 769 F.2d 1523, 1536-37 (11th Cir. 1985).

\textsuperscript{50} For example, the Teton Dam in Idaho was breached on June 9, 1976. Eleven lives were lost, 25,000 left homeless, and 300 square miles either completely or partially inundated. The dam was situated on difficult geographical conditions, but sound engineering practices could have built a structurally safe dam. However, a series of design, engineering, and institutional mistakes resulted in the dam failing during its initial filling. \textit{See} Denis Binder, \textit{Dam Safety: The Critical Imperative}, 14 Land & Water L. Rev. 341, 345-352 (1979).
In *Spillway Marina, Inc. v. United States*, the failure to give notice of the lowering of a reservoir was held to be a planning decision protected by the discretionary function exception. However, in *Lindgren v. United States*, the failure to post warning signs of hazards to water skiers by the lowering of a reservoir was an operational decision for which the government was held liable. The *Lindgren* court contrasted *Spillway Marina* by holding the earlier case involved periodic releases, which would impose a burden on the government to periodically provide notice, whereas *Lindgren* involved a one-time lowering of the lake level. This distinction is not, of course, contained in the language of the statute.

A district court in *Coates v. United States* held the government liable for failure to have an emergency action plan in place when a dam burst, killing plaintiff. On the other hand, no liability was imposed against the Coast Guard for failing to prepare an emergency action plan for fighting shipboard fires, a highly foreseeable maritime risk.

The Coast Guard was held liable in 1985 for the negligent placement of a navigational buoy, resulting in the grounding of a vessel, whereas immunity was found a year later for

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52 665 F.2d 978 (9th Cir. 1982).

53 612 F.Supp. 592 (C.D. Ill. 1985). However, no liability was imposed against the government in favor of injured landowners. Aldrich Enterprises, Inc. v. United States, 938 F.2d 1134 (10th Cir. 1991). Of course, causation would have been a problem for these plaintiffs because the absence of an emergency action plan did not cause the failure or affect the flow of water. Their structures were doomed once the breach occurred.


55 Eklof Marine Corp. v. United States, 762 F.2d 200 (2d Cir. 1985). See also, Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); Denham v. United States, 834 F.2d 518 (5th Cir. 1987); Sheridan Transportation Co. v. United States, 834 F.2d 467 (5th Cir. 1987) (failure to maintain navigational aids).
negligence in failing to repair or replace a malfunctioning weather observation buoy.\textsuperscript{56} Thus, liability was found for a mispositioned buoy, but not a malfunctioning buoy.\textsuperscript{57}

Suffice to say, these opinions provide little guidance to attorneys or judges adjudicating cases. Differential analysis with no principle basis for distinctions or unifying theme is all too common with the discretionary function exception.

\textbf{C. SUPREME COURT DECISIONS}

The inability to clearly distinguish between liability and immunity has led to a series of Supreme Court decisions that bring a degree of predictability to the discretionary/non-discretionary dichotomy. The Court does so by favoring immunity at the expense of safety and liability, and by encouraging governmental negligence, sloth, and inaction. While the Supreme Court has not promulgated a bright line test between discretionary and non-discretionary functions, its opinions seemingly establish substantial parameters.

\textit{Dalehite v. United States}\textsuperscript{58} was the first Supreme Court case to construe the discretionary function exception. Ammonium nitrate, intended for use in rebuilding Europe after World War

\textsuperscript{56} Brown v. United States, 790 F.2d 199 (1\textsuperscript{st} Cir. 1986), cert. denied 497 U.S.1058 (1987) (Three fishermen died). For a discussion of these cases, see Martin D. Aufredou, Casenote, \textit{Tort Law – Forecasts for Discretion}, 9 WNEC L. Rev. 361 (1987). Conversely, the failure of the National Oceanic and Atmospheric Agency (NOAA) to include a power line in a navigational chart was viewed as discretionary. Sewell v. United States, 732 F. Supp. 1103 (D. Colo. 1990). \textit{See also}, Baird v. United States, 653 F.2d 437 (10\textsuperscript{th} Cir. 1981), cert denied, 454 U.S. 1144 (1982) (extent of detail in charts is discretionary); Limar Shipping Ltd. V. United States, 206 F. Supp.2d 61 (D. Mass. 2002) (allegedly erroneous nautical chart). \textit{See also}, American Boat Co., Inc. v. Unknown Sunken Barge, 299 F.Supp. 2d 944 (E. D. Mo. 2003) (the failure to either warn of, or remove, a sunken barge was viewed as discretionary, following the presumptions of Gaubert); Crawford v. United States, 466 F.3d 955, 959 (11\textsuperscript{th} Cir. 2006) (the Coast Guard’s failure to either mark or remove a sunken wreck is discretionary because statutes, regulations, and internal policy allow broad discretion for the Coast Guard in marking a flat). \textit{See also}, Thames Shipyards and Repair Co. v. United States, 350 F.3d 247 (1\textsuperscript{st} Cir. 2003).

\textsuperscript{57} Indeed, two different judges reached conflicting opinions as to whether the failure to include a hill on an airport navigational chart was discretionary. \textit{Compare} Barna v. United States, 22 F.Supp. 2d 784 (N.D. Ill. 1998) (not discretionary) with Barna v. United States, 89 F.Supp.2d 983 (N.D. Ill. 1999) (discretionary).

\textsuperscript{58} 346 U.S. 15 (1953).
II as part of the Marshall Plan, exploded, resulting in an extensive loss of life and large property losses. At least 581 people died, and an additional 3,500 were injured. The concussion wave was felt 3.5 miles from the port.\textsuperscript{59} In essence, Texas City, Texas was leveled. Extensive litigation ensued. Plaintiffs alleged the government was negligent in the manufacture, bagging, shipment, and storage of the ammonium nitrate, compounded by additional negligence by the Coast Guard in fighting the fire.\textsuperscript{60} A test case with 300 claimants seeking $200 million in damages reached the United States Supreme Court.

This germinal case clearly presents the conundrum created by Congress in enacting the discretionary function exception. The Court recognized the clear intent of Congress to waive immunity for the tortious conduct of government employees acting within their scope of business. Yet Congress just as clearly intended no liability for the performance of acts of a governmental nature or function.\textsuperscript{61} No bright line separates these goals. To the contrary, they substantially overlap like Venn diagrams. Only at the extremes will the delineation be clear.

A majority of the Justices decided in favor of the United States, concluding that all the government actions were “responsibly made at a planning rather than operational level . . . .”\textsuperscript{62} The Court found the fertilizer was manufactured and distributed according to detailed plans and specifications developed by federal officials “from the top.” The Court stated the discretionary

\textsuperscript{59} The French freighter Grandcamp, loaded with up to 2,300 tons of ammonium nitrate, exploded. By way of comparison, the truck bomb that blew up the Oklahoma City Federal Courthouse on April 19, 1995, contained less than 3 tons of ammonium nitrate. New York Times, April 16, 1997 at p. A10, col. 1 (Nat. Ed.). 168 people died in the Oklahoma City bombing.

\textsuperscript{60} The ammonium nitrate was manufactured in government ordinance plants, the coating was readily susceptible to oxidation, and the ammonium nitrate was bagged in easily ignitable paper containing no warnings.

\textsuperscript{61} 346 U.S. at 27-28.

\textsuperscript{62} Id. at 42.
function concept includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations.\textsuperscript{63} Discretion extends not only to decisions at the planning level of government, but also to the acts and failures of subordinates carrying out the plans as directed.\textsuperscript{64}

In other words, discretion at a high governmental level will serve as an umbrella protecting subordinates who implement the decisions, plans, or operations. The Dalehite standard applies to all employees exercising discretion.\textsuperscript{65}

The Supreme Court did not define the limits of discretion, but held it includes the initiation of programs and activities, as well as determinations by an executive or administrator in establishing plans, specifications or schedules of operations.\textsuperscript{66} A critical line from Dalehite is: “Where there is room for policy judgment and decision there is discretion.”\textsuperscript{67}

The Court also noted, “[t]he power to adopt regulations or by-laws for the preservation of public health . . . are generally regarded as discretionary . . . .”\textsuperscript{68} The Court further stated:

The ‘discretion’ protected by the section . . . is the discretion of the executive or the administrator to act according to one’s judgment of the best course, a concept of substantial historical ancestry in American law.\textsuperscript{69}

Dalehite looked to legislative history to find “it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or

\textsuperscript{63} Id. at 35-36.
\textsuperscript{64} Id. at 36.
\textsuperscript{65} Id. at 33.
\textsuperscript{66} Id. at 35-36.
\textsuperscript{67} Id. at 36.
\textsuperscript{68} Id. at 43, citing Weightman v. Washington, (U.S.) 1 Black 39, 49 (1861).
\textsuperscript{69} Id. at 34.
function.” The Court recognized Congress intended to waive sovereign immunity for “ordinary common law torts,” such as negligence in the operation of a vehicle, whereas the Government should not be “subject to liability arising from acts of a governmental nature or function.”

Almost any act could seemingly be discretionary within the meaning of Dalehite. Indeed, one of the “discretionary” acts protected by the Supreme Court was a decision by the Field Director of Ammunition Plants to bag the ammonium nitrate at a temperature of 200 degrees Fahrenheit. The Court felt the decision-maker had to weigh the risk of fire and explosion inherent in bagging at high temperatures against the “greatly increased production costs and/or greatly reduced production.” The district court found this decision was the proximate cause of the explosion. Justice Jackson’s strong dissent in Dalehite contended the high-level decision was carelessly executed by those in charge of the details. He wrote: “Surely a statute so long debated was meant to embrace more than traffic accidents.”

One of the claims in Dalehite involved allegations of negligence by the Coast Guard in fighting the fire. The Court held the Act did not create new causes of action where none existed before. The effect of the Act “is to waive immunity from recognized causes of action and was

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70 Id. at 28, 30.
71 Id. at 28.
72 Id. at 28, 34.
73 Id. at 28. The Court stated: “[O]ne only need read §2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.” Id. at 32.
74 346 U.S. at 41.
75 Id. at 58 (Jackson, dissenting).
76 Id. at 60. See also Allen v. United States, 816 F.2d 1417, 1424-25 (10th Cir. 1987) (McKay, concurring), cert. denied 484 U.S. 1004 (1988).
not to visit the Government with novel and unprecedented liabilities.”

Alleged failures or carelessness by public firefighters do not create private actionable rights.

In the subsequent case of Indian Towing Co. v. United States, the Supreme Court rejected a distinction between governmental and proprietary functions. The Coast Guard negligently failed to maintain a lighthouse by allowing the light to go out. Keeping the light operational did not involve any permissible exercise of judgment. The Court stated:

The Coast Guard need not undertake this lighthouse service. But once it exercised its discretion to operate a light … and engendered reliance on the guidance offered by the light, it was obligated to use due care to make certain that the light was kept in good working order…

Thus, if the light became extinguished, then the Coast Guard was obligated to use due care both to discover that it was out, and then repair the light or give warning that it was not functioning.

*Indian Towing* recognized one of the basic “duty” concepts of Torts law: the “Good Samaritan” test. Even if no duty to act initially exists, once a party begins to act, it must act

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79 The government conceded the discretionary function exception was inapplicable in the operation of a lighthouse. Instead, it argued the FTCA contained an implied exception for “uniquely governmental functions.” Id. at 64. This contention was rejected by the Supreme Court, which was leery of pushing “the courts into the ‘non-governmental’ – ‘governmental’ quagmire that has long plagued the law of municipal corporations. Id. at 65. As one court noted, while the planning/operational distinction may make sense on a theoretical level, it becomes very problematic when applied to concrete facts. Blessing v. United States, 447 F.Supp. 1160, 1173 (E.D. Pa. 1978). As a practical matter, the governmental/proprietary distinction becomes even more difficult to apply as government has progressively expanded its reach. An advocate of the operational/planning distinction is Professor Reynolds. See Osborne M. Reynolds Jr. The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration, 42 OKLA. L. REV. 459 (1989)
80 Id. at 538, n.3.
81 350 U.S. at 69.
82 Id.
83 Id. at 61. A.L.I. RESTATEMENT (SECOND) TORTS §323 provides:
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 protect his undertaking, if
reasonably. Thus, once a government agency undertakes to act, it has a duty to exercise due care.\(^{85}\) While the initial decision to build and maintain the lighthouse was a discretionary judgment, the failure to maintain it did not involve any permissible exercise of policy judgment.\(^{86}\)

Justice Frankfurter cautioned: “There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation.”\(^{87}\) He also wrote the Court should neither promote profligacy nor careless construction, nor should it impart immunity back into a statute designed to limit it.\(^{88}\)

The 1957 case of Rayonier v. United States\(^{89}\) involved allegations of government employees initially being negligent in allowing a forest fire to start on government land, subsequently followed by negligence in fighting the fire. The government negligently allowed highly flammable, dry grasses, brush and other materials to accumulate. On August 6, 1951, sparks from a railroad engine ignited six fires on the right of way and adjoining land. The fire

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\(^{84}\) Justice Cardozo uttered these memorable words in Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922): “It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to a duty of acting carefully if he acts at all.”


\(^{86}\) See also E. Ritter & Co. v. Department of the Army, Corps of Engineers, 874 F. 2d 1236 (8th Cir. 1989); ARA Leisure Services v. United States, 831 F. 2d 193 (9th Cir. 1987) (design and construction of road was a policy decision, but maintenance was not).

\(^{87}\) Id. at 68.

\(^{88}\) Id. at 69.

\(^{89}\) 352 U.S. 315 (1957).
was almost extinguished after burning for five weeks, covering 1600 acres. The Forest Service then reduced the fire fighting crew to a few firefighters. The fire flared up, spreading up to 20 miles in one direction.

The Supreme Court reaffirmed the holding in Indian Towing Co. that no distinction can be made between proprietary and governmental capacities. Indeed, the Court held the Government could be liable for the negligence of its firefighters if Washington law so allowed.90

The United States contended the government should not be liable for negligence in fighting a forest fire on private land because fighting forest fires is a “uniquely governmental” activity. The Court stated:

[I]t may be that it is “novel and unprecedented” to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.91

90 Firefighting is usually viewed as non-actionable/discretionary conduct. See e.g. City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985); Ayers v. Indian Heights Volunteer Fire Department, 493 N.E.2d 1229 (Ind. 1986); Westbrook v. City of Jackson, 655 So.2d 833 (Miss. 1995) (ran out of water in fighting a fire). However, even the subject of fire fighting can be complicated. Fire protection is not automatically exempt from liability under state common law. For example, Massachusetts has held the discretionary function exception in the Massachusetts Tort Claims Act does not shield a city from liability for its fire fighters’ negligence. Harry Stoller and Co. v. City of Lowell, 587 N.E. 2d 780 (Mass. 1992). In Commerce & Industry Ins. Co. v. Grinnell Corp., 280 F.2d 566 (5th Cir. 2002), the Fifth Circuit held liability can be imposed when firefighters violated fire department regulations and policies in fighting a warehouse fire (Louisiana’s discretionary function exception is similar to the Federal Act).

Discretion obviously applies when the government has to prioritize in fighting multiple fires. Miller v. United States, 163 F.3d 591 (9th Cir. 1988). Similarly, the design of a fire-fighting facility is discretionary. Bruneau v. United States, 150 F. Supp. 2d 303 (D. Mass. 2001).

A decision not to fully close a national forest during a fire season was protected by the discretionary function exception. The forest was closed to industrial, logging, and off-road motor vehicle use, but not for other uses. The decision not to close was based on a wide variety of factors, including the discretion involved in the fire protection plan. Pope & Talbot, Inc. v. Department of Agriculture, United States, 782 F. Supp. 1460 (D. Ore. 1991).

91 Id. at 319.
The trend of Indian Towing and Rayonier to limit the discretionary function exemption after Dalehite’s broad interpretation did not last long. The Supreme Court reaffirmed Dalehite in the 1984 case of United States v. S.A. Empresa de Viacao Aerea Reo Grandense (Varig Airlines), and held a statutory duty to promote safety does not mandate the agency ensure safety.

The Court noted the testimony of a government spokesman in the Committee hearings on the proposed statute. He testified the discretionary function exception was:

[D]esigned to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency . . . . It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort.

The Supreme Court recognized the prior cases had not followed a straight line, as well as the impossibility of defining the fine lines and boundaries of the exception. As in Dalehite, the Court found it impossible to define with precision every contour of the discretionary function exception.

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92 Varig rejected the argument Dalehite no longer represents “a valid interpretation of the discretionary function exception. Id. at 811-812.


94 Id. at 821. Varig Airlines represented the consolidation of two Ninth Circuit opinions. In the first case, plaintiffs alleged a plane type, the Boeing 707, was improperly issued an airworthiness certificate even though the towel disposal area in the lavatory did not comply with fire safety standards. The second case involved the issuance of a supplemental type certificate providing the plane met all airworthiness standards. A gasoline-burning cabin heater did not comply with Federal aviation Administration (FAA) regulations. The cause of the second crash was traced to defects in the installation of the gas lines.

95 Id. at 809-10.

96 Id. at 811.

97 Id. at 813.

98 467 U.S. at 813.
However, it identified factors that are useful in determining which acts fall within the exception. They include “the nature of the conduct, rather than the status of the actor.” The exception is also clearly intended to protect the government acting in its role as a regulator of the conduct of private individuals. The basic inquiry therefore “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.”

*Varig Airlines* followed *Dalehite* in explicitly rejecting a distinction based on the administrative level at which the challenged activity occurred:

“[T]he ‘discretionary function or duty’ . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decisions 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.”

The purpose of the discretionary function is 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.” Regulatory agencies have a great amount of discretion in exercising their safety duties. They must balance the objectives sought to be obtained against practical considerations, such as staffing and funding. The Court further recognized that the plain intent of the legislation is to “encompass the discretionary acts of the Government acting in

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99 Id.
100 Id. at 813-14.
101 Id.
102 Id. at 811, quoting Dalehite, 346 U.S. at 35-36.
103 Id. at 814.
104 Id. at 820. The Supreme Court recognized: “Decisions as to the manner of enforcing regulations directly affect the feasibility and practicability of the Government’s regulatory program . . ..” Id.
its role as a regulator of the conduct of private individuals."\textsuperscript{105} The FAA was allowed to delegate the responsibility for inspecting aircraft to the manufacturer and to conduct spot check monitoring of the manufacturer.\textsuperscript{106} The Court held that when an agency “determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulation on authority of the most basic kind.”\textsuperscript{107}

The FAA’s decisions were therefore protected because the agency was specifically empowered to make policy judgments regarding the degree of confidence to be placed in a manufacturer.\textsuperscript{108}

\textsuperscript{105} Id. at 813-14.

\textsuperscript{106} Pursuant to \textit{Varig Airlines}, courts have generally held a decision by the government to delegate safety to a contractor is protected by the discretionary function exception. Andrews v. United States, 121 F.3d 1430, 1440 (11\textsuperscript{th} Cir. 1997) (disposal of nuclear waste); Domme v. United States, 61 F.3d 787 (10\textsuperscript{th} Cir. 1995); Creek Nation Indian Housing Authority v. United States, 905 F.2d 312, 314 (10\textsuperscript{th} Cir. 1990); Feyers v. United States, 749 F.2d 1222 (6\textsuperscript{th} Cir. 1984) (safety of rail yard workers); Wallace v. United States, 991 F. Supp. 1285, 1288 (D. N. Mex. 1996). The retention of open-ended supervisory authority that allows government officials to exercise choice and discretion does not render the exception inapplicable, Domme v. United States, 61 F. 3d 787,791 (10\textsuperscript{th} Cir. 1995); United States v. Page, 350 F. 2d 28 (10\textsuperscript{th} Cir. 1965), \textit{cert. denied}, 382 U.S. 979 (1966); Craghead v. United States, 423 F. 2d 664 (10\textsuperscript{th} Cir. 1970), even if the government is allegedly negligent in the delegation of safety responsibilities. Totten v. United States, 806 F. 2d. 698, 701 (6\textsuperscript{th} Cir. 1986). The retention of authority to suspend a contractor for failure to comply with federal safety rules does not require the government to supervise the contractor. Bear Medicine v. United States, 47 F. Supp. 2d 1172, 1181 (D. Mont. 1999).

