1968

The Discretionary Function Exception of the Federal Tort Claims Act

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THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT

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In waiving sovereign immunity in tort, the Federal Tort Claims Act of 1946 specifically excepted suits brought to recover for injuries caused by the performance of a discretionary act. Courts have since attempted to apply the exception with tests as numerous and varied as the opinions. After analyzing the different judicial treatments and the various suggestions of commentators, Professor Reynolds concludes that the "operational-planning" test would offer the best guidelines for a uniform rule which would also satisfy the purposes of the Act and the exception.

It seems an anomaly that the theory "the King can do no wrong" could become so entrenched in the laws of a country founded on the precept that the King had indeed done wrong. But by 1821, the U.S. Supreme Court had clearly adopted the doctrine of sovereign immunity, and the only means by which a citizen could seek redress for an injury caused by governmental action was by a private relief bill presented before Congress. Despite the early warning of John Quincy Adams that "[t]here ought to be no private business before Congress," the number of such bills grew into the thousands by the 1940's. The inadequacies of the legislative procedure from the standpoint of the claimant and Congress, and the desire of government officials to have claims against the Government settled in a more rational fashion, precipitated the congressional hearings of 1945. The main focus of these hearings was the determination of a more equitable manner by which such claims could be

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2See *Collins v. Virginia*, 19 U.S. (6 Wheat.) 257, 285 (1821). This decision was a complete reversal of the Court's first treatment of sovereign immunity, which had found it inconsistent with the theory of popular sovereignty. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

3MEMOIRS OF JOHN QUINCY ADAMS 479-80 (1876).

486 CONG. REC. 12,018 (1940). Less than 15% of those bills were passed.

5Common protests on the part of the claimants were: large recoveries could never be obtained due to the objections of some members to substantial rewards; political connections were usually necessary; and the executive department accused of the wrong made the investigation, and its sometimes biased recommendations were normally followed.

6Much valuable time was drained while important legislation was pending. *Hearings on H.R. 5373 & H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess., ser. 13, at 40* (1942).

7By 1940, the Government was paying over $1 million per Congress to private bill recipients. H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945).
adjudicated; the result was the Federal Tort Claims Act, passed by the Seventy-ninth Congress in 1946.

The Act was initially acknowledged as "a general waiver of governmental immunity in tort, limited only by enunciated exceptions." This impression was short-lived, however; within nine years one writer observed that "none could be expected to foresee at the time the monstrous joker now threatening to engulf the entire Act in a twilight zone—the vague and ambiguous exceptions from federal liability for 'due care in the execution of a statute' and 'performance of a discretionary function.'" The author was referring to the first exception to liability, set forth in section 2680 of the Act, which states that the provisions of that chapter shall not apply to: "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . 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." This exception has caused most of the difficulty which now surrounds application of the Act. The words "discretionary function or duty" have been given such a great emphasis that the basic purpose of the Act is far too often ignored. It is the fervent hope of this author that, after considering the purpose of the exception and its past application by the courts, some guidelines may be suggested which will aid future judicial bodies in achieving the Act's desired end.

"Comment, The Federal Tort Claims Act, 56 Yale L.J. 534, 536 (1947). Several commentators were quick to note, however, that the exceptions included several of the types of claims which had caused most of the problems surrounding acts of government officials. See, e.g., Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060, 1084 n.79 (1946).
"The Act allows suits against the United States in tort in "the same manner and to the same extent as a private individual under like circumstances," but not "for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (1964).
"Id. § 2680(a).
THE EXCEPTION'S PURPOSE

In 1945, the House Report which accompanied the Act noted: "The right to sue the Government which would be granted by the bill is surrounded by certain safeguards and circumscribed by certain limitations." One of these limitations concerned the performance of discretionary functions or duties. Unfortunately, the legislative history of the Act is of little help in explaining why this exception was included; the 1945 Report is the main source of information. It states that the exception is quite important and is designed to prevent any liability where recovery is sought for an injury caused by certain governmental projects, such as irrigation or flood control, where a statute or regulation authorizing such a project is allegedly invalid, and the only basis for the right to an action is that the same conduct by a private person would be tortious. The bill, we are told, is not intended: (1) to allow suits testing the validity of discretionary acts; (2) to provide a remedy for damage caused by discretionary acts; or (3) to permit suits in tort testing the constitutionality of legislation or the legality of rules and regulations. But the report states that common-law torts by employees of either regulatory or nonregulatory agencies are covered by the Act and are not within the exception; therefore, an automobile collision caused by an employee of the Treasury Department is within the Act, even if the employee at the time of the accident was making a trip to administer functions within the exception.