In delegating to a contractor, an agency has discretion in determining the extent to which it will delegate or retain responsibility for safety. See e.g. Cazales v. Lecon, Inc., 994 F. Supp. 763, 775 (S.D. Tex 1997). The exercise of discretionary supervisory authority will not ordinarily give rise to liability. See e.g. Atallah v. United States, 955 F.2d 776 (1\textsuperscript{st} Cir. 1992); Ortiz v. United States, 661 F.2d 826 (10\textsuperscript{th} Cir. 1981); Mercado del Valle v. United States, 856 F.2d 406 (1\textsuperscript{st} Cir. 1988). The degree of supervision of government contractors is similarly protected. Kirchmann v. United States, 8 F.3d 1273, 1277 (8\textsuperscript{th} Cir. 1993); Tonelli v. United States, 60 F.2d 492, 496 (8\textsuperscript{th} Cir. 1995); Cazales v. Lecon, Inc., 994 F. Supp. 765 (S.D. Tex 1997).

The reservation of the right to inspect an independent contractor does not impose a duty on the government to inspect. See e.g. United States v. Page, 350 F.2d 28 (10\textsuperscript{th} Cir. 1961), Jennings v. United States, 530 F. Supp. 40 (D.R.I. 1981). Indeed, even the reservation of a right to thoroughly inspect every detail of a contractor’s work still allows discretion in determining the level of scrutiny to be exercised in the inspection. Kirchmann v. United States, 8 F.3d 1273, 1277 (8\textsuperscript{th} Cir. 1993).

\textsuperscript{107} Id. at 819.

\textsuperscript{108} Id. at 820.
Varig Airlines serves as a strong barrier against governmental liability for regulatory activities that involve discretion. Indeed, one appellate opinion, in denying relief to uranium miners, interpreted Varig and Dalehite by positing the Supreme Court held causes of actions against the United States “would be restricted to such ‘ordinary common law torts’ as automobile collisions.” Many courts have held that pursuant to Varig Airlines the government does not waive sovereign immunity for regulatory activities, which can include licensing decisions. In general therefore, federal regulatory enforcement activities will not give rise to actionable tort liabilities as long as the discretionary function test is met. This rule of non-liability even protects the issuance of regulations to implement the general provisions of a regulatory statute, not just the execution of the regulations.

A major clarification of the discretionary function exception for regulatory activities occurred four years later in Berkowitz v. United States. A two-month old infant ingested an oral vaccine, and then contracted a severe case of polio within a month. The illness left the plaintiff almost completely paralyzed, and unable to breathe without the assistance of a respirator. The National Institute of Health’s Division of Biologic Standards licensed the polio vaccine without first receiving test data on the safety of the vaccine in violation of applicable standards and regulations.

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109 Barnson v. United States, 816 F.2d 549, 552 (10th Cir. 1987), citing Dalehite, 346 U.S. at 28.

110 General Public Utilities Corp. v. United States, 745 F.2d 239, 247 (3rd Cir. 1984), cert. denied 469 U.S. 1228 (1985) (Licensing decisions fall into the heart of the regulatory functions). Another Court found a strong presumption pursuant to Varig Airlines and Gaubert that FAA actions are subject to policy considerations. Stables v. United States, 366 F. Supp. 2d 559, 570-1 (S.D. Ohio 2004).

111 See Gaubert v. United States, 499 U.S. 315, 323.

112 486 U.S. 531 (1988). The Berkowitz decision was foreshadowed 15 years earlier on analogous facts by the Third Circuit decision in Griffin v. United States. 500 F.2d 1059 (3d Cir. 1974).
The unanimous Supreme Court opinion recognized the discretionary function exception “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.”\textsuperscript{113} \textit{Berkowitz} rejected the Government’s argument that the exception precludes liability for “any and all” acts arising out of regulatory programs.\textsuperscript{114} The term “regulatory” is not coterminous with “discretionary.”

Instead, the Supreme Court promulgated a two-step analysis to determine when the discretionary function exception applies. The first step is to ascertain if the challenged conduct involves an element of judgment or choice; conduct cannot be discretionary unless it involves an element of judgment or choice.\textsuperscript{115} No discretion exists therefore to violate a specific, mandatory duty.\textsuperscript{116}

The first part of the \textit{Berkowitz} test has the virtue of simplicity as a rule of exclusion. If a statute, regulation, rule or policy statement clearly forecloses discretion, then the discretionary function exception is inapplicable.\textsuperscript{117}

\textsuperscript{113} \textit{Id.} at 536, citing Varig Airlines, 467 U.S. at 808.

\textsuperscript{114} \textit{Id.} at 538.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} Berkowitz echoed the analysis of Professor Reynolds, who noted an early exception to the discretionary function test involved the failure to comply with a mandatory duty. \textit{Reynolds, supra} n. 38 at 91, citing Somerset Seafood Co. v. United States, 193 F.2d 531 (4th Cir. 1951), and Oman v. United States, 179 F.2d 738 (10th Cir. 1949). \textit{See also}, D. Scott Barash, \textit{Comment, The Discretionary Function Exception and Mandatory Regulations}, 54 U. Chi. L. Rev. 1300 (1987). Dean Zillman argues that the \textit{Berkowitz} standard may be counterproductive. A literal compliance with every requirement may result in the bureaucrat not getting “the job done.” Oftentimes “the essence of governmental discretion” involves selectively enforcing laws, some of which may be contradictory. Donald Zillman,, \textit{Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act}, 1989 Utah L. Rev. 687, 718 (hereinafter referred to as “\textit{Zillman II}”), and \textit{Zillman, supra} n. 25 at 387.

\textsuperscript{117} A court has even held that a specific, non-discretionary duty may be created through a contractual obligation.
One result is that attorneys for claimants search for a statutory provision, regulation, rule or administrative policy, internal guideline\textsuperscript{118} or even executive order\textsuperscript{119} which restricts discretion. The issue then arises whether the provisions are mandatory or precatory.\textsuperscript{120}

If discretion is available, then the second prong of the Berkowitz analysis applies. Even if the conduct involves an element of judgment, a court must then determine if that judgment is of the kind the exemption was designed to shield.\textsuperscript{121} Only discretionary actions, that is decisions which are based on considerations of public policy, are protected.\textsuperscript{122} Berkowitz emphasized the discretionary function exception applies only to conduct that involves the “permissible exercise of policy judgment.”\textsuperscript{123}

The most recent discretionary function Supreme Court decision, \textit{Gaubert v. United States},\textsuperscript{124} reinforces the lessons of Dalehite, Berkowitz, and Varig Airlines. Gaubert alleged negligence by the Federal Home Loan Bank Branch and the Federal Home Loan Bank-Dallas in supervising the operations of a savings and loan. The federal agencies became extensively

\textsuperscript{118} In re Glacial Bay, 71 F.3d 1447 (9th Cir. 1995).


\textsuperscript{120} See e.g. Knochel v. United States, 49 F. Supp. 3d 1153 (D. Ariz. 1999), and notes 146-162, \textit{infra} and accompanying text.

\textsuperscript{121} 486 U.S. at 536.

\textsuperscript{122} \textit{Id.} at 537. Only those decisions grounded in social, economic and political policy are protected by the discretionary function exception. Childers v. United States, 40 F.3d 973, 974 (9th Cir. 1994), \textit{cert. denied} 514 U.S. 1095 (1995). Professor Reynolds observed 35 years earlier: “Where no evaluation of broad policy factors is necessary and decisions concern routine, everyday matters, the exception will not normally be applied.” Reynolds, \textit{supra} n. 40 at 105.

\textsuperscript{123} 486 U.S. at 537.

involved in the day-to-day activities of the thrift. Their negligence allegedly caused the failure of the thrift.

The district court dismissed plaintiff’s case because of the discretionary function exception. The Fifth Circuit reversed in part, relying upon a distinction between protected policy decisions and unprotected operational actions. As with Dalehite and Varig Airlines, the Supreme Court expressly extended the exception to agency employees who were executing a program at the operational level. Significantly, “A discretionary act is one that involves choice or judgment . . . .” Any decision, including day-to-day operational decisions, that involves judgment or policy choice is included in the exception.

The Court then added broad, new dimensions to the exception. Gaubert effectively gives the benefit of the doubt to the agency through its presumptions. If a government official complies with a mandated course of action, then the discretionary function exception precludes government liability. The critical holding is that if a regulation grants discretion, then “the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.” Indeed, “[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it

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125 Id. at 325. These acts are not limited to policy-making or planning functions, but can extend to the operational level.

126 The day-to-day decisions of the regulators involved balancing the solvency of the savings and loan industry, maintaining public confidence in the industry, the need to preserve the assets of the institution for the benefits of depositors and shareholders, and protection of the FSLIC’s insurance fund. Id. at 332. Clearly, the institution, industry and public fiscal considerations characterize the type of discretion protected by the exception.

127 Id. at 324.

128 Id.
must be presumed that the agent’s acts are grounded in policy when exercising that
discretion.”

As of Gaubert therefore, policy makers need not have consciously engaged in an
exercise of discretion to be protected by the discretionary function exception. Whether or not the
agency actually considered and weighed the relevant policy factors is irrelevant.

In addition, the focus of the inquiry, as in Berkowitz, is not on the subjective intent of the
employee in exercising discretion, “but on the nature of the actions taken and on whether they
are susceptible to policy analysis.” Policy considerations are the touchstone for determining
if the exercise of discretion is protected. Gaubert reaffirms Berkowitz that the exceptions
protect governmental actions based on considerations of public policy. The inquiry is an
objective one, which asks whether the actions are “susceptible to policy analysis,” rather than
focusing “on the agent’s subjective intent.” The complainant, to survive a motion to dismiss,
“must allege facts which would support a finding that the challenged actions are not the kind of
conduct that can be said to be grounded in the policy of the regulatory regime.” The Court
should not therefore look at whether the government employee actually considered the policy
factors.

129 Id.
130 Id. at 325.
131 Id. at 322-23.
132 Id. at 323, quoting Berkowitz, 486 U.S. at 537. The exception was designed to prevent judicial second-guessing
of legislative and administrative decisions grounded in social, economic, and political policy.
133 Id. at 325.
134 Id. at 324-25.
Inaction, therefore, may be protected by the exception; the government does not have to establish the decision was based upon a conscious weighing of policy options. To the contrary, the plaintiff has the burden of proof to show the decision could not be based on an exercise of discretion.

Discretion is not limited to long-term decisions. The statutory exemption also applies to day-to-day operations, which require judgment as to which of a range of permissible choices is the wisest.135

Justice Scalia, in his concurring opinion in *Gaubert*, argued the question should not be whether the government official acted “within the purview of the office,” but rather the official “exercised policy making responsibility.”136

*Gaubert* substantially changed the dynamics of the analysis, severely reigning in the discretion of federal courts in construing the exception.

**III. THE DECLINE OF LIABILITY AND RISE OF IMMUNITY**

The effect of the Supreme Court decisions is to provide parameters for the application of the discretionary function exception. The protected governmental act may be by high-level policy makers at the planning level or by subordinates at the implementation stage. The title or intent of the governmental official is not determinative, whereas the nature of the conduct is critical. Decisions involving judgment or choice of a policy nature are protected. No distinction exists between governmental and proprietary functions. The government may delegate safety responsibilities to others, and engage in spot-checking or even no checking.

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135 *Id.* at 325

136 *Id.* at 338
The Supreme Court decisions have not, though, resolved the confusion. Considerable uncertainty still exists, such as in the management of the public lands, resources, and buildings. In addition, lower courts still find themselves making judicial judgment calls.

Even within the Supreme Court parameters, a wide area of uncertainty exists. As we have seen, the Supreme Court in *Dalehite* acknowledged Congress’ intent, expressed through the Federal Tort Claims Act, that the Government should be liable for ordinary negligence. This test would seem easy to apply. Some courts are applying the exception as though it were a simple negligence test. For example, auto accidents and medical malpractice would thereby trigger liability.

In reality, ordinary negligence is a deceptively difficult test full of uncertainty and indefiniteness. The field of tort liability has expanded greatly in the half-century since enactment of the Federal Tort Claims Act. Liability has been extended, defenses abrogated,\(^\text{137}\) new causes of action created,\(^\text{138}\) and innovations in damages developed.\(^\text{139}\) Simple tort principles

\(^{137}\)For example, parent-child immunity has been abrogated, *See e.g.* Goller v. White, 122 N.W. 2d 193 (Wis. 1963); Stamboulis v. Stamboulis, 401 Mass. 762 (1988), as has charitable immunity, Pierce v. Yakima Valley Memorial Hospital, 260 P.2d 765 (Wash. 1953), and state tort immunity, Muskopf v. Corning Hospital District, 11 Cal. Rptr. 89 (Cal. 1961). Interspousal immunity has been substantially limited, Burns v. Burns, 518 So. 2d 1205 (Miss. 1988). The locality rule is rapidly disappearing in medical malpractice cases. *See e.g.* Cobbs v. Grant, 104 Cal. Rptr. 505 (Cal. 1972). Guest statutes are no more. Brown v. Merlo, 106 Cal. Rptr. 388 (Cal. 1973). Contributory negligence and assumption of risk have largely been subsumed into comparative negligence. *See e.g.* Li v. Yellow Cab, 119 Cal. Rptr. 858 (1975).


are no easier to identify and apply than basic unchallenged constitutional law principles. Yet, while common law tort liability is expanding, federal liability is shrinking

Dean Zillman’s empirical studies demonstrate the exception has swallowed the general rule of liability, with the government winning most discretionary function cases. He also breaks down the cases on functional lines by the type of case. The exception is usually held inapplicable in cases of vehicle accidents, premises liability, medical malpractice, and negligent aircraft ground control. The exception usually prevails in cases of flood control activities, military activities and matters of foreign policy, law enforcement activity, and regulatory and licensing activity. Between the Varig Airlines and Berkowitz cases, the government won 56 of the 79 cases (73.4 %) decided under the discretionary function exception. From 1990 to 1995 the government won 40 of the 58 appellate opinions (69%) and

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141 Zillman, supra n. 25 at 373, and Zillman II, supra n. 115 at 718.  
142 These cases are limited to accidents around structures, as opposed to parks and other open spaces.  
143 See Fang v. United States, 140 F.2d 1238, 1248 (9th Cir. 1998). Thus, decisions to release a mental patient for medical reasons are not protected by the exception. Lather v. Beadle City, 879 F.2d 365 (8th Cir. 1989); Mayer v. United States, 1989 WL 152671 (N.D. Ill. 1989).  
144 An incorrect decision by air traffic controllers, which led to a collision between an airliner and a military plane, gave rise to liability. Eastern Airlines, Inc. v. Union Trust Co., 221 F.2d 62, aff’d 350 U.S. 907 (1955).  
145 Ironically, the discretionary function may often be unnecessary to exculpate the government in flood control and irrigation cases. Section 702c of the 1928 Mississippi River Flood Control Act, 33 U.S.C. §702c provides “No liability of any kind shall attach to or rest upon the United States for any damages from or by flood waters at any place . . .” Liability does not exist if flood control is one of the authorized purposes of the project. The exemption applies to both personal injury and property damage claims. In general, see United States v. James, 478 U.S. 597 (1986). Michael S. Levine, Note, United States v. James: Expanding the Scope of Sovereign Immunity for Federal Flood Control Projects, 37 CATH. U. L. REV. 219 (1987); Mary Jean Pedersen, Note, Boudreau v. United States: Government Immunity Under the Flood Control Act of 1928 and the Effect of Outdated Legislation on Society, 41 VILL. L. REV. 1487 (1996). But see Central Green Co. v. United States, 531 U.S. 425 (2001) (immunity depends upon the nature of the water causing the damage rather than the purpose of a water project).  
146 Zillman, supra n. 25 at 374.  
147 Zillman II, supra n. 115 at 718.
of the 80 (76.3%) district court opinions. The reality is that the focus has shifted from negligence to discretion as federal courts struggle to fit cases into the Supreme Court parameters. The exception has swallowed the rule.

Indeed, this result is inevitable if we start with the premise that waivers of sovereign immunity are to be strictly construed. The result is also inevitable if we further accept the premise that the discretionary function exception is not based on safety considerations or risks to human life.

A. POST-GAUBERT APPROACHES

Courts have followed four general approaches in the decade since Gaubert. The first approach is literal. Unless specifically proscribed by a mandatory provision, discretion exists. The second approach focuses on the second prong of Berkowitz, and look at the decision exercised to see if the decision fits within the type of policy envisioned by Congress. This

148 Zillman, supra n. 25 at 373. Another study found plaintiffs winning 39 of 91 (43%) of the cases in the three years between Berkowitz and Gaubert, but only 22 out of 95 cases (23%) in the three years after Gaubert. Eight of the decisions finding liability in the three years after Gaubert have been described as “low-level, mundane decisions bordering on the ministerial.” Peterson and Van der Weide, supra n. 26 at 465-66.

149 The Supreme Court’s deference to sovereign immunity is not limited to tort liability. The last major abrogation of sovereign immunity by the Supreme Court was Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)(dealing with constitutional violations by federal law enforcement officers). The Court in recent years has fairly consistently limited the liability of governmental entities. For example, a series of opinions strictly construed Congressional attempts to waive the sovereign immunity of the federal government in environmental matters. See e.g. Hancock v. Train, 426 U.S. 167 (1976); Environmental Protection Administration v. California, 426 U.S. 200 (1976), and United States Department of Energy v. Ohio, 503 U.S. 607 (1992). Yet Congress has not amended the discretionary function exception, thereby giving rise to a theory of ratification of the Supreme Court’s broad interpretation of the exception, whereas it has legislated in response to the adverse environmental decisions.

approach overlaps the most recent approach, which is to require due care in the exercise of the
discretionary act. The final approach is eclectic. The exception may or may not apply.
Predictability does not exist.

1. THE BERKOWITZ STANDARD

The practical effect of these Supreme Court decisions is the widespread adoption of the
two-part Berkowitz test. The first part of Berkowitz is a seemingly easy test to apply. Either a
mandatory provision restrains government action, or discretion applies. Yet, even Berkowitz has
not proven to be very predictive.

Berkowitz provides a useful rule of exclusion, but does not provide a bright line test. If a
federal statute, rule, regulation, guideline or policy is mandatory, then the federal action is
excluded from the discretionary function exception. Liability is imposed even if the government
employee is unaware of the mandatory provision. If, though, the federal action is not
mandatory, then the other standards would apply.

150 See e.g., Aragon v. United States, 146 F.3d 819, 823 (10th Cir. 1998); Lesoeur v. United States, 21 F.3d 965 (9th
Cir. 1999); Tippett v. United States, 108 F.3d 1194, 1197 (10th Cir. 1997) (moose encounter with snowmobiles);
Leslie v. United States, 986 F. Supp. 900 (D.N.J. 1997) (Post Office security). In general, see William P.
Kratzke, The Supreme Court’s Recent Overhaul of the Discretionary Function Exception to the Federal Tort

151 An agency’s express regulations, Hurst v. United States, 882 F.2d 306, 309 (8th Cir. 1989), or policies,
Dickerson, Inc. v. United States, 875 F. 2d 1577, 1581 (11th Cir. 1989) may specify a course of action. For
example, a Department of Defense safety manual required munitions plants to be evacuated during electrical
storms. Liability was imposed when several plant employees were killed or injured in an explosion during a
thunderstorm. Government safety officials had failed to close the plant. McMichael v. United States, 856 F.2d
1026 (8th Cir. 1988). See also, Miles v. Naval Aviation Museum Foundation, Inc., 289 F.3d 715 (11th Cir. 1997).
Even an activity that normally involves substantial discretion, such as fighting shipboard fires, may be actionable
if contra to policy directives. See e.g. Commerce and Industry Insurance Co. v. Grinnell Corp., 280 F.3d 566 (5th
Cir. 2002); Galapagos Corporacion Curista v. The Panama Canal Commission, 205 F.Supp. 2d 573, 579 (E.D. La.
2002).

152 For example, liability was imposed for a negligent Coast Guard inspection of a vessel, when the inspector was
The Berkowitz standard necessitates courts deciding whether a standard is mandatory or precatory. Many courts find some room for discretion in the precise wording of the applicable standard. Thus, manual provisions of general guidance,\footnote{For example, an agency manual, which provides objectives and principles to be followed in waste disposal decisions, is not mandatory. OSI, Inc. v. United States, 285 F.3d 947, 952 (11th Cir. 2002).} and use of the advisory “should” rather than the mandatory “shall,” do not meet the Berkowitz standard.\footnote{Fortney v. United States, 714 F. Supp. 207, 208 (W.D. Va. 1989), Sewell v. United States, 732 F.Supp. 1103, 1107 (D. Colo. 1990). The word “should” is, pursuant to standard rules of statutory construction, advisory rather than mandatory. Dube v. Pittsburg Corning, 870 F.2d 790, 794-95 (1st Cir. 1989) (dangers of asbestos).}

Indeed, courts have often engaged in parsing language and English lessons.\footnote{Some of the linguistic debates hearken back to Humpty Dumpty in Alice in Wonderland: “When I use a word, Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master – that’s all.” Lewis B. Carroll, THROUGH THE LOOKING GLASS, 197 (Nonesuch Cynet Ed. 1963).} As one court related:

Instead, he relied solely on the letter of the regulation – language which while perhaps suggestive, was at the very least a mixed bag, interweaving imperatives with weaker, precatory verbs and generalities more characteristic of discretion than of mandatory directives.\footnote{Kelly v. United States, 924 F. 2d 355, 360 (1st Cir. 1991). Some of the parsing of language is reminiscent of President Clinton’s famous definition of “is”: “It depends on what the meaning of the word ‘is’ is. If the—if he—if ‘is’ means is and never has been, that is not—that is one thing. If it means there is none, that was a completely true statement.” JUSTIN KAPLAN, GENERAL EDITOR, BARTLETT’S FAMILIAR QUOTATIONS 842 (17 Ed. 2002).}

However, words such as “will” and “must” are not always mandatory, but may be used in a discretionary sense.\footnote{Id.} A general policy to warn of known dangers does not fall astride of Berkowitz\footnote{Dube v. Pittsburgh Corning, 870 F.2d 790, 794 (5th Cir. 1989).} because liability must be based on a special directive. The legal test becomes not
one of general policy, such as “safety,” but whether or not the words prescribe a specific course of conduct.\textsuperscript{159}

For plaintiffs, the search for mandatory language is often an exercise in futility. Even the otherwise mandatory word “shall” does not always result in liability. Discretion may still exist in the particulars.\textsuperscript{160} For example, a regulation provides United States Attorneys “shall” protect witnesses against harm from a suspect. Yet the United States Attorneys still possess judgment and choice in determining how to protect witnesses.\textsuperscript{161} The regulation was too broad to provide specific guidelines.

Similarly, absent a statutory mandate to prepare contingency or emergency action plans, the failure to produce such a plan is protected by the discretionary function test. Thus, the Coast Guard was not liable for failure to have a contingency plan prepared to fight shipboard fires. The decision whether to prepare such a plan was viewed as a “textbook discretionary function.”\textsuperscript{162}

Yet, the failure to plan for foreseeable risks is negligence. Many enterprises are required to have emergency action plans available.\textsuperscript{163} For the Coast Guard to lack an emergency response plan would otherwise be actionable negligence. Indeed, in light of the Coast Guard’s duties to promote safety at sea, as well as the foreseeability of maritime fires, the failure to prepare such a plan would appear to be the epitome of negligence.

\textsuperscript{159} See \textit{e.g.} Miller v. United States, 163 F.3d 591 (9th Cir. 1998); Duke v. Department of Agriculture, 131 F.3d 1407 (10th Cir. 1997); Kelly v. United States, 241 F.3d 755 (9th Cir. 2001).

\textsuperscript{160} Let us remember the cliche: “The Devil is often in the details.”

\textsuperscript{161} Ochran v. United States, 117 F.3d 495, 500 (11th Cir. 1997).

\textsuperscript{162} DFDS Seacruises (Bahamas) Ltd. v. United States, 676 F.Supp. 1193, 1205 (S.D. Fla. 1987). See also, Gager v. United States, 149 F. 3d 918 (9th Cir. 1998) (negligent training, that is failure to train and supervise postal workers in bomb detection, protected as a discretionary function).

In short, generalized duties and policies to promote safety do not impose a specific, mandatory duty on the government.\textsuperscript{164} Indeed, discretion is implicit in fulfilling a general duty. For example, a broad duty to warn the public of “special hazards” falls within the discretionary function exception since discretion is necessarily involved in identifying such hazards.

Phrases such as “To the extent possible, eliminate safety hazards,”\textsuperscript{165} “all prudent measures shall be taken,”\textsuperscript{166} or “as may be practicable,”\textsuperscript{167} trigger the discretionary function exception. Indeed, even an agency manual, intended only for guidance, does not limit discretion.\textsuperscript{168} Pursuant to these interpretations, the means to meet general safety guidelines necessarily involve the exercise of discretion.\textsuperscript{169}

2. PRESUMPTION OF DISCRETION

Many cases are effectively building upon the Supreme Court decisions as a rule of exclusion. Unless a specific statute, regulation, guideline, policy or standard precludes a course of action, the government’s act is perforce one of discretion.\textsuperscript{170} For example, in \textit{Baldassaro v.}

\textsuperscript{164} See Conrad v. Tokyo Aircraft Instrument Co., Ltd., 988 F. Supp 1227, 1231 (N.D. Wisc. 1997) (safety order was intended as a “working tool”). A general duty will not override the discretionary function exception. For example, a general duty to safeguard prisoners does not limit the discretion of the Bureau of Prisons in classifying prisoners. Cohen v. United States, 151 F.2d 1338 (11th Cir. 1998); \textit{See also}, Kelly v. United States, 241 F.3d 755 (9th Cir. 2001) (lack of specifics in training requirements for contract fire-fighting pilots); Mihaylou v. United States, 70 F. Supp. 2d 4 (D.D.C. 1999) (how to provide security to foreign embassies); Kilby v. United States, 145 F. Supp.2d 666, 672-3 (W.D. Pa. 2001) (logging contractor rendered a paraplegic when struck by a dead tree while removing the tree.


\textsuperscript{166} Brotman v. United States, 111 F. Supp.2d 418 (S.D.N.Y. 2000).

\textsuperscript{167} Aragon v. United States, 146 F.3d 819, 824 (10th Cir. 1998) (Executive Order)

\textsuperscript{168} Id.

\textsuperscript{169} Valdez v. United States, 56 F.3d 1177, 1180 (9th Cir. 1995) (Plaintiff was rendered a quadriplegic when he lost his footing and fell down a waterfall in King’s Canyon National Park).

\textsuperscript{170} Thus, absent “any statutes, rules, regulations, or administrative policies” which address operations or “require warnings in any specific manner,” the failure to post warnings or to aerate a lake during winter, the conduct fell
a seaman was injured when a detachable sea rail separated from his bunk while he was climbing into his upper bunk. The court held the act of selecting or approving a ship involved an element of choice or discretion. Since nothing required permanent rails, the design of the bunks was a discretionary act. The opinion followed the reasoning of Gaubert. In addition, the court did not want to “dissect and second-guess each discreet aspect of a total design package . . . .” Thus, a seemingly mundane design decision involving protective railings on a bunk bed has been held to be an act of discretion.

This approach is the one which most often leads to results of seemingly mundane decisions being termed “discretionary,” resulting in a finding of no liability.

3. POLICY DISCRETION INTENDED BY CONGRESS AND THE EXERCISE OF DUE CARE

Often overlooked, but now receiving increasing judicial scrutiny, is the second prong of the Berkowitz test: does the judgment reflect the policy considerations intended to be protected by Congress. The focus is on the basis underlying the agency’s action to determine if protected policy factors are available. If so, the act is protected. If not, liability should apply. The exception is inapplicable when the record does not show that a decision is based on protected policy considerations.173

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171 64 F. 3d 206 (5th Cir. 1995). See also Bragg v. United States, 55 F. Supp. 2d 575 (S.D. Miss. 1999).

172 64 F. 3d at 211.

173 In Re Glacial Bay, 71 F.3d 1447, 1450 (9th Cir. 1995) (ship ran aground because of inadequate nautical charts). Thus, technical safety assessments “come within a category of objective professional judgments” that are not by
Courts are increasingly construing narrowly the second standard of Berkowitz. Many courts now hold safety considerations do not fall into “economic, social or political concerns,”\textsuperscript{174} while in Griffin v. United States,\textsuperscript{175} the Third Circuit held that if the judgments are professional or scientific in nature rather than policy oriented, then courts are “fully capable of scrutinizing the processes and conclusions of the decision-maker by the usual standards applied to cases of professional negligence.”

Absent matters of policy, the discretionary function exception is not “intended to create inconsistent liabilities between private and government employees performing identical acts.”\textsuperscript{176} Not every decision involving a choice or hint of policy concern will merit the discretionary function protection. Rather, the exemption extends to decisions involving the exercise of a policy judgment of a social, economic, or political nature. For example, a decision by a government driver to violate the speed limit, or to go through a red light, in order to get home early, would not normally invoke the discretionary function exemption.

Of course, reconciling the conflicting case law on this issue can be difficult\textsuperscript{177} with the case-by-case approach leading to “some disarray.”\textsuperscript{178}

\textsuperscript{174} See e.g. Summers v. United States, 905 F.2d 1212 (9th Cir. 1990) (failure to warn of hot coals in fire rings on a beach); Boyd v. United States, 881 F.2d 895 (10th Cir. 1989) (failure to warn swimmers of dangerous conditions). See notes 197-214 supra, and accompanying text.

\textsuperscript{175} 500 F.2d 1059, 1066-67 (3rd Cir. 1974).

\textsuperscript{176} Marlys Bear Medicine v. United States, 241 F.3d 1208, 1213 (9th Cir. 2001).

\textsuperscript{177} O’Toole v. United States, 295 F.3d 1029, 1035 (9th Cir. 2002).

\textsuperscript{178} Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999).
Since the test, pursuant to Gaubert,\textsuperscript{179} Berkowitz,\textsuperscript{180} and Varig Airlines,\textsuperscript{181} is whether the decision is susceptible to social, economic, or political policy concerns, it is unimportant whether the government actually balanced these factors in reaching its decision.\textsuperscript{182} However, if the agency decision does not partake of the economic, political or social policy considerations envisioned by Congress, then both the decision, and its subsequent implementation, are closely looked at. As the Ninth Circuit noted in Ducey v. United States,\textsuperscript{183} “the judgment and decision-making involved in day-to-day management of a recreational area are not the sort of decision-making contemplated by the exception.” The exception is inapplicable when the record does not show that a decision is based on protected policy considerations.\textsuperscript{184} Thus, technical safety assessments “come with a category of objective professional judgments” that are not by themselves subject to policy analysis.\textsuperscript{185}

\textsuperscript{179} 499 U.S. at 323.
\textsuperscript{180} 486 U.S. at 537.
\textsuperscript{181} 467 U.S. at 814.
\textsuperscript{183} 713 F.2d 504, 515 (9th Cir. 1983)
\textsuperscript{184} In Re Glacial Bay, 71 F.3d 147, 1450 (9th Cir. 1995).
\textsuperscript{185} Shansky v. United States, 164 F.3d 68, 694 (1st Cir. 199).
A series of cases, led by the Ninth Circuit, hold that while the government may make a policy decision protected by the discretionary function exception, it must still proceed with due care in implementing that decision. As the Ninth Circuit noted in *Ducey v. United States*, “the judgment and decision-making involved in day-to-day management of a recreational area are not the sort of decision-making contemplated by the exception.” The Ninth Circuit’s approach is the modern manifestation of the *Indian Towing Co.* holding. Once the government begins to act, it must act reasonably. In other words, a distinction is made between the underlying policy decision and its subsequent implementation. The former is protected by discretion, whereas the latter is subject to negligence analysis. Thus, while design decisions may be viewed as discretionary, discretion is not necessarily involved in construction or maintenance. The failure to maintain a road in a safe condition may not be a decision

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186 See *Chaffin v. United States*, 176 F. 3d 1208, 1211 (9th Cir. 1999); *Richardson v. United States*, 943 F. 2d 1107 (9th Cir. 1991); *Kennewick Irrigation District v. United States*, 880 F. 2d 1018 (9th Cir. 1989); *Huber v. United States*, 838 F. 2d 398 (9th Cir. 1988); *ARA Leisure Services v. United States*, 831 F. 2d 193 (9th Cir. 1987). Opinions of the Ninth Circuit are not necessarily authoritative if reviewed by the Supreme Court. For example, the Supreme Court reviewed 29 decisions of the Ninth Circuit during the 1996-97 Term and reversed 28 of them. See David G. Savage, *Getting the High Court’s Attention*, 83 ABAJ 46 (Nov. 1997). Clearly opposite to the Ninth Circuit’s approach is that of the First Circuit. See e.g. *Brown v. United States*, 790 F.2d 199 (1st Cir. 1986).

The Ninth Circuit has not always been consistent. In *Ellen v. United States*, 32 Fed. App. 270, 273 (9th Cir. 2002), the Court recognized that safety considerations may be based on policy considerations, such as trading off safety versus accessibility in the national parks. *Valdez v. United States*, 56 F. 3d 1177, 1179-80 (9th Cir. 1995). See also, *Childeas v. United States*, 40 F.3d 973 (9th Cir. 1994); *Blackburn v. United States* 100 F. 3d 1426 (9th Cir. 1996).

187 See *Caplan v. United States*, 877 F. 2d 1314, 1316 (6th Cir. 1989) (negligence in implementation of decision to deforest land), citing *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). See also *Reminga v. United States*, 631 F. 2d 449 (6th Cir. 1980) (Even if decision to issue navigational charts is discretionary, the government is accountable for negligence in locating hazards on the published charts).

188 713 F. 2d 504, 515 (9th Cir. 1983).


190 *Chaffin v. United States*, 176 F. 3d 1208, 1211 (9th Cir. 1999); *Richardson v. United States*, 943 F. 2d 1107 (9th Cir. 1991).

191 *Kennewick Irrigation District v. United States*, 880 F. 2d 1018, 1029, 1031-32 (9th Cir. 1989).

192 *ARA Leisure Services v. United States*, 831 F. 2d 193, 195 (9th Cir. 1987) (A tour bus went off the road and rolled over a mountain pass in Denali Park, Alaska. The National Park Service had permitted a road “which had edges so soft as to be dangerous” to erode from an original width of 28 feet to 14.6 feet at the time of the accident). The decision was followed by the Third Circuit in *Mitchell v. United States*, 225 F. 3d 361, 364 (3rd 1987).
grounded in social, economic or political policy considerations.\textsuperscript{193} Even the need to work within a budget does not render the failure to maintain a road a protected discretionary function.\textsuperscript{194} Similarly, a Coast Guard decision as to which of several vessels to assist may be discretionary in light of limited resources. However, once the Coast Guard began to render assistance to a specific vessel, it had to conform to the applicable standard of care.\textsuperscript{195}

The gist of the Ninth Circuit reasoning is that the government is not free to violate objective safety or technical standards\textsuperscript{196} or building codes\textsuperscript{197} anymore than government physicians may commit medical malpractice. Professional incompetence by physicians was one of the early exceptions carved out by the judiciary to the discretionary function exception. Safety considerations are similarly not the type of policy considerations contemplated by Congress.\textsuperscript{198} As expressed by the Eighth Circuit, “if only professional, non-governmental discretion is at issue, the discretionary function exception does not apply.”\textsuperscript{199} The court also held

\begin{footnotesize}
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\item[193] Id. at 196.
\item[194] Id. at 195.
\item[195] Huber v. United States, 838 F. 2d 398 (9th Cir. 1987). Similarly, even if the Coast Guard does not have a duty to rescue boaters in peril, it may be liable for terminating a search and rescue effort thereby worsening the position of the victims. The actual conduct of the Coast Guard was viewed as wanton and reckless. See Hurd v. United States, 34 Fed. Appx. 77 (4th Cir. 2002).
\item[196] See \textit{e.g.} United Cook Inlet Drift Ass’n. v. Trinidad Corp. (In Re Glacial Bay), 71 F. 3d 1447, 1454-4 (9th Cir. 1995). Thus, regulations providing that an utility shall “construct and operate facilities in accordance with accepted industry practices” is a mandatory standard. The District Court can ascertain the appropriate standard. Baker v. San Carlos Irrigation Project Dist., 58 Fed. Appx. 303, 304 (9th Cir. 2003).
\item[198] The implementation of basic safety measures is not a policy-based consideration. McCall v. United States Department of Energy, 914 F. 2d 191, 196 (9th Cir. 1990). Thus, the operation of a backhoe without a safety device was not protected discretion. Routh v. United States, 941 F. 2d 853 (9th Cir. 1991).
\item[199] Lather v. Beadle County, 879 F. 2d 365, 368 (8th Cir. 1989); Griffin v. United States, 500 F. 2d 1059 (3rd Cir. 1974); Hendry v. United States, 418 F. 2d 774 (2nd Cir. 1969).
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in Aslakson v. United States that if the challenged activity involves safety considerations, rather than the balancing of competing public policy considerations, the exception does not apply. 200

By analogy, the violation of objective scientific standards is not protected by sovereign immunity. 201 Thus, scientific evaluations are not protected by discretion. 202 Nor are removing obvious health hazards, such as failing to control the accumulation of toxic mold. 203

Nor does the exception apply to governmental conduct that invokes the execution of a previously adopted safety policy that is neither regulatory in nature nor in the nature of administrative decision-making grounded in social, economic or political policy. 204 For example, a motorcyclist in Seyler v. United States, 205 failed to negotiate a turn on the road. The plaintiff alleged the Bureau of Indian Affairs negligently failed to erect speed limit signs on the road. The Ninth Circuit felt nothing in the record suggested the failure to post warning signs was grounded in social, economic, or political policy. 206 More significantly, the court doubted that any decision to not provide adequate signs would be “of the nature and quality that Congress intended to shield from tort liabilities.” 207

200 790 F. 2d 688, 692 (8th Cir. 1986). The case involved a failure to comply with the agency’s own safety policy. Id. at 692-94.


202 See e.g. Griffin v. United States, 500 F.2d 1059, 1066 (3rd Cir. 1974).

203 Whisnant v. United States, 400 F. 3d 1177, 1183 (9th Cir. 2005).

204 790 F.2d . at 693.

205 832 F. 2d 120 (9th Cir. 1987).

206 Id. at 123.

207 Id.
Similarly, in *Arizona Maintenance Co. v. United States* the choice as to the amount of dynamite in a charge should be governed by objective standards. The discretionary function exception does not protect the negligent failure to follow known safety standards. The Ninth Circuit wrote:

> This language has created confusion concerning what negligent conduct by federal officials will subject the United States to liability. If taken literally, as the government appears to take it, such language implies that policy decisions and all conduct carrying out policy decisions are protected by discretionary function immunity, even if government employees are negligent in the course of implementing a policy decision. As a result, the discretionary function has threatened to swallow the FTCA’s general waiver of immunity.