Further explanation may be gathered from the testimony of Assistant Attorney General Shea who testified on behalf of an earlier bill before the House Committee on the Judiciary. He declared that the exception was meant to prevent the propriety of discretionary administrative acts from being tested by damage suits brought in tort; such suits should not be allowed simply because the same conduct by private persons might give rise to liability, or because of alleged abuses of discretionary authority by regulatory or licensing agencies. Referring to a prior bill which had not contained the exception, he stated that the cases covered by the exception would have been exempted from the Act by judicial construction anyway, since courts normally exercise restraint

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20 Id. at 5-6. Several other examples are given of what the exception is intended to cover: claims against regulatory agencies founded on abuse of discretionary power, claims based on the alleged negligence of the Treasury in the exercise of its blacklisting or freezing powers. Id.
21 Hearings on H.R. 5373 & 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess., ser. 13, at 29 (1942). The exception under discussion was the same as the version eventually passed.
where the validity of legislation or discretionary administrative action is concerned. The exception was intended only to clarify this point. Also, he believed\textsuperscript{18} that nonregulatory administrative action, such as the expenditure of funds or the execution of a federal project, would be covered by the exception, as well as those cases involving the validity of regulations or legislation.

Other materials indicate the exception was designed primarily to prevent claims against regulatory agencies, the Federal Trade Commission being used as a frequent example.\textsuperscript{19} Indeed, an earlier version of the Act contained an exception, in place of present section 2680(a), declaring the orders of the FTC and the SEC to be outside the coverage of the Act; it was felt that if such agencies issued a cease-and-desist order later found invalid, the party against whom the order had been issued should not have a claim under the Act for damage to his business.\textsuperscript{20} But that provision was considered unclear, and later versions resembled the one eventually adopted.

When the Act was passed, writers were somewhat puzzled as to the purpose of the discretionary function exception, finding it difficult to predict how far the courts would extend the exemption from liability. It was recognized that if courts wanted to keep governmental liability within narrow limits, they could apply the common-law definition of “discretionary”: the authority or right to perform official acts according to what appeared just and proper under the circumstances.\textsuperscript{21} Similarly, based on the change in wording that removed the specific reference to certain commissions, it could be argued that the exception was intended to cover regulatory decisions by all government employees.\textsuperscript{22} Yet, there seemed little reason for much concern over the exception in the Act’s early days. The courts were experienced in determining whether acts were ministerial or discretionary, e.g., deciding whether or not mandamus would lie against a government officer or agency.\textsuperscript{23} Reading section 2680(a) as a whole, one might well believe the entire exception was meant simply as a safeguard to prevent development of a

\textsuperscript{18}Id. at 33.
\textsuperscript{20}Hearings on S. Res. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. 48-49 (1940).
\textsuperscript{22}101 U. Pa. L. Rev. 420, 423 (1952). That article also states that the legislative history does not indicate any intention to cover nonregulatory decisions made in carrying out government projects. Id.
\textsuperscript{23}It has been suggested that such experience would be of use in applying the exception. Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. L.J. 1, 44 (1946).
"governmental tort" doctrine in cases where government action was allegedly taken without constitutional or statutory authority. Judicial interpretations of the exception, however, soon complicated its definitions and applicability.

APPLICATION OF THE EXCEPTION PRIOR TO 1953

EARLY SUPREME COURT INTERPRETATIONS OF THE ACT

Although the discretionary function exception itself was not interpreted by the Supreme Court until 1953, the Court indicated at an early date that the Federal Tort Claims Act should be liberally construed against the Government, evidencing a strict construction of the exceptions to liability. In United States v. Aetna Cas. & Surety Co., it recognized the argument that statutes waiving sovereign immunity should be strictly construed, but rejected it, choosing instead to favor the principle that sovereign immunity, since it involves considerable hardship, should not be reinstated by narrow construction where a waiver has occurred. To justify a liberal interpretation of the Act, the Court noted the broad language and Congress's desire to rid itself of many small claims. This view was reiterated in later decisions by the Supreme Court and lower federal courts. Thus, it quickly appeared, at least in cases considering the Act as a whole, that restrictions not made clear by the Act would not be read into it.