So too, a contracting officer’s on-site decisions should turn on sound engineering practices rather than cost.

The Court of Appeals approach has been followed by district courts. For example, even if the decision to engage in above ground nuclear testing was discretionary, the failure to observe objective standards of care for the protection of the health and safety of humans resulted in liability. The court refused to extend the discretionary function exception to negligent failures to follow known safety standards. A choice which falls within established objective safety standards is not protected discretion.

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208 864 F. 2d 1497 (9th Cir. 1989).

209 *Id.* at 1500. This passage is contrary on its face to that of the majority in *Dalehite*. See notes 57-75, *supra*, and accompanying text.

210 Kennewick Irrigation District v. United States, 880 F. 2d 1018, 1031 (9th Cir. 1989).


212 *Id.* at 795.

213 *Id.* at 797.
The rule, which excludes objective safety standards from protected discretion, is not limited to the Ninth Circuit. The Eighth Circuit has also held that while discretion may have been involved in the design and construction of an outlet ditch in a flood control project, the failure to maintain and support the banks of the ditch was not protected discretion.214 The project was designed such that, in the absence of maintenance, the banks would deteriorate and cause erosion.

*Cope v. Scott* 215 involved the failure to post signs warning of dangerous road conditions on a heavily traveled road in Rock Creek Park. The D.C. Circuit recognized that a failure to repair can be a discretionary act if it is based on a public policy rationale. However, it rejected the government’s argument that any decision that implicates the slightest financial or budgetary concern was rooted in policy, and therefore immune from liability.216 Otherwise the second step of *Berkowitz* would be eviscerated and the exception would swallow the act’s sweeping waiver of liability. The placement of the road signs was held to involve engineering rather than protected policy judgments.217

A similar result was reached in *Duke v. Department of Agriculture Forest Service*. 218 A six-year-old suffered significant brain injuries when a boulder rolled down a hillside and smashed into his tent during a family campout in Gila National Forest. The 10th Circuit found liability based upon a failure to post a sign warning of the dangers. The agency’s action was not based on any “political, social, or economic decision of the sort the exception was designed to

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214 E. Ritter & Co. v. Department of the Army, Corps of Engineers, 874 F. 2d 1236, 1241 (8th Cir. 1989).
216 Id. at 449.
217 Id. at 451-2.
218 131 F.3d 1407 (10th Cir. 1997).
The government relied on the presumption that there was some policy reason for the failure to do anything at the site. However, no evidence supported the contention that the agency’s decision was policy based.

_Cope_ and _Duke_ posit a duty to erect a sign warning individuals of an inherently dangerous condition on government-controlled property.

Similarly, the Third Circuit held against the Navy in _Gotha v. United States_ when it failed to provide a handrail while requiring an employee to negotiate a steep, unlighted 20-foot-long path. The record showed the Navy had been asked two or three years earlier to install a handrail.

The government claimed immunity because its actions or inactions were motivated by “military, social, and economic considerations.” The court rejected this claim because the government failed to articulate a public policy rationale that factored into its decisions not to rebuild the stairway or install a handrail. Significantly, the court rejected the government’s broad policy consideration that could conceivably go to any decision by the Navy.

The court viewed the Navy’s inaction as a “mundane, administrative, garden-variety, housekeeping problem that is about so far removed from the policies applicable to the Navy’s

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219 Id. at 1412.
220 Id.
221 115 F.3d 176 (3rd Cir. 1997).
222 Id. at 181.
mission as it is possible to get.\textsuperscript{223} Instead, the case was of the type Congress contemplated when it limited sovereign immunity.\textsuperscript{224}

\textit{Cope} was also followed by the Third Circuit in \textit{Cestonaro v. United States}.\textsuperscript{225} The National Park Service was not protected by the discretionary function exception when it failed to establish that providing some lighting,\textsuperscript{226} but not more, was grounded in policy objectives. The Court quoted \textit{Gotha}: “This case is not about a national security concern, but rather a mundane, administrative, garden-variety, housekeeping problem ….”\textsuperscript{227}

The court felt that torts stemming from these garden-variety decisions fall outside the discretionary function exception.\textsuperscript{228} It further quoted \textit{Dalehite} that “uppermost in the collective mind of Congress were the ordinary common law torts.”\textsuperscript{229} Congressional thought was centered on granting relief for the run-of-the-mill accidents.

The agency could not make a decision unrelated to policy, but then seek shelter by claiming discretion.\textsuperscript{230} In following \textit{Cope}, “a decision, or non-decision, must be reasonably

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\textsuperscript{223} \textit{Id.}
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\textsuperscript{224} \textit{Id.} at 182. The case is also different from a decision not to have guards and rails on the upper berth of prison bunk beds because of fears that prisoners could convert them into weapons or be used as a means of escape. See B.G. Bulgema v. United States, 354 F. 3d 379 (6th Cir. 2004). Of course, as we have seen, discretion was found in a failure to provide protective rails on a bunk bed. Baldrasso v. United States, 64 F. 3d 206 (5th Cir. 1995).
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\textsuperscript{225} 211 F.3d 749 (3rd Cir. 2000).
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\textsuperscript{226} \textit{Id.} at 757. The court noted that Indian Towing involved inadequate lighting.
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\textsuperscript{227} \textit{Id.} at 755, quoting Gotha, 115 F.3d at 181.
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\textsuperscript{228} “That torts stemming from garden variety decisions fall outside the discretionary function exception is consistent with a primary motive behind the FTCA.” \textit{Id.}
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\textsuperscript{229} \textit{Id.} at 755-56, citing Dalehite, 346 U. S. at 28, 28 n.19.
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\textsuperscript{230} \textit{Id.} at  759
\end{flushright}
related to a policy consideration” to be protected discretion.231 The agency did not “present a viable argument of how failure to warn” was rooted in policy objectives.232

Examples abound of the government asserting discretion in cases of otherwise routine acts of negligence, such as allowing an irrigation system to fall into disrepair.”233 The government characterized “its decision to forego needed repairs and maintenance as a proper exercise of agency discretion” in which the Bureau of Indian Affairs had to make a judgment call to achieve its policy goals when the agency always lacked the resources to repair the system. The Ninth Circuit rejected this argument, analogizing the agency’s decision to a failure to maintain the brakes on a car.234 Otherwise, “every slip and fall, every failure to warn, every inspection and maintenance decision can be couched in terms of policy choices based on allocation of limited resources.”235 In reality, the court refused to apply discretion to “a mundane question of ditch maintenance.”236

In another case,237 an airport approach chart for a runway was published for four years without indicating the runway was out of service. An air traffic controller directed a plane to the out-of-service runway with unfortunate results. The government claimed discretion. The district court summarily rejected the defense:

231 Id. at 760
232 Id. at 757.
233 O’Toole v. United States, 295 F.3d 1029, 1035 (9th Cir. 2002).
234 Id. at 1035-36.
235 Id. at 1037.
236 Id.
The contention of the United States is without merit. There is no rational connection between publishing inaccurate information and the policy concerns that underlie the discretionary function exception.\textsuperscript{238}

An earlier district court opinion also felt the failure to warn visitors of dangers at a national park shared the “characteristics of a garden-variety tort rather than the social, political or economic overtones of a discretionary function.”\textsuperscript{239} The gist of these cases is that “routine, implementation actions” should not be viewed as discretionary.\textsuperscript{240}

The Ninth Circuit circumvented the \textit{Gaubert} presumptions in a case involving an accident in a national park.\textsuperscript{241} Plaintiff claimed negligence both in failing to warn and in raising a speed limit to 35 mph. The United States defended by claiming discretion. The Court held the speed limit decision should be viewed as a professional and scientific decision. The government failed to produce any evidence that it was covered as a protected policy decision, relying upon \textit{Gaubert}. The Court in a footnote rejected this claim:

\begin{displayquote}
During oral argument, the government contended that it has no obligation to adduce such evidence, but could instead rely on hypothetical justification indicative of a social, economic and political judgment. The law is to the contrary.\textsuperscript{242}
\end{displayquote}

\textsuperscript{238} \textit{Id.} at 433.

\textsuperscript{239} Dehne v. United States, 1990 WL 51485, #5 (N.D. Ill. 1990). Similarly, the failure to provide guard rails or warning signs on a national parkway, or inadequate guard rails, are not protected policy decisions. Bowman v. United States, 820 F.2d 1393 (4th Cir. 1987); Pifer v. United States, 903 F. Supp. 971 (N.D. W. Va. 1995). A postal patron was allowed recovery when a stanchion fell on her as she waited in line. The Postal Service’s implementation of a method of queue control was an internal choice that did not involve uniquely governmental considerations. Gonzalez v. United States, 690 F. Supp. 251 (S.D.N.Y. 1988).

\textsuperscript{240} Peter H. Schuck & James J. Park, \textit{The Discretionary Function Exception in the Second Circuit}, 20 Q. L. Rev. 55, 66-67 (2000). On the other hand, the creation of a “general safety exception” to protected policy under the act is not accepted by all courts. \textit{See e.g.} Shansky v. United States, 164 F3d 688, 692 (1st Cir. 1999).

\textsuperscript{241} Soldano v. United States, 453 F. 3d 1140 (9th Cir. 2006).

\textsuperscript{242} \textit{Id} at 1150, n. 7.
The Ninth Circuit is essentially reintroducing safety into government liability by using the second prong of Berkowitz as leverage. Similarly, a decision by the Forest Service to raise the speed limit on a snowmobile trail without assuring the safety of traffic at that speed was not protected discretion.243

The effect of these decisions is to engage in a searching analysis of the underlying facts to determine if the decisions are of the nature of discretion envisioned by Congress. This approach is consistent with Gaubert because the Gaubert presumptions are conditioned upon the action or non-action falling within the category of protected discretion. Gaubert did not formulate the factors, with any degree of specificity, which determine if a decision is discretionary. That issue is still open, even after Varig Airlines and Berkowitz. These courts then postulate that basic safety decisions, and acts governed by professional standards, are not normally discretionary in nature. The burden is on the government to factually establish the discretionary nature of these decisions.

4. JUDICIAL JUDGMENT CALLS

The existing opinions have led to a crazy-quilt pattern of inconsistent, and often, irreconcilable opinions. The key to liability in many situations is a judicial deference to “judgment calls.” Uncertainty and imprecision are inherent in many scenarios. Federal courts will often carve out these areas with inherent uncertainty, and protect the resulting “judgment call” as an exempt discretionary function, unless it falls into a well-recognized tort category,

243 Oberson v. United States Department of Agriculture, 441 F. 3d 703 (9th Cir. 2006). See also, Moran Towing Corp. v. Girasol Maritima SA, Inc., 146 F. Supp. 2d 87 (D. Mass. 2001) (Speed limits on the Cape Cod Canal are not discretionary).
such as medical malpractice. Lawyers are unable to advise their clients with any degree of precision.

Certain problems, which inherently involve the exercise of judgment where no certainty exists, give rise to judicial non-intervention. A classic example is weather forecasting, which is generally protected by the discretionary function test.\textsuperscript{244} Trying to predict the forces of nature is often difficult. Indeed, forecasting the weather constitutes the paradigm of the lack of precision in measuring nature. The First Circuit observed in \textit{Brown v. United States}:\textsuperscript{245}

\begin{quote}
\textit{[T]he Weather Service is a particularly unfortunate area in which to establish a duty of judicially reviewable due care. A weather forecast is a classic example of a prediction of indeterminate reliability, and a place particularly open to debatable decisions, including the desirable investment of government funds and other resources. Weather predictions fail on frequent occasions. If in only a small proportion parties suffering in consequence succeed in ... persuad[ing] a judge ... that the government should have done better, the burden on the fisc would be both unlimited and intolerable.}
\end{quote}

Indeed, discretion was found in a famous case involving the death of three fishermen off Georges Bank. They had relied upon an erroneous weather forecast, which was based upon a number of inputs. However, the National Weather Service knew for three months that a weather buoy was sporadically malfunctioning.\textsuperscript{246}

\begin{footnotes}

\textsuperscript{245} 790 F.2d at 204. By analogy, the proper method to combat hurricane damage and beach erosion is also discretionary. Devito v. United States, 12 F. Supp. 2d 269 (E.D.N.Y. 1998). See also Vaizburd v. United States, 90 F.Supp.2d 210 (E.D. N.Y. 2000). Broad discretion would also exist in determining the manner in which forecasts and storm warnings would be issued. Monzon v. United States, 253 F.3d 567 (11th Cir. 2001) (failure to warn of dangers of rip currents).

\textsuperscript{246} Dalehite v. United States, 346 U.S. 15, 43 (1953). See also, Brown v. United States 790 F.2d 199 (1st Cir. 1986).
\end{footnotes}
The analytically correct interpretation would be to hold weather forecasts do not constitute discretionary acts, but also that inaccurate forecasts are not actionable negligence because of the inherent uncertainty in weather forecasting.\textsuperscript{247} Tort law recognizes that the abrogation of an immunity does not in itself result in liability because a duty still has to be established.\textsuperscript{248}

Another problem of judgment calls arose in Washington state courts.\textsuperscript{249} Washington State promulgated a safety zone around Mount St. Helens prior to the volcano’s imminent eruption. The Governor adopted the restrictive zones proposed by the United States Forest Service. Red zones and blue zones were created. The inner red zone was essentially off-limits to everyone, while the outer blue zone allowed access through a permit system.

Proposed revisions to the zones were prepared, but the volcano erupted on Sunday, May 18, 1980 without warning before the revisions could be acted upon. The eruption exceeded the safety zones on one side of the mountain, but left unscathed some of the restricted zones on the other side. Sixty people died in the eruption. Many of the deceased were outside the restricted zone.

\textsuperscript{247} Cf. Taylor v. United States, 139 F.Supp. 2d 1209 (D. Utah 2001) (highly unpredictable business of forecasting the weather). Liability could result in forecasts either too general or so broad as to become useless to both the general public and the aviation community.


\textsuperscript{249} Compare Cougar Business Owners Assn. v. State of Washington, 647 P.2d 481 (Wash. 1982) with Karr v. State, 765 P.2d 316 (Wash. App. 1988). State cases may provide light on the discretionary function exception because many state statutes are modeled on the Federal Tort Claims Act. For example, when the state of Alaska took over the Dalton Highway, a 374 mile dirt and gravel road, running from Prudhoe Bay to the Yukon River bridge, from the Alyeska Pipeline Service Company, Alaska discontinued dust control procedures because of the expense and other priorities. A truck pulled off to the side of the highway, out of gas. It was rear-ended a short time later by another truck, whose vision was obscured by heavy dust. The court accepted the state’s argument that immunity existed because it was a basic policy decision at the planning level. Freeman v. State of Alaska, 705 P.2d 918 (Alaska 1985).
Fourteen of the victims filed suit, alleging negligence in the drawing of the restrictive zones. Conversely, merchants on the other side of the mountain sued because their community was not removed from the restricted zone prior to the eruption. In other words, the zones were over-inclusive on one side but under-inclusive on the other. The actual eruption was 10 to 15 times greater than the largest known previous eruption of Mt. St. Helen’s, and 15 times larger than an expert’s worst prediction.

The cases were filed in state court alleging a cause of action under Washington’s Tort Claims Act, whose provisions are analogous to the Federal Tort Claims Act. The state won both cases. The establishment of a restricted zone of entry around Mt. St. Helen’s was viewed as essential to the preservation and maintenance of life, health, property, and the public peace.250 The Governor made a considered policy decision in closing areas around the mountain.251

Similarly, discretionary judgment calls are often involved in prosecutorial decisions252 as well as those involving parole and probation. Decisions whether to prosecute are, of course, classic discretionary acts.253 The decision to grant parole is based on a number of factors, many of which are subjective.254 Decisions to release prisoners on parole, the plan of supervision of a parolee, and whether or not paroles are to be revoked are discretionary.255 So too are decisions as

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250 647 P.2d at 484.
251 765 P.2d at 319.
252 See e.g. Smith v. United States, 375 F. 2d 243 (5th Cir. 1967), cert. denied 389 U.S. 841 (1967). Investigative and prosecutorial criminal law enforcement decisions are discretionary. Id.; Pooler v. United States, 787 F.2d 868 (3rd Cir. 1986, cert. denied 479 U.S. 849 (1986); K. W. Thompson Tool Co., Inc. v. United States, 836 F.2d 721 (1st Cir. 1988); Sabow v. United States, 93 F.3d 1445, 1454 (9th Cir. 1996) (exception applies even if the government agents “acted with poor judgment and a general disregard for sound investigative procedure”).
253 See e.g. Moore v. Valdez, 65 F.3d 189 (D.C. Cir. 1995); Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983).
255 Id. at 1276. Weissich v. United States, 4 F. 3d 810 (9th Cir. 1993) (failure to warn prosecutor of impending threats by a probationer). See also United States v. Addonizio, 442 U.S. 178, 188 (1979) (“The decision as to when a
to the amount, if any, of protection to be accorded witnesses\textsuperscript{256} or inmates.\textsuperscript{257} The discretionary function exception has even been held applicable to federal marshals in executing an arrest warrant,\textsuperscript{258} and to police dispatchers in determining how to respond to a 911 call.\textsuperscript{259}

However, not all inherently unpredictable, imprecise activities trigger the exception. For example, medical malpractice cases are routinely treated in terms of common-law negligence. In reality, the practice of medicine is often an art rather than a science, calling for a number of discreet judgment calls.\textsuperscript{260} Oftentimes, the medical decision is made by an expert acting under exigent circumstances with limited knowledge of the full extent of the problem. Yet, a jury may be asked to second-guess the expert’s judgment. The liability for medical malpractice has been extended to psychotherapy.\textsuperscript{261} Yet psychotherapy is far from a precise medical science and is truly a medical art.

Courts sometimes seemingly dismiss claims by labeling an act as discretionary when the real reason is a dislike of the plaintiff’s claims on the merits. For example, in \textit{Martin v. United States},\textsuperscript{262} a hitchhiker was killed by a grizzly bear in Yellowstone National Park. Plaintiff alleged liability on the government’s part because it closed the garbage dumps at which the bears

\begin{thebibliography}{9}
\bibitem{256} Piechowicz v. United States, 889 F.2d 1207 (4th Cir. 1989).
\bibitem{257} Calderon v. United States, 123 F.3d 947 (7th Cir. 1997); Alfray v. United States, 276 F.3d 557 (9th Cir. 2002); Palay v. United States, 125 F.Supp.2d 855 (N.D. Ill. 2000).
\bibitem{258} Johnson v. United States, 47 F. Supp. 2d 1075 (S.D. Ind. 1999).
\bibitem{259} Four v. United States, 431 F. Supp. 2d 985 (D.N.D. 2006).
\bibitem{260} Of course, California does not hold lawyers liable in legal malpractice for failing to understand the rule against perpetuities. \textit{See} Lucas v. Hamm, 15 Cal.Rptr. 821, \textit{cert. denied} 368 U.S. 987 (1962).
\bibitem{261} \textit{See e.g.} Sigman v. United States, 217 F. 3d 785 (9th Cir. 2000).
\bibitem{262} 546 F.2d 1355 (9th Cir. 1976), \textit{cert. denied} 432 U.S. 906 (1977).
\end{thebibliography}
had been feeding. The court held the government’s decision was at the planning level and then protected by discretion.263

B. THE SPECIAL CASE OF FEDERAL LANDS AND THE DUTY TO WARN

The management of the public lands is a prime example of discretion trumping safety with numerous fatalities and injuries to the public, many of whom are innocent victims. Judicial opinions generally deferred to the government, but the trend is towards imposing a duty of reasonable care under the circumstances. This duty will usually be met through the providing of adequate warnings. The national parks and forests involve government agencies often weighing and balancing competing and irreconcilable goals mandated by Congress. Visitor safety must be balanced against natural beauty, aesthetics, recreational uses, and preservation. With millions visiting our national parks, forests, and recreational facilities annually, accidents, even tragic accidents, are inevitable.

As one court stated: “Decisions whether and how to make federal lands safe for visitors require making policy judgments protected by the discretionary function exception.”264 This case involved a 16-month old girl who was badly burned when she fell into a fire pit at a government campground. The court noted that if statutes, regulations, and administrative policies do not require fire pits to be maintained in any specific manner, then it is a discretionary function of the agency.265

263 The court also felt plaintiff was contributory negligent. The deceased had not paid the required visitor’s fee, had disregarded advice to go to the visitor’s center, and had camped in an unauthorized place.
264 Rosebush v. United States, 119 F.3d 438, 443 (6th Cir. 1997).
265 In another case, Childers v. United States, 40 F.3d 973 (9th Cir. 1994), an 11 year-old fell to his death off a trail while hiking in Yellowstone National Park during winter. The government’s safety manual provided that roads and trails should either be closed or warnings posted to the public if they could not be maintained as designed and
The decision to place natural beauty and scenic wonder over human life, health and safety may appear misguided, if not inhumane. However, the statute establishing the National Park Service directs the agency to regulate the use of national parks in accordance with the fundamental purpose to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”  

Conversely, Chapter 8.5 of the Management Policies of the Park Service provides “[T]he saving of human life will take precedence over all other management actions.” Yet, a court viewed this statement as an aspirational, general goal, and therefore found protected discretion. General statements on visitor safety do not give rise to a mandatory duty. Broad safety statements do not remove discretion. The statement is too general to remove discretion from a park ranger’s conduct.

As a practical matter, one judge wrote that if safety in the national parks and forests is the highest priority, then fences would have to be erected around or warning signs placed at every

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267 U.S. Dept. of the Interior National Park Service, Management Policies Ch. 8.5 (1988), as cited in Tippett v. United States, 108 F.3d 1194, 1197 (10th Cir. 1997). The directive was viewed as too general to remove discretion.

268 Shansky v. United States, 164 F.3d 688, 691 (1st Cir. 1999).

269 Autery v. United States, 992 F.2d 1523, 1528-29 (11th Cir. 1995).

270 Tippett v. United States, 108 F.3d 1194, 1197 (10th Cir. 1997).

271 Id. See also Daigle v. Shell Oil Co., 972 F. 2d 1527, 1540 (10th Cir. 1992).
attraction that is conceivably hazardous. Yet, this extreme approach is unnecessary to further visitor safety on our public lands.

The conundrum of public lands, recreational users, dangers, and safety can be resolved pursuant to the common law by imposing a duty to warn on the government. Basic negligence law for licensees, invitees, and known trespassers, posits, at a minimum, the duty to warn of known dangers. The duty to warn permeates the common law of Torts. Section 402A of the Restatement (Second) of Torts popularized the duty to warn in products liability of unavoidably unsafe products. Both the common law and statutes require disclosures in real estate transactions.

However, the issue of whether the government should warn of hazards in the natural parks and forests has bedeviled the federal judiciary. The case law until recently is as confusing and contradictory as elsewhere with the discretionary function exception. Clearly, the decisions to warn may involve policy considerations, such as aesthetics, protecting wilderness agencies, or national defense considerations. Discretion may be exercised with considered, deliberated decisions not to warn or make modifications in response to accidents, or even with

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273 While the extent of the duty may vary, See e.g. Dillon v. Legg, 441 P.2d 912 (Cal. 1968), the duty itself exists. The critical distinction between licensees and invitees was the presence or absence of a duty to use reasonable care to discover dangers.
274 See e.g. Johnson v. Davis, 480 So.2d 625 (Fla. 1985); Loghry v. Capel, 132 N.W. 2d 417, 419 (Iowa 1965); Village Development Co. v. Filice, 526 P.2d 83 (Nev. 1974); Easton v. Strassberger, 199 Cal. Rptr. 383 (Ct. App. 1984). See also, A.L.I., Restatement (Second) of Torts §353 (1977) (duty to disclose latent defects).
276 To some extent, the issues can be resolved through state recreational use statutes. See e.g., Howard v. United States 181 F.3d 1064 (9th Cir. 1999); Casas v. United States, 19 F. Supp. 2d 1104 (C.D. Calif. 1998).
277 See e.g. Barnson v. United States, 816 F. 2d 549 (10th Cir. 1987); Begay v. United States, 768 F. 2d 1059 (9th Cir. 1985).
the extent of any warnings or medications. Many cases though involve considerations far different than involved in decision making. Indeed, an absence often exists of any decision-making - a failure not only in doing nothing, but also in not even thinking about doing anything. The failure to warn may be the result of inertia or even in violation of previously adopted safety policies.

The basic decision whether to warn visitors to national parks, wilderness areas, or forests of potential dangers had often been held to be a protected act of discretion. For example, the Sixth Circuit held the discretionary function generally protects:

1. Decisions concerning the proper response to hazards;
2. Decisions concerning whether and how to make federal lands safe for visitors; and
3. Decisions concerning whether to warn of potential danger.

Decisions on whether to post warning signs, and if so, how to post them, require the weighing of a number of policy judgments. Indeed, courts have held that even when signs are mandated, discretion exists with the placement and content of the signs. Factors to be

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278 See e.g. Brotman v. United States, 111 F. Supp.2d 418 (S.D.N.Y. 2000) (inadequate lighting and non-uniform placement of warning signs at the Statue of Liberty). See also, Shansky v. United States, 164 F.3d 688 (1st Cir. 1999).

279 See e.g. Mandel v. United States, 793 F. 2d 964, 967 (8th Cir. 1986).

280 See e.g. Graves v. United States, 872 F.2d 133, 137 (6th Cir. 1989) (no warning was provided of the danger of going over a dam).

281 Rosebush v. United States, 119 F.3d 438, 443 (6th Cir. 1997); Reetz v. United States, 224 F. 3d 794, 797 (6th Cir. 2000); Sharp Ex Rel Estate of Sharp v. United States 401 F. 3d 440, 445 (6th Cir. 2005) (law enforcement staffing decisions).


283 Blackburn v. United States, 100 F. 3d 1426, 1430-31 (9th Cir. 1993); Kiehn v. United States, 984 F.2d 1100 (10th Cir. 1993); Whalen v. United States, 29 F. Supp. 2d 1093, 1097 (D.S.D. 1998); contra, see McMellon v. United States, 395 F. Supp. 2d 442 (S.D. W.VA 2005).
weighed include natural and historic preservation, public safety and budgetary concerns. Aesthetics can outweigh safety.\textsuperscript{284} In some situations the Government is protected because the policy decision is to maintain areas in their natural condition, or to let visitors enjoy the scenic attractions in their natural settings.\textsuperscript{285} These decisions are not novel. In 1963 a court held a field decision on how to handle a troublesome bear in a national park was protected by the discretionary function exception.\textsuperscript{286}

A decision to neither post no-diving signs nor to patrol the shoreline in a national park was protected by the discretionary function exception. Plaintiff was rendered a quadriplegic when his head struck the bottom of the lake on his last dive. The government presented evidence the Park Superintendent made an affirmative decision neither to post warnings nor to patrol the area to “save money, protect the pristine nature of North Bar Lake, allow it to remain a ‘preserve’ area, increase user accessibility, and create the least impact on the environment.”\textsuperscript{287} At least, the government official made a decision.

\begin{footnote}{284} Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999). \end{footnote}

\begin{footnote}{285} See e.g. Kiehn v. United States, 984 F.2d 1100, 1105 (10th Cir. 1993) (decision not to place warning signs on unstable rock formations at petroglyph site was part of policy to protect natural scenery); Johnson v. United States Department of Interior, 949 F.2d 332, 338 (10th Cir. 1991) (decision not to post warnings concerning dangers of mountain climbing in Grand Tetons was based on policy of not engaging in strict regulation of climbing activity in Grand Teton National Park); Zumwalt v. United States, 928 F.2d 951, 953 (10th Cir. 1991) (decision to warn of dangers of caves in Pinnacles National Monument in pamphlet, but not to erect warning signs, was part of policy to maintain trail in wilderness state); Gallardo v. United States, 29 F. Supp. 2d 572 (E.D. Mo. 1998) (balancing of aesthetic and safety considerations for design of indoor steps for the Gateway Arch). \end{footnote}

\begin{footnote}{286} Ashley v. United States, 215 F. Supp. 39 (D. Neb. 1963). \end{footnote}

\begin{footnote}{287} Alef v. United States Department of Interior, 990 F. Supp. 932, 933 (W.D. Mich. 1997); see also Blackburn v. United States, 100 F. 3d 1426 (9th Cir. 1996)(plaintiff rendered a quadriplegic in diving off a bridge in Yosemite Park). \end{footnote}
Some cases, which hold no duty to warn exists because of agency discretion,\textsuperscript{288} can actually be based on an alternative interpretation. These cases often involve clear and obvious dangers for which the common law provides no duty to warn.\textsuperscript{289}

Contra to these cases is the modern trend to impose liability on the government for the failure to warn of known dangerous conditions on the public lands. Not all the cases are recent. The government was held liable in 1954 for the negligent failure to warn boaters of the dangers of a federal navigational project.\textsuperscript{290} The Ninth Circuit held in 1982 the Bureau of Reclamation had a duty to warn water skiers of the dangers of water fluctuations on the Colorado River below Parker Dam. The government had discretion in controlling the discharges, but rapid changes in the discharges created a danger to those downstream. The Bureau thereby had a duty to warn of the dangers.\textsuperscript{291}

As we have seen, several circuits view basic safety measures, including warnings, to be garden-variety activities rather than protected discretionary activities.\textsuperscript{292} Courts have held the failure to exercise policy judgment in a decision not to warn is unprotected by the discretionary function exception.\textsuperscript{293} The trend is to posit a duty to warn unless the government can validate the failure to warn through policy decisions. For example, the court reasoned in \textit{Cestonaro v. United

\textsuperscript{288} See \textit{e.g.} Johnson v. United States Department of Justice, 949 F.2d 332 (10th Cir. 1992) (no duty to place additional warnings regarding mountain climbing in Grand Teton National Park); Kiehn v. United States, 984 F.2d 1100 (10th Cir. 1993) (discretion as to warn of dangers of rock climbing). Of course, one who ignores a series of warning signs may not receive much sympathy from the courts. See \textit{e.g.} Pearce v. United States, 261 F.3d 643 (6th Cir. 2001). See also, Elder v. United States, 141 F. Supp. 2d 1334 (D. Utah 2001).

\textsuperscript{289} See \textit{e.g.} Paubel v. Hitz, 96 S.W.2d 369 (Mo. 1936); Erickson v. Walgreen Drug Co., 232 P.2d 210 (Utah 1951); Hackworth v. United States, 366 F. Supp. 2d 326 (D. S. Car. 2005).

\textsuperscript{290} 210 F.2d 123 (6th Cir. 1954).

\textsuperscript{291} Lindgren v. United States, 665 F.2d 978 (9th Cir. 1982). See also, Mandel v. United States, 793 F. 2d 964 (8th Cir. 1986).

\textsuperscript{292} \textit{See notes} 185-228, \textit{supra}, and accompanying text.

\textsuperscript{293} \textit{See e.g.} Caplan v. United States, 877 F. 2d 1314, 1321 (6th Cir. 1989).
that the National Park Service “didn’t present a viable argument of how failure to warn
in rooted in policy objectives.”

In *Boyd v. United States* the failure to warn swimmers of dangerous conditions was a
safety issue. Even if the decision not to zone an area for swimming was discretionary, protected
discretion was not involved in the failure to warn of dangerous conditions. The failure to warn
did “not implicate any social, economic, or political policy judgment with which the
discretionary function exception [was] properly . . . concerned.”

The Ninth Circuit also found liability in *Summers v. United States* when the National
Park Service failed to warn of hot coals on a park beach. The formulation of the policy regarding
fire rings in beach areas did not consider visitor safety. Without much reasoning, the Ninth
Circuit held in *Seyler v. United States* the failure of the Bureau of Indian Affairs (BIA) to post
warning signs on a curve in the road was not protected by the discretionary function exception.
Plaintiff alleged the road was negligently designed, maintained and marked by the BIA. The
court found nothing in the record to suggest the BIA’s actions were grounded in social, economic
or political policy.

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294 211 F.3d 749 (3d Cir. 2000).
295 *Id.* at 757.
296 881 F.2d 895 (10th Cir. 1989).
297 *Id.* at 898.
298 905 F. 2d 1212 (9th Cir. 1990).
299 832 F.2d 120 (9th Cir. 1987).
300 *Id.* at 123.
Similarly, in *Faber v. United States*, liability was imposed when park rangers failed to warn of the hazards of diving off a waterfall. The National Park Service had identified diving from the waterfall as a particular hazard because of a large number of accidents, and responded by developing a plan to: 1) develop a sign plan; 2) formulate a media response; and 3) provide a process to verbally warn the public. The plan did not specify how to implement these goals, but in any event, the agency did nothing. The court held that any discretion possessed by the agency did not include the failure to do anything.

The Tenth Circuit in *Duke v. Department of Agriculture* held a decision by the Forest Service not to post signs warning of falling boulders in a national forest was unprotected by the exception. The agency’s decision was not based in social, economic or political policy. A failure to warn swimmers, snorkelers and divers, through signs or other markers, of dangers was negligence unprotected by the discretionary function exception. However, the decision to not zone the lake between restricted and unrestricted uses was protected. Competing economic and social considerations necessitated balancing between public safety and recreational use. The safety aspect included consideration of the available funds, whereas the recreational interest involved allowing the greatest possible variety of unrestricted uses by the public. However, the

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301 56 F. 3d 1122 (9th Cir. 1995).
302 131 F. 3d 1407 (10th Cir. 1997). See also, Medina v. State, 35 P.3d 443 (Colo. 2001).
303 Similarly, a 14-year-old boy fell into a super-heated thermal pool in Yellowstone National Park. The Court of Appeals held in *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976) the failure to post warning signs did not constitute an act of protected discretion. No liability was found though because of contributory negligence.
304 Boyd v. United States, 881 F. 2d 895 (10th Cir. 1989). Similarly, in Caplan v. United States, 877 F.2d 1314 (6th Cir. 1989), the decision to deforest part of the government’s land was grounded in public policy and thus protected. However, the failure to warn a contractor of the dangers involved ordinary principles of negligence.
failure to warn swimmers of dangerous conditions did not involve social, economic, or political policy judgments. The failure to warn, a decision to do nothing, was not protected.  

The D.C. Court of Appeals in *Cope v. Scott* also held that while the maintenance of roads was a discretionary function, decisions on where to place road signs were not. The mere presence of a choice, even one involving monetary constraints, does not trigger the exception. Only exercises of policy judgment are protected. A district court held in another case that while discretion may exist in establishing a swimming area, the Forest Service then had a duty to act reasonably for the protection of the swimmers, especially against hidden dangers the government was aware of. Similarly, once the decision was made to “warrant,” that is to ride, a snowmobile trail, and correct perils, such as by redesigning the trail or by installing warnings signs, it had to act with reasonable care. Thus, the failure to warn of a steep hill on an otherwise “well-signed” trail was actionable.

These cases are illustrative of a trend to protect visitors the public lands. The decisions of the Eighth, Ninth, and Tenth Circuits are particularly significant because roughly one-third of

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305 Id. at 898. See also Smith v. United States, 546 F. 2d 872, 876-77 (10th Cir. 1977) (the government’s failure to warn about hazards of thermal heating pool was not discretionary even if the decision to leave some park areas undeveloped and hazardous was discretionary); Ducey v. United States, 713 F. 2d 504, 515 (9th Cir. 1983) (“While the government’s decision to encourage recreation at Eldorado Canyon is the exercise of a discretionary function, the government’s duty to warn of or guard against hazards resulting from that decision may nonetheless be actionable.”) An analogous case is Alabama Electric Co-Op, Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985). The Army Corps of engineers was accused of causing erosion beneath an electrical transmission line on the bank of a river through construction of an upstream dike. The court held that if the agency makes a social, economic or political policy decision in the design of a project, then the exception applies. However, if such policy decisions are not present, then the design decisions are subject to judicial review. Id. at 1536-37.

306 45 F. 3d 445 (D.C. Cir. 1999).

307 Id. at 449.

308 George v. United States, 735 F. Supp. 1524 (M.D. Ala. 1990) (the area was populated by alligators).

309 Oberson v. United States, 311 F. Supp. 2d 917, 956 (D. Mont. 2004); affirmed in part, and questions certified on appeal, Oberson v. United States Department of Agriculture, Forest Service, 441 F. 3d 703 (9th Cir. 2006).

310 Similarly, in *Martinez v. United States*, 780 F.2d 525 (5th Cir. 1986), plaintiff fractured his neck and became
the nation’s lands are owned by the federal government, with the vast bulk in the western states
governed by these appellate courts.311

The government needs to be consistent in its policies. For example, it may claim that no
warnings were provided because of aesthetic considerations, i.e. a decision not to mar the
pristine beauty of the natural resource. However, in one case it posted a “shore-breaker” warning
sign on a less-developed, and hence more pristine beach in the Virgin Islands, but not one on a
more developed beach that already had numerous signs posted on it. The government’s defense
obviously failed because of the factual inconsistencies.312

Discretion might be available in how the warning is communicated as opposed to
providing no warning at all. The Ninth Circuit in Childers v. United States313 recognized that the
agency’s decision to provide warnings could be through such means as park brochures, visitor
center displays, bulletin board information, personal contacts or the posting of signs. Such a
decision would be protected discretion. The National Park Service’s policy at issue in the case

311 See in general, PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION’S LAND: A REPORT TO THE
PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION (1970). Of the nation’s
2,271,343,360 acres of land in 1968, 755,368,055 (33.3%) were held by the federal government. The applicable
percentages for the western states are Alaska (95.3%), Arizona (44.6%), California (44.3%), Colorado (36.3%),
Hawaii (9.7%), Idaho (63.9%), Montana (29.6%), Nevada (86.4%), New Mexico (33.9%), Oregon (52.8%), Utah
(66.5%), Washington (29.4%), and Wyoming (48.2%). Id. at 327, Appendix F. The figures are slightly different
today, especially with Alaska, but the overall picture remains the same.

312 Fabend v. Rosewood Hotels and Resorts, Ltd., 174 F. Supp.2d 356 (D. Virgin Islands 2001) (Plaintiff, while
swimming, was driven into the sand by a shore-break wave and rendered a quadriplegic).