SOME BROAD APPLICATIONS OF THE EXCEPTION WHERE "DISCRETION" INVOLVED

Many of the early cases in which the discretionary function issue was raised simply indicated that if an act involves discretion, the exception applies. In a leading case, the Government constructed a river control project in order to create a water transportation route. The plaintiff alleged that the project damaged his land and crops.

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2 Armstrong & Cockrill, The Federal Tort Claims Bill, 9 Law & Contemp. Prob. 327, 330 (1942) (discussing a provision identical to that included in the Act). This purpose was revealed by the first part of the exception. Id.
4 Id. at 380.
7 Coates v. United States, 181 F.2d 816 (8th Cir. 1950).
Noting that the words "discretionary function" were chosen only after considering the separation of powers doctrine, which had always kept the courts from interfering with the exercise of judgment by members of the executive branch, the court held that the authorizing and planning of the project fell within the exception. Indeed, the court stated that it would be almost impossible to find a clearer example of a discretionary function than the changing of the course of a river. Similarly, another case soon held the exception to cover federal construction of a dam that allegedly raised the level of underground waters on a landowner's premises, resulting in the flooding of his cesspool and cellar. Although both cases involved decisions to construct projects, the exception's application was later extended to alleged negligence in the operation of such projects.

In the very first case to apply the exception, Thomas v. United States, it was held that where the development of streams for flood control and navigation was being carried out under direction of the Chief of Engineers of the War Department, even details in the plan involved discretionary acts. Thus, if the engineers negligently planned and installed a revetment so as to deflect the flow of water onto the plaintiff's land, this negligence was within the exception. In Boyce v. United States, the Chief of Engineers of the Department of the Army had approved a plan for blasting operations that were necessary to deepen the Mississippi River. Due consideration had been given past experience in dynamiting, but plaintiff's property was nonetheless damaged. Negligence in the blasting was alleged, but the blasting was held to involve discretion, and was thus within the exception. These cases indicate the judiciary's reluctance to subject decisions of government administrators to its scrutiny. Nevertheless, separation of powers and administrative independence would not seem to preclude liability for negligence in the details of operation and maintenance.

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\(^{22}\)Id. at 817. The court stated that "discretionary function or duty" is a phrase with a history of being contrasted with mere administrative performance of a task and that nothing in the Act indicates the phrase is to be used in any different way. Congress intentionally used that phrase in order to keep the courts from interfering with lawful legislative and executive decisions. But the court set no guidelines by which to determine where such decisions end and administrative performance begins. Id. at 817-18.


\(^{25}\)Congress had approved the basic plan, but the Corps of Engineers chose the angle at which to place the revetment. The latter act involved the alleged negligence. Accord, Danner v. United States, 114 F. Supp. 477 (W.D. Mo. 1953) (construction and maintenance of approach fill in flood control project was within the exception).

\(^{26}\)93 F. Supp. 866 (S.D. Iowa 1950).
Congress passed the Federal Tort Claims Act with the obvious intent to create governmental liability in numerous cases; if such a minor decision as whether or not to include a rip-rapping river bank below a dam is within the discretionary exception, there may be few matters that fail to fit that exception. Any decision involves some discretion—some use of judgment.

The exception was applied even where little "discretion" was involved. Where Army engineers were under a statutory duty to give weather information and they allegedly performed the duty negligently, leaving the plaintiff unprepared for a flood, one court held that if any duty was breached, it was only a discretionary one. It indicated that where judgment is necessary to adapt a means to an end, discretion is involved. This court took the view, shared by other courts, that the exceptions should not be strictly construed, since in enacting them Congress was clearly specifying instances in which it did not waive governmental immunity.

Some of the early cases also illustrated occasional confusion as to what a discretionary function included: "Franklin Canal, being authorized, created, and maintained under authority of acts of Congress of the United States, is a Governmental function involving discretion." But most cases indicated that a "function" involved some activity, and are notable mainly for the number and variety of activities they brought within the exception.

Two cases which gave a broad definition to "discretionary" deserve special attention. In Smart v. United States, a mental patient was released by a veterans' hospital after his condition improved. On his way...
home, he stole a car and drove it negligently, injuring the plaintiff, who sued the Government for negligently releasing the patient. The court stated that the decision to allow the patient to return home and to go unattended was within the exception. An even more sweeping application was the decision in *In re Texas City Disaster Litigation.* The Fifth Circuit, believing that the exception illustrated a congressional intent to keep the legislative and executive branches free from judicial supervision, held the exception applicable to those who planned, launched, and carried out the manufacture and shipment of the product that was involved in the fire and explosions. The exception was applied even to sacking and transporting, with the court expressing the view that the exception was based on the theory that all who participate in such an undertaking must be free of judicial control over the exercise of their judgment, just as courts must be free from suits for their errors.