313 40 F.3d 973 (9th Cir. 1994).
was “if roads and trails cannot be maintained as designed and built, they should either be closed or the public adequately warned.”\textsuperscript{314} The agency kept the trails open, but provided no warnings on unmaintained winter trails in Yellowstone National Park. The tribunal held the exception would not apply if the National Park Service ignored the safety manual’s mandate that the public be “adequately warned.”\textsuperscript{315}

Another appellate tribunal held the government had a duty to warn beach visitors of the danger of periodic riptides.\textsuperscript{316} The court noted: “[I]t is absolutely clear that the slightest bit of care, thought, trouble, and expense by the defendants could have saved the lives of the three victims . . . .”\textsuperscript{317} No warning whatever had been provided of the hazardous surf with dangerous riptides at their popular beach.\textsuperscript{318} Previous incidents occurred at the beach. Entry and information booths were at the entrance to the beach, and fees were collected upon entry. A bulletin board provided rules but no warnings. Plaintiffs were visiting from the Midwest and were unaware of the risks. Beach toys were handed to the small children to play with on the sand and water.\textsuperscript{319} A year later, another court of appeals also held there was a duty to warn of rip currents.\textsuperscript{320}

Warnings can avoid many of the problems present in management of the public land. For example, rather than post disruptive signs that could mar scenic beauty, a warning brochure and

\textsuperscript{314} \textit{Id.} at 976.
\textsuperscript{315} 40 F.3d at 976.
\textsuperscript{316} Pacheco v. United States, 220 F.3d 1126 (9th Cir. 2000) (duty to post or hang out warnings).
\textsuperscript{317} \textit{Id.} at 1127.
\textsuperscript{318} A riptide can suck the sand out from underfoot, resulting in a loss of balance, and then being swept out to sea.
\textsuperscript{319} Under the circumstances, the court viewed the agency’s conduct as creating a needless trap with deadly consequences.
\textsuperscript{320} Monzon v. United States, 253 F.3d 567 (11th Cir. 2001).
map could be provided at the entry booths into the national parks, forests, seashores, monuments, recreational areas, and historic structures.

At the minimum, the government should let the public know it will offer them no protection. The legal default in failure to warn cases should be liability, not immunity or discretion, with the burden on the government to justify the non-warning.

C. INSPECTIONS

Much of the federal government’s safety responsibilities lie in inspections. It exercises extensive investigative powers as part of its overall regulatory/safety responsibilities. Pursuant to its regulatory role, the federal government inspects private and governmental facilities and activities. Often times an accident occurs either after a federal safety inspection or in the absence of one. The victim may sue the federal agency claiming that a timely, competent inspection would have discovered the problem and prevented the subsequent accident.321

1. LIABILITY OF PRIVATE INSPECTORS

The case law for federal safety inspections is as varied as with other areas of discretionary function litigation. One initial issue distinguishes inspections from other areas though—the need to establish a private cause of action.322 The defendant often claims no duty is owed to the victim under the common law because the safety inspection was performed at the request of a third party, a contractual undertaking with the third party, or pursuant to a government regulatory requirement.

321 Negligent inspections are not included in the misrepresentation exception to the statute. See Block v. Neal, 460 U.S. 289 (1983).

322 The test is not whether a local government would be liable, but whether the government would be liable if it were a private individual. Appleton v. United States, 69 F.Supp.2d 83, 96 (D. D.C. 1999).
This argument should be a non-starter because the common law rule is to the contrary.

The basis for liability for negligent inspection is well established. The Restatement of Torts (Second) §324A provides:

§ 324A. Liability to Third Person for Negligent Performance of Undertaking

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 protect his undertaking, if his failure to exercise reasonable care increases the risk of such harm, or he has undertaken to perform a duty owed by the other to the third person, or the harm is suffered because of reliance of the other or the third person upon the undertaking.

Comment “b” to § 324A reiterates:

This section applies to any undertaking to render services to another where the actor’s negligent conduct in the manner of performance of his undertaking ... results in physical harm to the third person ... it applies to ... undertakings ... which are gratuitous.323

Judge Cardozo uttered these memorable words in Glanzer v. Shepard:324

"It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to a duty of acting carefully if he acts at all."325

A classic case is Ingram v. Howard-Needles-Tammen & Bergendorf.326 The Kansas Turnpike Authority contracted the annual safety inspections of its turnpike bridges to a firm of consulting engineers. The deceased, while driving a tractor and trailer truck across a bridge, struck a 4-foot by 5-foot-4-inch hole on the bridge caused by deck deterioration in its final

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323 In addition, §323 of the Restatement (Second) Torts provides:

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.

324 135 N.E. 275 (N.Y. 1922).
325 Id. at 276.
326 672 P. 2d 1083 (Kan. 1983).
stages. The driver swerved, hit the guardrail, and fell twenty-five to thirty feet to the ground. Defendants had performed annual safety inspections on the turnpike bridge since 1957, filing a report on their findings after each inspection. The bridge in question was inspected in 1978, with an inspection report dated October 25, 1978 being submitted to the Authority. The fatal accident occurred on February 20, 1979.

The Supreme Court of Kansas followed the principles of §324A in upholding a verdict of $710,000 against the consulting engineers and the Turnpike Authority, holding the engineers “had a legal duty to exercise reasonable care in conducting an annual safety inspection which it owed to the decedent—and to other members of the traveling public.”327 This duty exists even though the engineering consultant was hired by the Authority as part of its trust agreement with the bondholders.328

Indeed, liability exists in many states for public inspectors.329 Several cases analogous to *Ingram v. Howard-Needles-Tammen & Bergendorf* exist.330 Thus, the principal of liability for negligent safety inspection by private parties is well established.331

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327 *Id.* at 1086.

328 Defendants did not help their case by stating in the introduction to the annual safety inspection report that the entire turnpike had been given a close and complete inspection by its consulting engineers and architects with particular attention being given “to items which might impose a hazard to public safety or result in increased future maintenance if not promptly corrected.” It stated in a public report that while the safety of the bridge may not be readily apparent to the Turnpike patron, “the integrity of the structure is apparent, however, to the structural engineers who regularly perform the annual inspections.”

Factually, as a defense, the engineers claimed all they were required to perform was visual inspection. Expert testimony for the plaintiff successfully established that the professional standard of care encompasses much more than a visual inspection. Even defendant’s experts provided testimony favorable to plaintiff. Two engineers performed the actual inspections of the 345 bridges and other facilities in a period of about five days. Earlier reports on the bridge in question noted severe deterioration from 1965 to 1977 with no major repairs being undertaken.

2. DISCRETION IN INSPECTIONS


Some jurisdictions by common law, Gerace v. Liberty Mutual Ins. Co., 264 F. Supp. 95 (D.D.C. 1966) (inspection was to reduce its risk); Zamecki v. Hartford Accident & Indem. Co., 95 A. 2d 302 (Md. App. 1953); Hassan v. Hartford Ins. Co., 373 F. Supp. 1385 (Del. 1974); Stacy v. Aetna Cas. & Sur. Co., 484 F. 2d 289 (5th Cir. 1973); Viducich v. Greater New York Mut. Ins. Co., 192 A. 2d 596 (N.J. App. 1963) (reliance necessary) or statute have reached the opposite result. Statutes, of course, can exempt insurers from liability. They are common in the workers compensation area. For example, a workers compensation carrier was not held liable for conducting spot inspections rather than an undertaking to inspect the entire plant. See also Kifer v. Liberty Mutual Insurance Co., 777 F. 2d 1325, 1338 (8th Cir. 1985), recognizing a legislative trend toward granting immunity to insurance companies. A few states specifically grant immunity to all insurers who perform safety inspections. See e.g., Mass. Gen. Laws Ch 143 §16A; Wisc. Stat. §895.44. The general rule establishes a duty of reasonable care on the part of the inspectors.
The case law regarding liability for negligence in federal safety inspections is as perplexing as elsewhere with the Federal Tort Claims Act.332 For example, negligence in an OSHA “wall to wall” inspection has resulted in a denial of liability based upon the discretionary function exception.333 This case illustrates the confusion in interpreting the discretionary function exception.334 The litigation was in the federal courts for twenty years, resulting in two published district court335 and four appellate opinions,336 including an en banc opinion.337

Courts often hold discretion is involved in the execution of an inspection. Several courts, both in mine safety338 and OSHA339 inspections, have held the government liable for negligent inspections only if the inspections were initiated to supplant rather than supplement the employer’s own inspections. The primary safety responsibility is on the employer. The government is not liable pursuant to this approach.

332 For example, the Fourth and Fifth Circuits reached conflicting results in claims by deceased miners alleging negligence by government employees in conducting mine safety inspections. Plaintiffs alleged the accidents would not have happened without negligence by the inspectors. Compare Estate of Bernaldes v. United States, 81 F.3d 428 (4th Cir. 1996)(no cause of action), and Ayala v. United States, 771 F. Supp. 1097 (D. Colo. 1991) with Myers v. United States, 17 F.3d 890 (6th Cir. 1994)(No liability existed though because state law did not impose a duty on inspectors).

333 Irving v. United States, 162 F. 3d 154 (1st Cir. 1998).

334 One court would impose liability only when the inspector has undertaken to inspect the specific instrumentality causing the injury or the entire physical plant of which the instrumentality is a part. Blessing v. United States, 447 F.Supp. 1160, 1189 (E.D. Pa. 1978).


336 Irving v. United States, 49 F.3d 830 (1st Cir. 1995), 909 F.2d 598 (1st Cir. 1990), 867 F.2d 606 (1st Cir. 1988) (Table). See also 1998 WL 152941 (April 8, 1998).

337 162 F.3d 154 (1st Cir. 1995) (en banc).

338 See e.g. Myers v. United States, 17 F.3d 890 (6th Cir. 1994). See also Estate of Bernaldes v. United States, 81 F. 3d 428 (4th Cir. 1996) and Ayala v. United States, 771 F. Supp. 1097 (D. Colo. 1991). On the other hand, the failure to evaluate all complaints of alleged hazards violated mandatory requirement. Olson v. United States, 362 F. 3d 1236 (9th Cir. 2004).

On the opposite end of the scale is the situation where the government inspectors fail to comply with mandatory standards. Pursuant to Berkowitz, the discretionary function exception is inapplicable. Discretion does not involve failing to discover defects which the agency is charged with looking for, and should have discovered. Inspectors must comply with regulations.340

For example, in McMichael v. United States341 the Defense Department’s safety manual mandated that inspectors were to ensure independent contractors complied with its safety requirements at the plant, including evacuating employees during a storm. The government assigned three on-site inspectors to the facility. Their regular procedures included a 51-step procedure review checklist for safety compliance. Item 16 of the checklist provided:

Verify that the contractor complies with electrical storm procedure. Note: in the event of an electrical storm, DCAS personnel are to evacuate area of explosives in buildings. Notify QAR if this should occur.

Similarly, in Matthews v. United States342 an employee of an independent contractor was injured while blending a gunpowder mixture. The contract between the Army and the contractor incorporated the Army’s safety manual, which imposed on the commanding general the duty to enforce the mandatory requirements of the manual. Provisions included a mandatory preoperational check of the humidity level and the use of nonconductive gloves. Plaintiff alleged a violation of the mandatory safety provision.343 On the other hand, the right to inspect work

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340 For example, liability exists when inspectors violate the mandatory requirements of the applicable inspection handbook for grain elevators. Appley Brothers v. United States, 7 F. 3d 720 (8th Cir. 1993).
341 856 F. 2d 1026 (8th Cir. 1988).
342 720 F. Supp. 1535, 1541 (D. Kan. 1989) (the commander “shall enforce the mandatory requirements”).
343 The exception was also invalidated when a government inspector violated regulations requiring condemnation or tagging of contaminated beef, National Carriers, Inc. v. United States, 755 F. 2d 675, 677-78 (8th Cir. 1985), as well as failure to comply with mandatory lead paint requirements, Pierre v. United States, 741 F. Supp. 386 (D. Mass. 1990).
sites of independent contractors and monitor compliance with safety provisions does not create liability for the government.344

Some interpretations verge on the ludicrous, and carry the discretionary function exception to the absurd. For example, a checklist required inspectors to check the ventilation every thirty days. However, because the checklist prescribed no procedures for testing the ventilation, the discretionary function applied. The checklist also did not specify the course of action an inspector should take if inadequate ventilation was found.345

Even more perplexing is a case where OSHA regulations provided the “end saws of the trimmer shall be guarded.” An OSHA inspector had instructed the employer to remove the existing wood guard from the trimmer saw and replace it with a wire mesh guard. The court held discretion was involved because no regulation specified the type of guard.346 After the accident OSHA inspectors cited the employer for violating the regulation because they did not believe the wire mesh guard complied with OSHA regulations. The court felt the inspector exercised “discretionary regulatory authority of the most basic kind.”347 He had to exercise judgment and choice because the adequacy of any guard is in the eye of the individual who inspects the saw.348

345 Tracor/MBA, Inc. v. United States, 933 F. 2d 663, 667 (8th Cir. 1991). See also Cassens v. St. Louis River Cruise Lines, Inc., 44 F. 3d 508 (7th Cir. 1995) (no specific Coast Guard inspection directive regarding hand rails on cruise ships).
346 Daniels v. United States, 967 F. 2d 1463 (10th Cir. 1992).
347 Id. at 1465, citing Varig Airlines, 467 U.S. at 819-20.
348 Id. at 1465. Conversely, an appellate court felt the “failure to inspect floors for uncovered and unguarded openings” was not an exercise of permitted discretion. Carmozzi v. Roland/Miller and Hope Consulting Group, 866 F.2d 287, 290 (9th Cir. 1989). The contract required compliance with OSHA regulations, which in turn specified that floor openings are to be covered. The failure was mundane and of a commonplace nature.
At least in one case the government forthrightly argued a non-discretionary decision “is one in which employees do no more than cross-check facts against a clear rule or standard.”349 Another court broadly stated: “The discretionary function exception shields the entire inspection process including alleged negligent omissions.”350

Another approach is to craft finely tuned distinctions. An example is *Lemke v. City of Port Jervis.*351 The Farmers Home Administration (FHA) financed plaintiffs’ purchase of a home in 1991. The house contained high levels of lead, which allegedly caused personal injury to their daughter, who was born in 1993.352

The FHA advised plaintiffs that any house they selected would be subject to inspection by, and approval of, the FHA to insure the house was adequate for the family, and met applicable FHA standards, including suitability requirements. A FHA representative visually inspected the house in May 1991, and approved the loan. The house was approximately 90 years old. It was constructed when lead plumbing and lead-based paint were common. A house containing extensive lead plumbing was unsuitable for the loan program. The house’s bad plumbing “was clearly visible to a person with a basic knowledge of plumbing.”353

350 Cassens v. St. Louis River Cruise Line, Inc., 44 F. 3d 508, 515 (7th Cir. 1995).
352 Plaintiff’s daughter had dangerously high levels of lead in her blood, and suffered significant developmental difficulties.
353 *Id.* at 263.
The district court recognized the federal government possessed the discretion to decide what to inspect for, including lead plumbing. The government is free to “set standards for safety and suitability.”

However, plaintiff’s claim was based on the premise that once the government decided to inspect homes to assess their suitability, and having defined “safety” as one element of suitability, then the failure to detect clearly apparent conditions that make the house unsafe is not a matter subject to policy analysis. The failure to obtain information, which would have revealed the presence of lead plumbing, does not warrant protection under the discretionary function exception. In essence, the court held the negligent failure to discover the lead plumbing was not in furtherance of any governmental policy, or constituted an exercise of discretion.

The Second Circuit followed the lack of protected policy approach in Coulthurst v. United States. Plaintiff, a prisoner in a federal penitentiary, was severely injured when a frayed cable snapped on a weight machine two days after it was inspected. He alleged negligence in the inspection of the equipment. The government unsuccessfully asserted immunity. It conceded regulations mandated inspections, but claimed they were lacking in specific instructions as to the method of inspection. The court held, however, that even if discretion existed in whether or not to inspect or even when to inspect, it was not present in the details of

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354 Id. at 265.
355 Id
356 Id. at 265. Similar reasoning was used in a case involving a negligent inspection of a grain warehouse. The inspection failed to discover massive grain shortages. A failure to investigate was not protected, whereas the decision on how to investigate might be protected. Appley Brothers v. United States, 164 F.3d 1164, 1172 (8th Cir. 1999).
357 214 F.3d 106 (2nd Cir. 2000).
the inspection. The exception should not be construed to include lazy or careless failures to perform discretionary duties with due care.

The court presented examples of negligent acts that do not involve elements of judgment or choice within the meaning of *Gaubert* and are not grounded in considerations of government policy:

For example, the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed … to have performed; the official may have been distracted or inattentive and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the report or deal with the paperwork involved in reporting the damage.\(^{358}\)

Thus, we see in yet another context that the execution of a discretionary policy, in this case an inspection, may not have involved discretion, but rather is governed by ordinary negligent factors.

### 3. PRIORITIZING IN INSPECTIONS

Another aspect of safety inspections is the prioritizing of the timing and degree of inspections.\(^ {359}\) Factors to be considered include determining the risks that pose the greatest threat to the public safety, which potential risks are to receive the closest scrutiny, and the personnel and resources to be allocated to each inspection.\(^ {360}\) Decisions may involve deciding whether to

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\(^{358}\) *Id.* at 109. A state court also recognized that intoxication and absence from the duty station are probably not protected. Gordon v. City of Henderson, 766 S.W.2d 784 (Tenn. 1989). On June 23, 1983, a 100’ deck section of the Mianus River Bridge on Interstate 95 collapsed, killing three motorists and injuring another three, when two tractor trailers and two cars fell into the river at 1:30 a.m. One of the state’s bridge inspectors panicked and altered his notes after the collapse to make it appear he had warned about the bridge’s safety. N.Y. Times, Sept. 20, 1983 at B10.1. A subsequent investigation by the Hartford Courant revealed that two Department of Transportation divers falsified inspections. They were responsible for ensuring the underwater safety of 300 bridges in the state. Their acts were not, in fact, the cause of the Mianus River Bridge collapse, but are certainly revealing. See Craig W. Baggott, *DOT Says Fired Frogmen Faked Dozens of Other Dives*, The Hartford Courant, Nov. 30, 1984, at p. A1, col. 1.


\(^{360}\) See *e.g.* Varig Airlines, *supra*, notes 98-103, and accompanying text.
conduct spot inspections at a number of sites or comprehensive inspections at only a few facilities. We know that absolute safety does not exist, and that even the federal government possesses finite resources. The allocation of these resources is a Congressional and administrative function. The discretionary functions exemption intends that the judiciary will not ordinarily second-guess these decisions. Yet the Supreme Court decisions protect agencies that have not even engaged in any deliberative acts.

Government, in its multiple roles as an owner, operator, designer, builder, inspector and regulator of facilities and activities must continually prioritize. Not every facility can be inspected or repaired simultaneously. Factors to be weighed in the exercise of discretion should include the risks of an accident, the potential magnitude should the risk materialize, existing or known defects, types of defects, the expense, difficulty and length of repairs, the availability of financial resources and personnel, public and political pressures, available time, and the value of the facility to the public. Thus, discretion may be involved in deciding which facilities to inspect, and what to search for in the inspections. The design, maintenance and inspection of a project are generally protected by the discretionary function exception.361

Even when a mandatory duty to inspect may exist, the timing and parameters of the inspection may still be discretionary.362 The process and standards utilized in determining safety inspections may be discretionary. If a prescribed cause of action is not specified, but rather the

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361 United States v. Page, 350 F.2d 28 (10th Cir. 1965) (administration of safety program); Russell v. United States, 763 F.2d 786 (10th Cir. 1985) (negligent coal mine inspection); Flynn v. United States, 631 F.2d 678 (10th Cir. 1980) (design); Craghead v. United States, 423 F.2d 664 (10th Cir. 1970) (negligent failure to provide safe work site and negligent inspection); Irzyk v. United States, 412 F.2d 749 (10th Cir. 1969) (design and inspection); Daniels v. United States, 967 F.2d 1463 (10th Cir. 1992) (negligent OSHA inspection).

applicable statute or regulation allows the exercise of judgment and choice, then the exception applies. Conversely, internal agency guidelines may direct government inspectors to follow a detailed regime. The discretionary function exception does not apply in these situations.363

However, this flexibility should not result in the courts basically giving a carte blanche deferral to agencies in the matters of safety, inspections, or assessing risks. As we have seen, even private inspectors must meet a standard of care in their professional activities.364 An alternative approach is to impose liability for the failure of a government inspector to make a careful inspection once an inspection is undertaken.365

In addition, even if discretion may exist in the details of an inspection, the failure to inspect at all may be actionable when a duty to inspect arises.366

D. FUNDING LIMITATIONS AND TRADEOFFS

Inadequate funding may not be a defense in private negligence cases.367 Such decisions, when made by a private party, are subject to judicial review, usually through a jury trial, to determine if they are reasonable or negligent.

However, they may be a factor in applying the discretionary function exception to public entities. The prioritizing of limited resources has often fallen within the protections of the

363 McMichael v. United States, 856 F.2d 1026, 1033-34 (8th Cir. 1988).
364 See notes 320-326, supra, and accompanying text.
discretionary function exception. The balancing of safety and economic factors may constitute an exercise of discretion. Thus, as one court stated, the allocation of resources is “inherently bound up in considerations of economic and social policy, and accordingly are precisely the type of governmental decisions that Congress intended to insulate from judicial second-guessing.” Since not all repairs can be made simultaneously, budget and safety considerations can be balanced in prioritizing repairs and modifications, and redesigns.

Similarly, no liability was found when an infant child ingested lead paint chips in military family housing. The budget for the Department of Defense included no funds for sampling or abatement programs for lead-based paint in military housing. Thus, economic and budgetary considerations brought the decision under the discretionary function exception.

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368 See e.g. C.R.S. v. United States, 11 F.3d 791, 801-2, (8th Cir. 1993). Decisions as to the allocation or use of limited resources, including fiscal policy, are protected. See e.g., Irving v. United States, 162 F.3d 154, 169 (1st Cir. 1998) (en banc) (Decision making requires a balancing of interests: “e.g. how to deploy scarce government resources in the accomplishment of worthwhile-but expensive-public needs”); Cope v. Scott, 45 F. 3d 445, 448 (D.C. Cir. 1995) (Courts will not second guess the way government officials choose to balance economic, social, and political factors). Limar Shipping Ltd. v. United States, 324 F. 3d 1, 10 (1st Cir. 2003). Indeed, air safety must be balanced against cost effectiveness. Momen v. United States, 946 F. Supp. 196, 200 (N.D. N.Y. 1996). In Claypool v. United States, 103 F. Supp.2d 899 (S.D.W.Va. 2000) the National Park Service made a conscious decision to allocate its resources to administering the New River Gorge National Park rather than on inspection and maintenance of the terrain adjoining trails and roads. See also Mayer v. Martin Marietta, 481 F.2d 585 (5th Cir. 1975); Gollehon Farming v. United States, 17 F. Supp. 2d 1145, 1156 (D. Mont. 1998); Fullmer v. United States, 34 F. Supp. 2d 1325, 1330 (D. Utah 1997).

369 See e.g. United States v. Ure, 225 F.2d 709 (9th Cir. 1955); Estate of Callas v. United States, 682 F.2d 613, 620 (7th Cir. 1982). Discretion may involve the balancing and trade-off of risks as well as costs. For example, the Post Office treaded efficiency and the safety of postal deliverers against the safety of residents by requiring mailboxes to be located on the opposite side of a state route. Shrieve v. United States, 16 F. Supp. 2d 853 (N.D. Ohio 1998). Similarly, the FAA may have to weigh safety against efficiency. Management Activities, Inc. v. United States, 21 F. Supp. 2d 1157, 1164 (C.D. Calif. 1998).

370 Baum v. United States, 986 F.2d 716, 724 (4th Cir. 1993) (the safety measures involved would require substantial expenditures). The allocation and development of limited government resources are the type of administrative judgment protected by the discretionary function exception. Fang v. United States, 140 F.3d 1328, 1241 (9th Cir. 1998) (stocking of medical resources); Layton v. United States, 984 F.2d 1496, 1504 (failure to warn government contractor of the dangers of falling trees).

371 See e.g. Mitchell v. United States, 225 F. 3d 361 (3rd Cir. 2000) (The agency focused its attentions on a few highly dangerous portions of the road).

However, a carte blanche deferral to budgetary constraints has major safety implications. As long as these decisions are protected under the discretionary function rubric, federal agencies, and indeed Congress, will lack an incentive to allocate the budgetary resources to ensure safety.

Some courts though reach a contrary result and hold the mere existence of a choice, even one involving money, does not trigger the exception. For example, the failure to perform routine ditch maintenance because of financial constraints is not protected discretion. The Ninth Circuit held:

We hold that an agency’s decision to forego, for fiscal reasons the routine maintenance of property – maintenance that would be expected of any other landowner – is not the kind of discretion that the discretionary function exception protects.

The Ninth Circuit has cautioned that a defense of “inadequate funding” could lead to too broad an exception to liability:

“Every slip and fall, every failure to warn, every inspection and maintenance decision can be couched in terms of policy choices based on allocation of united resources.”

The Court though has also recognized that when statutes, regulations, or policy allow budgetary considerations to be taken into account, then the discretionary function exception applies.

Discretion may involve the balancing and trade-off of risks as well as costs, such as in security measures implemented by the Post Office. However, an allegation that government

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374 O’Toole v. United States, 295 F. 3d 1029 (9th Cir. 2002).
375 ARA Leisure Services v. United States, 831 F.2d 193 (9th Cir. 1987).
376 O’Toole v. United States, 295 F. 3d 1029 (5th Cir. 2002).
377 National Union Fire Ins. Co. v. United States, 115 F. 3d 1415, 1421-2 (9th Cir. 1997), cited in Walters v. United States, 474 F. 3d 1137 (8th Cir. 2007) (relying on 25 C.F.R. §170.6 (2004) which states “subject to availability of funds”)
security guards were “goofing off,” “ill-trained, incompetent, or simply not doing what they were hired by defendant to do” goes to the effectiveness of security measures which had been implemented. Therefore, a cause of action was stated against the United States.379

IV. THE DENIGRATION OF SAFETY

The 40 years from Dalehite to Gaubert witness a logical, evolutionary progression of the discretionary function exemption, if we start with the premise that sovereign immunity is the rule rather than the exception. A degree of certainty exists because of the Supreme Court decisions. However, the Supreme Court cases have progressively widened the discretionary function exception at the expense of safety. As we have seen, ordinary negligence, of which safety is a major factor, has been sublimated with the public lands and in safety inspections.

To the extent that federal district courts and courts of appeals may be stretching immunity too far, their actions are rational in light of both the letter and spirit of the Supreme Court decisions.

The Supreme Court admittedly has had to interpret a vague and ambiguous statutory provision, lacking informative legislative history. In doing so, the Court, starting with Dalehite, has pursued a pattern of construing the exception broadly and liability narrowly.

A practical effect of these decisions, though, is to ignore the need for safety in federal facilities and activities, as with the federal lands. The Supreme Court has not, with the possible exception of Varig Airlines, consciously minimized safety. However, the inexorable logic of the

opinions has in fact placed safety on a lower pedestal than discretion – discretion, which after
Gaubert, is fairly open-ended. The Supreme Court has clearly accorded safety a secondary
priority to relatively unbridled discretion.

Dalehite illustrates the basic problem with the Court’s interpretation. Quite simply,
Federal employees were negligent in the handling of ammonium nitrate, resulting in a major
tragedy. The issue in Dalehite did not involve the questioning of high level or operational policy
decisions, but careless handling of ammonium nitrate, a known volatile explosive.380

The Supreme Court gave its imprimatur to simple negligence. Because Dalehite
emphasizes the nature of the conduct rather than the status of the actor, the door is left wide open
for a broad ambit of discretion.381

The decision in Dalehite was widely criticized and questioned.382 Even Congress found
the holding unpalatable and enacted compensation for the victims.383

380 Liability need not be based on strict liability for the handling of ultra hazardous materials, such as explosives. A
fundamental principal of negligence law is that as the potential risk increases, so too does the corresponding
standard of care: “[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not
one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very
moment that an automobile is crossing a railroad track, but the risk of death is nevertheless sufficiently serious to
require the driver to look for the train and the train to signal its approach. As the gravity of the possible harm
increases, the apparent likelihood of its reoccurrence need be correspondingly less to generate a duty of

381 For example, an appellate tribunal did not like a district court second-guessing an on-scene coordinator’s decision
when to schedule a CERCLA cleanup. The Court of Appeals analogized the coordinator’s acts to the protected
decision in Dalehite of the Field Director in bagging the ammonium nitrate at a temperature of 200° The on-site
coordinator chose a time of the day with unfavorable wind conditions against expert advice, endangering the
15,000 population of a town and injuring five state employees. United States Fidelity & Guaranty Co. v. United
upheld the Field Director’s act as discretionary because the decision-maker had to weigh the risk of fire and
explosion inherent in bagging at 200° against the greatly increased production costs and/or greatly reduced
production by bagging at a lower temperature. Dalehite, 346 U.S. at 41.

382 See e.g., Walter Gellhorn and Louis Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U. L.
Rev. 1325 (1954); Hugh C. Stromswold, The Twilight Zone of the Federal Tort Claims Act, 4 Am. U. Int. L. Rev.
41 (1954).
Cases are often looked at in isolation and in terms of precedence. The discretionary function exception is no exception. In building upon the Dalehite case, the Supreme Court issued a series of opinions, which focused narrowly on the discretionary function exception. The effect has been to sublimate negligence and safety.

One can understand in Varig Airlines that the inspection of a lavatory does not, on the surface, have the same priority as hydraulics, landing gear, or avionics. Yet, the question in Varig is not whether a physical inspection of the 707 should have included anything greater than a surface glance, but if a reviewer could apply the applicable FAA regulations to the design specifications. The matching of regs to specs is a ministerial act that should not involve discretion.384 In addition, Varig clearly lets the government balance budgetary and other concerns against safety.385

383 Neither the Federal Tort Claims Act nor sovereign immunity bars Congress from enacting legislation that imposes liability on the United States. Congress has in fact enacted compensatory measures in cases involving highly publicized disasters or in situations involving great political pressure even if tort liability might not otherwise be imposed on the United States. Examples include:

1) The Texas City, Texas, ammonium nitrate ship explosion. Congress voted compensation to the victims after the Supreme Court held the federal government had not waived sovereign immunity. Texas City Disaster Relief Act of Aug. 12, 1955, Pub. L. No. 84 –378, Ch. 864, 69 Stat. 707 (1955) (recovery limited to $ 25,000 per death or injury to property or person).

2) Sovereign immunity applied in Aetna v. United States, 628 F.2d 1201 (9th Cir. 1980), when the Teton Dam burst on its initial filling, killing eleven people. Congress then appropriated $400 million in compensation for the personal and property claims. Pub. L. 94-400, 90 Stat. 1211.

3) Uranium miners were voted compensation under the Radiation Exposure Compensation Act of 1990 even though courts had denied relief to the miners.


385 467 U.S. at 819-20.
On its face, Berkowitz reigns in discretion. Yet, even Berkowitz is not really a substantive opinion, but one of process and procedure. Berkowitz does not look to the merits of the ultimate decision, but how it was reached. Berkowitz essentially adopts well-accepted principles of administrative law in which an agency is obligated to follow specified procedures. Berkowitz, though, raised the objective standard of asking whether the decisions are “subject to policy and analysis.” The Court did not delve into subjective intent. Indeed, the Court did not require an agency to produce evidence that would objectively allow a court to conclude the governmental decision was actually based on permissible policy analysis.

Governmental agencies, like all bureaucracies, have the ability to modify their behavior in response to legal constraints. If pursuant to Berkowitz, liability is imposed for non-discretionary duties, then the agency can write or rewrite its regulations to include discretionary language. For example, the Army Corps of Engineers amended certain enforcement regulations to remove all non-discretionary authority. In addition, boiler-plate “waffle” language may become common in government regulations to give an agency “wiggle room.” Thus, Berkowitz may serve as an incentive to agencies to vest their employees with greater, rather than lesser, discretion to shield the agency from liability.

Ironically, Berkowitz is fundamentally flawed when viewed from the perspective of substantive tort law. Compliance with government standards does not preclude liability in private tort litigation. Government standards, as with industry custom and standards, only

386 See Hurst v. United States, 882 F. 2d 306, 309 n.5 (8th Cir. 1989). Among the language omitted was the phrase “shall immediately.”
387 Krent, supra n. 26 at 892.
establish the floor for a reasonable standard of care under the circumstances. The trier of fact can always find that reasonable care, based upon the reasonable foreseeability of the risk, exceeds these lower standards. Indeed, the trier of fact is free to second-guess the allocation and prioritization of risks by a private defendant.

The application of Berkowitz also brings in the perspective of parsing language, seemingly reading tea leaves, and splitting technicalities such that we run afoul of Justice Frankfurter’s admonitions in Indian Towing Co. v. United States that “There is nothing in the Tort Claims Act which shows that Congress intended to draw distinction so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulations,” and that the Court should not “import immunity back into a statute designed to limit it.”

The second prong of the Berkowitz standard appears significant on its face, but in fact sheds little light on the debate since, as Professor Krent recognizes, “almost every government action, no matter how ministerial, can be viewed as grounded in social, economic, or political policy.” Reflecting this attitude, one court felt that for administrative action to be non-discretionary, a “specific and orderly applicable prescription” is necessary.

389 See especially, the classic cases of The T. J. Hooper, 60 F.2d 737 (2nd Cir. 1932) and Helling v. Carey, 519 P.2d 981 (Wash. 1974).
390 One exception to this rule is if the government standards preempt state and private actions. See e.g. Cipollone v. Ligget Group, Inc., 505 U.S. 504 (1992).
392 Id. at 68.
393 Id. at 69. Justice Frankfurter felt immunity “is an anachronistic survival of monarchical principles, and runs counter to democratic notions of moral responsibility of the State.” Kennecott Copper Corp. v. State Tax Comm’n., 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting).
394 Krent, supra n. 26 at n. 117. Professor Kratzke echoes these sentiments: “Arguably, almost all administrative decisions implicate such a policy. If every such decision were immune from liability, the government would never be liable in tort. The Court ought not to use one phrase in one sub-section of the FTCA to emasculate the
Courts have occasionally construed narrowly the second standard of *Berkowitz*. As we have seen, some courts have held safety considerations and professional standards do not fall into “economic, social or political concerns.” The Third Circuit held in *Griffin v. United States* that if the judgments are professional or scientific in nature rather than policy oriented, then courts are “fully capable of scrutinizing the processes and conclusions of the decision-maker by the usual standards applied to cases of professional negligence.”

Thus, even the *Berkowitz* standard presents less certainty than might initially appear. *Gaubert* creates a series of presumptions that further defer to the discretion of the government. The case follows the Supreme Court’s inexorable logic of construing immunity broadly and governmental liability narrowly. The *Gaubert* presumptions have resulted in exculpating government agencies for conduct that could otherwise result in liability for negligence. Indeed, pursuant to *Gaubert*, the failure to consider safety issues is now protected. A literal application of *Gaubert*’s presumptions echoes a broad rational basis test.

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395 Muniz-Rivera v. United States, 326 F. 3d 8 (1st Cir. 2003).

396 See *e.g.* Summers v. United States, 905 F.2d 1212 (9th Cir. 1990) (failure to warn of hot coals in fire rings on a beach); Boyd v. United States, 881 F.2d 895 (10th Cir. 1989) (failure to warn swimmers of dangerous conditions). See notes 195-212 supra, and accompanying text.

397 500 F.2d 1059, 1066-67 (3rd Cir. 1974).

398 See *e.g.* C.R.S. v. United States, 11 F.3d 791, 797 (8th Cir. 1993); Pope & Talbot, Inc. v. United States Dept. of Agriculture, 782 F. Supp. 1460, 1467 (D. Or. 1991); Layton v. United States, 984 F.2d 1496, 1504 (8th Cir. 1993); Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999).

399 See *e.g.* Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999); Roseburk v. United States, 119 F.3d 438, 444 (6th Cir. 1997).

An example of the extent to which some courts apply *Gaubert* is *Autery v. United States*.401 A rotten locus tree fell over on a car, killing the driver and injuring a passenger. The court applied the discretionary function exception in holding for the government. The court’s holding, that the development and implementation of the park’s tree inspection plan was protected, involved the assumption that:

To decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park Service likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available.402

This judicial interpretation of *Gaubert* is not unusual. The Supreme Court decisions are susceptible to broad readings that foreclose government liability. For example, one district court construed *Varig* to mean that “Liability simply may not be placed on the FAA in the certification process . . . .”403

The Third Circuit construed *Gaubert* to restrict all inquiry into officials’ subjective decision-making. The Court held that even if the agency was negligent in the manner in which it collected the underlying data that preceded a discretionary decision, the ultimate decision was protected. No purpose would be served in attempting to assess what role the challenged data played in the policymaking.404

401 992 F.2d 1523 (11th Cir. 1993).
402 *Id.* at 1531. The decision is consistent with a decision 42 years earlier, which held the failure to remove a rotten exotic tree was a protected act of discretion. Toledo v. United States, 95 F. Supp. 838 (D.P.R. 1951). However, the visual inspection of trees was not protected. 992 F. 2d at 1527-29.
404 Fisher Brothers Sales v. United States, 46 F. 3d 279, 285-87 (3rd Cir. 1995) (en banc) (the alleged negligent testing of grapes resulted in a ban on the importation of Chilean grapes into the United States). See also Franklin Savings Corp v. United States, 180 F. 3d 1124, 1137, 1139 (10th Cir. 1999).
Some governmental actions seem so blatantly negligent, callous, and so irresponsible that federal courts find the discretionary function exception does not apply. Courts will, in the great common law tradition, stretch and strain to find liability and exception to sovereign immunity when they believe the government has gone too far, as many courts have done with accidents on the public lands.

For example, the discretionary function exemption does not apply to such actions, or non-actions, as failing to warn swimmers of dangerous conditions in a popular swimming area,\(^{405}\) or failing to provide safeguards on a footpath on a Navy underwater tracking range,\(^{406}\) or the failure to warn of the risks of boulders crashing down onto a campsite.\(^{407}\) The express reasoning of these opinions does not otherwise support a finding the discretionary function exception is inapplicable.

The potential liability of the federal government inevitably involves the analysis of safety. However, the inexorable logic of the Supreme Court decisions interpreting discretion is to place a secondary priority on safety. As the Supreme Court stated in *Varig Airlines*: “The power to promote safety does not mandate the agency ensure safety.”\(^{408}\) Case law, following the lead and guidance of the Supreme Court opinions, indicates the determination of safety measures


\(^{406}\) Gotha v. United States, 115 F.3d 176, 181-82 (3d Cir. 1997).

\(^{407}\) 131 F.3d 1407, 1412 (10 Cir. 1997) (skull of six year old was severely injured).

\(^{408}\) 467 U.S. at 821.
is often a discretionary function, absent a specific directive. A general duty to promote safety may still give room for discretion.

Courts have recognized the application of the exception “may be troubling when it acts as a shield for carelessness and poor judgment,” but defer to the government’s reservation of the right to act without liability.

V. CONCLUSION

How ironic that the federal government, in its regulatory activities, may be quite assiduous in clamping down on “unsafe” activities in the private sector, but has a much more cavalier attitude towards unsafe operations by its employees. The government uses the discretionary function exception as a shield to hide behind to escape liability for ordinary negligence. The judicial decisions, led by the Supreme Court, serve as a disincentive to safety in government activities. All too often, what should be a question of fact becomes a matter of law. The result is that the protected activities can range from the mundane and pedestrian to the

409 See e.g. Ochran v. United States, 117 F.3d 495, 501 (11th Cir. 1997) (decision whether to provide safety to a witness threatened by a suspected offender); Bailor v. Salvation Army, 51 F.3d 678, 685 (7th Cir. 1995) (degree of danger posed by halfway house resident); Bowman v. United States, 820 F.2d 1393, 1395 (4th Cir. 1987) (lack of guardrails); Kiehn v. United States, 984 F.2d 1110, 1103 (10th Cir. 1993) (warning signs); General Public Utility Corp. v. United States, 745 F.2d 239, 247 (3d Cir. 1984), cert. denied 469 U.S. 1228 (1985) (failure to report safety information which might have avoided the accident at the Three Mile Island Nuclear Reactor); Maas v. United States, 94 F.3d 291, 297 (7th Cir. 1996) (failure to warn military personnel of dangers involved in handling nuclear weapons).

410 See Kennewick Irrigation District v. United States, 880 F.2d 1018, 1026 (9th Cir. 1989), citing Varig Airlines.


412 National Union Fire Ins. v. United States, 115 F.3d 1415, 1422 (9th Cir. 1997).

413 See e.g., Richardson v. United States, 943 F.2d 1107 (9th Cir. 1991) (the failure to install ground wires on power lines); Chute v. United States, 610 F.2d 7 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980) (Coast Guard decision to mark a sunken wreck with a small (3 ½ foot) buoy, instead of a larger buoy); and Cochran v. United States, 38 F. Supp.2d 986 (N.D. Fla. 1998) (keeping bowling alley open during renovations); Shansky v. United States 164 F.2d 688 (1st Cir. 1999) (failure to install handrails); Baker v. San Carlos 1 RR Project, 176 F.Supp.2d 970 (D. Ariz. 2001) (failure to issue warnings, orange bags, and/or warning devices on transmission lines).
Many of these decisions have trivialized the Federal Tort Claims Act. The Supreme Court has emphasized the “exalted” principle of sovereign immunity to the exclusion of other policy values.

Congress intended liability to be the general rule and discretion the exception. The Supreme Court has flipped the premise by making the exception the rule and liability the exception.

The standard presumption in the law is that defenses constitute an affirmative defense. Nothing in the plain words of the statute or its legislative history suggests Congress meant to reverse this presumption. Yet, the Supreme Court has shifted the burden of proof. The government should have the burden of proof to establish policy reasons to justify the act as including one of discretion.

The Gaubert presumptions are neither supported by the plain language nor the legislative history of the statute, judicial precedence, or valid policy reasons. They simply reflect the deep-

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414 These cases involve failures to warn of the dangers of asbestos (see Smith v. Johns-Manville Corp., 795 F.2d 301 (3rd Cir. 1986); Shuman v. United States, 765 F.2d 283 (1st Cir. 1985); Kane v. United States, 15 F.3d 87, 89 (8th Cir. 1994) and radiation (See Begay v. United States, 786 F.2d 1059, 1066 (9th Cir. 1985); Allen v. United States, 816 F.2d 1417, 1424 (10th Cir. 1987); Barnson v. United States, 816 F.2d 549 (10th Cir. 1987)); HIV contaminated blood (C.R.S. v. United States, 11 F.3d 791 (8th Cir. 1993)); and Cisco v. United States, 768 F.2d 788 (7th Cir. 1985) (dioxin contaminated soil). In general, see Jarvis, supra n. 26 at 9, 561-565 (duty to warn of known environmental hazards).

415 States often follow a contrary presumption. For example, the California Supreme Court in Muskoff v. Corning Hospital District, 555 Cal. 2d 211, 219, 359 P.2d 457 (1961) held “[W]hen there is negligence, the rule is liability, immunity is the exception.”

416 A split of authority exists on the issue of who has the burden of persuasion on the applicability of the exception. Cases which place the burden on the government include Sigmar v. United States, 217 F.3d 785, 793 (9th Cir. 2000); Prescott v. United States, 973 F.2d 692 (9th Cir. 1992); and Carlyle v. United States, 674 F.2d 554 (6th Cir. 1982). Contra, see Kiehn v. United States, 984 F.2d 1100, 1105 (10th Cir. 1993) and Miller v. United States, 710 F.2d 656 (10th Cir. 1983).
seated bias of the Supreme Court against abrogating sovereign immunity, a non-constitutional doctrine.

An alternative exists. Congress clearly did not intend an open-ended discretionary function exception; it wanted ordinary principles of negligence to govern. Similarly, Congress did not intend administrative agencies to have unfettered power to issue licenses, rules, and regulations. Hence, it adopted the arbitrary and capricious\(^\text{417}\) abuse of discretion\(^\text{418}\) and substantial evidence\(^\text{419}\) tests to govern administrative actions.

Let us remember Congress intended to impose liability for ordinary negligence. Liability should encompass more than automobile accidents and medical malpractice. The discretionary function exception provides a limited exception to a broad statute. No legislative history exists that indicates Congress intended to limit liability to the categories discerned by Dean Zillman.

The practical effect of the Supreme Court decisions is to eviscerate the Federal Tort Claims Act\(^\text{420}\). The Supreme Court, in an effort to bring certainty into the interpretation of the statute, creates presumptions, particularly in *Gaubert*, that leave little room for government liability. The specific discretionary function exemption has swallowed the general rule of liability.


\(^{418}\) *Id.*

\(^{419}\) *Id.* at §706(2)(E).

\(^{420}\) Thus, one appellate judge felt the Federal Tort Claims Act has become a “fake promise” in all but fender-bender and possibly medical malpractice cases. Allen v. United States, 816 F.2d 1417, 1421-25 (10th Cir. 1987). McKay, concurring) while a dissenting judge recognized the exception has “swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act.” Rosebush v. United States, 119 F.3d 438, 444, (6th Cir. 1997) (Meritt, C. J. dissenting).
This result is ironic in light of the Court’s general rule of statutory interpretation to start with the plain language of a statute.\textsuperscript{421} The presumptions of \textit{Gaubert} are the most pernicious. Yet, they are neither based on the statutory language nor legislative history.

Negligence and safety have been sublimated to immunity. The Supreme Court has rendered governmental actions non-actionable even when, in fact, no recognizable discretion was involved. The Supreme Court has legally, effectively placed the burden on the claimant to negate discretion and sovereign immunity rather than on the government to establish the applicability of the exception. Discretion should clearly be viewed as an affirmative defense with the burden of proof on the proponent.

Inaction is rewarded by shifting the burden of proof. For example, while the regulatory issuance of a license for a nuclear power plant is discretionary, the failure to follow up and timely warn other operators of a design defect in a reactor’s design should not be discretionary. In the litigation ensuing in the aftermath of the Three Mile Island Nuclear Reactor accident, the Court of Appeals held the actions of the Nuclear Regulatory Commission were protected by the discretionary function exception. Eighteen months before the malfunction at the Three Mile Island Nuclear Plant (TMI), a similar incident had occurred at the Davis-Beese Nuclear Plant outside Toledo, Ohio. The operators of TMI unsuccessfully argued the Nuclear Regulatory Commission should have forwarded information about the earlier mishap to them.\textsuperscript{422}

Many labels can attach to this failure: negligence, misfeasance, dilatory, bureaucratic inertia, etc. However, a federal court held a year’s delay in notification of operators of similar


\textsuperscript{422} General Public Utilities Group v. United States, 745 F. 2d 239 (3d Cir. 1984), \textit{cert denied} 469 U.S. 1228 (1985).
reactors of a mishap at the Davis Beese nuclear Plant outside of Toledo was “discretionary.” The delay led to the reactor failure at the Three Mile Island Nuclear Reactor in Harrisburg, Pennsylvania.

The Supreme Court is quite willing to turn traditional law on its head when the Court feels strong policy considerations support such a decision. For example, the Court has held in defamation cases that the plaintiff has the burden of proof to establish the falsity of the accusation,423 whereas the common law treats truth an affirmative defense.

Ironically, agency discretion is not unbridled. The judiciary will often rein in agency discretion under the long-understood arbitrary and capricious standard when the courts feel the agencies have overreached. Discretion must be exercised within authorized parameters.424

The problem is not that ordinary negligence is subordinate to discretion; it’s that the Supreme Court decisions protect, indeed encourage, inaction. The current rules limiting liability are a form of false economy, similar in the past to externalizing pollution costs. The monetary costs to the government or polluter may be limited, but the overall costs to the victims and society are large.

Safety does not have to be accorded a lower priority than discretion. Significantly, discretion and safety can co-exist while serving the goals of protecting governmental discretion and the pursuit of safety. Tort law often provides that safety can be legally satisfied through the

providing of warnings.\textsuperscript{425} Thus, the government may decide natural beauty outweighs the risk to human life and safety in the national forests and parks. Visitors to these areas could be provided with warnings that acquaint them with the government’s policy, and illustrate the known major risks.\textsuperscript{426}

No one can anticipate all risks. However, the government, subject to ordinary negligence principles, should reasonably provide warnings of known or knowable risks. Safety should not presumptively be discretionary. The warnings can be provided in an unobtrusive manner, such as through a pamphlet provided visitors as they enter those areas.\textsuperscript{427} The government should have the burden of proof to establish policy reasons to justify deviation from objective, professional standards of safety.

At the minimum, the discretionary function exception should require some governmental deliberation, action, or consideration. For example, if the government reviews a safety risk, and decides either a corrective action or warning is necessary, or conversely, no action or warning is required, then discretion has been exercised. The discretionary function exception precludes review as long as the government’s decision was exercised within permissible parameters. When conscious choices are made within legally permissible parameters, discretion should apply.


\textsuperscript{426} These warnings could include such natural risks as lightning in certain areas, rocks in shallow waters (i.e. check for rocks before diving), slippery slopes, and dangerous animals. See especially, George v. United States, 735 F. Supp. 1524 (M.D. Ala. 1990).

\textsuperscript{427} Visitors to the national forests and parks pay a fee to enter these areas, so a warning pamphlet could be issued to them at the entrance booth. For example, visitors to the Hawaii Volcanoes National Park receive a park brochure, which includes a map, information on the park, and safety tips. See Kahan v. United States, 73 F. Supp. 2d 1172 (D. Hawaii 1999); See also Zumwalt v. United States, 928 F. 2d 951, 955 (10th Cir. 1991) (Warnings in pamphlet, but not on trail of wilderness area).
However, the government may simply have done nothing. It may not even have considered the issue or problem. A failure to consider the matter should not be treated as an act of discretion, but as non-action, nonfeasance if you will, which should be subject to the ordinary rules of negligence.\footnote{428} Non-actions of this nature should not receive judicial protection under the guise of discretionary function.\footnote{429} The failure to act, to deliberate, to decide, is not discretion; it is actionable nonfeasance. Discretion is inherent in regulation.\footnote{430} Professor Krent posits the discretionary function exception should generally hinge on the process by which the action is reached rather than the nature of the action challenged.\footnote{431}

Furthermore, while discretion may often apply in deciding whether or not to act, once the government starts to act, it must act reasonably. This basic principle of tort law was recognized and followed in \textit{Indian Towing Co}. Indeed, \textit{Berkowitz} cited \textit{Indian Towing} for this proposition.\footnote{432} Several courts of appeals, led by the Ninth Circuit, have resurrected \textit{Indian Towing}. Administrative agencies once claimed their acts were not subject to judicial review because of the discretion reposed in the agency. The Supreme Court decisively overturned that theory of

\footnote{428} See also Peterson and Van Der Weide, \textit{supra} n. 26 at 474: “The government should be immune. . . only when it can produce evidence that an official. . . actually relied on a true policy factor in making the challenged decision.” Some cases support this proposition.

\footnote{429} Occasionally, some courts held inaction could give rise to liability. In Dube v. Pittsburg Corning, 870 F.2d 790 (1st Cir. 1989), government inaction, a failure to make a policy decision on whether or not to warn, led to liability for the failure to warn of the dangers of asbestos. However, \textit{Gaubert} effectively overturns \textit{Dube}.

\footnote{430} The essence of risk analysis is that an agency has made an affirmative assessment of the respective risks and benefits to determine the appropriate level of regulation. Even if the level of regulation is low, that decision is based on affirmative analysis, rather than inaction.

\footnote{431} \textit{Krent, supra} n. 26 at 874.

\footnote{432} 486 U.S. at 538, n.4.
judicial deference in the famous case of *Citizens to Preserve Overton Park v. Volpe*,\(^4\) which held that as long as there was some law to be applied, discretion was reined in.

Ironically, agencies, which now have to respond administratively for their acts through judicial review, still claim discretion, deference, and immunity when their acts injure or kill third parties. They should equally be subject to judicial review when the law of negligence applies to acts that do not partake of the protected policy factors envisioned by Congress.\(^4\) The act should not be trivialized by rejecting liability for acts that are not covered by protected policy factors.

In addition, non-deliberative actions or *post hoc* rationalizations are less deserving of protection under the discretionary function exception. These decisions are not generally formulated after extensive debate, varied input, and internal agency deliberation that normally characterize policy determination.\(^5\) Post hoc rationalizations should not be acceptable justification for discretion.\(^6\) The government should show its deliberations preceded the accident, rather than being advanced by the agency or lawyers after the fact.\(^7\)

\(^6\) Krent, *supra* n. 26 at 898-99. Elsewhere in the law the Supreme Court gives little or no deference to *post hoc* rationalizations. See Motor Vehicle Manufacturers Association of U.S., Inc. v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983). Indeed, the Court has stated: “It is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency.” *Id.* at 50. *See also*, Bear Medicine v. United States Secretary of the Department of Interior, 241 F.3d 1208, 1216 (9th Cir. 2001).

\(^7\) Post hoc rationalizations are impermissible under the Administrative Procedures Act. *See e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

\(^8\) *See e.g.*, Boyd v. United States, 881 F.2d 895 (10th Cir. 1989). Plaintiff was struck and killed by a boat while snorkeling. The Corps of Engineers provided no warnings of the dangers posed by boaters. The Tenth Circuit found liability. The court noted that discretion could have been exercised in the decisions not to warn, but the Corps presented no evidence it was.
should therefore produce evidence of policy factors “that might have influenced an official’s decision.”

Pursuant to the recent trend of appellate opinions, the government should have the burden of proof to establish its act or failure to act, decision or non-decision, falls into one of the protected policy grounds intended by Congress. Only then should the presumptions of Gaubert apply. Anything else trivializes the Act and rewards garden-variety negligence.

The Gaubert presumptions do a grave disservice to the basic principles of negligence law. Duty is often based upon the reasonable foreseeability of the risk. The failure to act, the failure to even consider a course of conduct, constitutes basic negligence.

But under Gaubert the failure to act is rewarded.

The Ninth Circuit’s approach is compelling. The Gaubert presumptions are inapplicable until the government satisfies the second prong of the Berkowitz standard – that the act falls within the protected category “social, economic and political” policy. Acts which are mathematical, professional or scientific should not be treated as exempt acts of discretion.

The courts should therefore carefully scrutinize the facts of each case to ensure the second prong of the Berkowitz test is met. Discretion should not apply to clearly established professional standards. As with medical malpractice in which a physician’s exercise of care is measured against the professional standard of care, policy reasons do not usually justify a deviation from professional standards. The government should adhere to professional standards

unless clearly articulated policy reasons explain the deviation. The burden of proof should therefore be on the government to establish policy reasons for the breach.

Agencies should have plans available for reasonably foreseeable risks, unless policy reasons to the contrary exist. Failure to plan for such foreseeable risks, such as with the Coast Guard’s failure to prepare an emergency action plan, is plain negligence and not discretion.\(^{439}\)

The presumptions created in \textit{Berkowitz} and \textit{Gaubert} do not even require post hoc rationalizations. Indeed, they promote negligence by not requiring agencies to formulate, consider and deliberate their courses of action, but instead, blithely rely on a presumption the actions were grounded in permissible policy. Inaction is encouraged, and indeed rewarded, because no penalty exists for a failure to act, decide, or deliberate. Little legal incentive exists for agencies to improve safety since the specter of tort liability is removed.\(^{440}\)

One of the many purposes of Tort law is the encouragement of safety by imposing liability for unsafe practices. The Supreme Court decisions have removed this strong incentive from federal agencies.

The judicial response to \textit{Berkowitz} and general duties, which lack in specific details, results in tolerating, if not encouraging, unsafe practices. While decisions must be made in implementing these general rules. The failure to act, or even to deliberate, is not a protected option.

\(^{439}\) See \textit{e.g.}\ Coates v. United States, 612 F.Supp. 592 (C.D. Ill. 1985).

\(^{440}\) The prospects of tort liability could serve as a check on government activities. See \textit{Krent, supra} n. 26 at 884-894. For example, in response to the California Supreme Court decision in \textit{Bigbee v. Pacific Telephone and Telegraph Co.}, 665 P.2d 947 (Calif. 1983), telephone companies throughout the country removed outdoor, enclosed pay telephone booths. Similarly, in the aftermath of \textit{Helling v. Carey}, 519 P.2d 981 (Wash. 1974), most optometrists and ophthalmologists now routinely test all patients for glaucoma even though the incident rate below the age of 40 is 1/ 25,000.


_Gaubert_ is especially pernicious. It invites, if not encourages, a cavalier attitude towards human safety. If a government agency charged with protecting the general public has no duty to warn the public of dangers it has discovered or reasonably should have discovered, then the agency has little incentive to protect those who are unable to protect themselves.°41 Immunity may foster negligence whereas culpability may serve as an incentive for careful conduct and caution. The _Gaubert_ presumptions remove the incentive for government employees to exercise reasonable care,

°42 certainly the opposite of Congress’ intent in enacting the act. Indeed, as a result of the logical evolution of the Supreme Court decisions, courts refer to the Federal Tort Claims Act as a “limited waiver,”°43 even though Congress intended the act as a general waiver.

Even Dalehite has created an anti-safety bias that persists to this day. By positing that discretion at the highest policy levels carries down to the basic operational level, the decision allows courts to confuse policy decisions with negligent execution of that policy. Not every implementation of a discretionary decision is protected by discretion.

Ironically, the Supreme Court decisions are logically inevitable if we start with the premise that the act is a limited waiver of sovereign immunity. One of the major objectives of tort law is to change conduct. Private enterprises consider liability issues in formulating courses of action. The fear of liability leads to improved product safety and decreased risks to the public. Instead, _Gaubert_ creates a strong incentive for government agencies to do nothing.

°41 See Jarvis, _supra_ n. 26 at 557. The author recognizes discretion in the EPA in setting standards, deciding on enforcement actions and the establishment of methods and timing of cleanup activities, but not in providing safety warnings. _Id._ at 561-2.

°42 _Id._ at 567.

Governmental accountability is also lacking in another critical constraint. Any judgment or settlement $2500 or above comes out of the judgment fund, which is funded by continuing annual appropriations rather than that of the individual agency.\textsuperscript{444} Without either legal or financial accountability, governmental entities lack incentive to promote, pursue, or maximize safety, or to otherwise reduce risks in their activities.

Since individual federal employees are not liable when acting within the scope of their employment, and since the agencies are also not assessed liability, much of the incentives that motivate private parties to improve safety, are lacking to maximize safety.

Government power is a two-edged sword. It can protect, but if it is wielded in an abusive, irrational, or malicious fashion, it can cause grave injury.\textsuperscript{445}

As we enter the twenty-first century, \textit{Gaubert} takes us back to the non-feasance doctrines of the nineteenth century. Indeed, the Supreme Court has become a bastion of limited liability. With 60 years of the discretionary function exception behind us, the time has come to change the emphasis from trying to explain past cases and drawing a fine line to making the Federal Tort Claims Act an affirmative source of promoting safety. If substantive decisions cannot be challenged, then the government agencies and their employees should at least provide reasonable warnings. In short, a duty to warn should be posited.

These rules will necessitate a new focus by the Supreme Court, but one, indeed the only one, which satisfies Congress’ intent. The government cannot guarantee safety, but it should not


\textsuperscript{445} Cf. Sinaloa Lake Owners Association v. City of Simi Valley, 864 F.2d 1475 (9th Cir. 1989).
be encouraging, rewarding, or tolerating negligence by government employees, agencies, and regulators.