Thus, in a wide variety of cases, the courts, at an early date, adopted so wide a definition of discretion that the exception seemed capable of swallowing the rest of the Act.

NONOBLIGATORY FUNCTIONS

The exception was not always applied solely on the ground that some discretion was involved. Where the alleged liability arose from the government's failure to perform some act, the courts often asked: Was the Government under an absolute obligation to perform the act? If the answer was in the negative, they sometimes said that the failure was within the discretionary realm and thus within the exception. This reasoning was exemplified in *Denny v. United States,* where the wife of an Army officer alleged that the Army was negligent in failing to send an ambulance for her promptly when she was beginning labor, and that as a result her child was stillborn. Since the applicable Army regulation provided for medical attention to the wives and other dependents of officers "whenever practicable," the court concluded that any obligation was discretionary and the failure to act was within the exception. The result seems harsh, and the reference to a "discretionary obligation" presents a linguistic puzzle. It is not surprising, therefore, that the

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"197 F.2d 771 (5th Cir. 1952), rev'd Dalehite v. United States, 1950 A.M.C. 1084 (S.D. Tex.). This case is the lower court decision appealed in Dalehite v. United States, 346 U.S. 15 (1953).

"197 F.2d at 778.

"171 F.2d 365 (5th Cir. 1948), cert. denied, 337 U.S. 919 (1949). The concurring opinion stated that the duty was not discretionary, but rather conditioned on the practicableness of the situation. Id. at 367."
exception's application in Denny has been termed "particularly unjustifiable."\textsuperscript{44}

On the other hand, few found fault with the application of the no-obligation rule in \textit{Old King Coal Co. v. United States}.\textsuperscript{45} There the Secretary of the Interior had taken over a coal mine under an Executive order of the President. The mine was inoperative during the war, and the owner sued to recover his lost profits. The court held that the Secretary had discretion as to whether or not to operate the mine and that the failure to operate was within the exception, a result with which it is difficult to quarrel.\textsuperscript{46} Somewhere between these two extremes falls the case of \textit{Kline v. New York},\textsuperscript{47} involving the Coast Guard's failure to replace destroyed guide lights. In addition to stating that decisions on where and when to replace the lights involved discretion, the court pointed out that there was no absolute duty to replace the lights at all; thus, the decision of whether to replace the lights was also within the exception.

One case even applied the no-obligation rule in a situation involving misfeasance, as opposed to nonfeasance.\textsuperscript{48} Such an interpretation appears faulty, for it would seem that a discretionary decision on whether to act cannot turn the carrying out of that act into a discretionary one; it may be a purely mechanical chore involving no discretion at all. Certainly, this attempted "carryover" would be contrary to the principle that once a job is undertaken, reasonable care must be exercised in performing it.

**DUTY OF CARE AFTER EXERCISE OF DISCRETION**

The rule that once the Government has decided to act it must do so with care is still operative in the application of the exception. It was developed in a series of early cases, finding its first clear formulation in

\textsuperscript{44}Note, \textit{The Discretionary Function Exception of the Federal Tort Claims Act}, 27 IND. L.J. 121, 127 (1951). The commentator stressed the fact that Army authorities had indicated they would send an ambulance for the wife. This, it is argued, constituted the exercise of discretion; following that, the failure to send the ambulance involved a mere ministerial act not within the exception. \textit{Id.} at 127.

\textsuperscript{45}88 F. Supp. 124 (S.D. Iowa 1949).


\textsuperscript{47}113 F. Supp. 298 (S.D. Tex. 1953).

\textsuperscript{48}Western Mercantile Co. v. United States, 111 F. Supp. 799 (W.D. Mo. 1953). A statute required that information as to precipitation and flood danger be disseminated by the weather bureau whenever certain officials considered it advisable. When incorrect information resulted in injuries, the court held the giving of the report discretionary and within the exception.
Costley v. United States.49 There an Army sergeant’s wife was admitted to an Army hospital and given an injection of the wrong drug causing her permanent paralysis from the waist down. The court held that those treating her were not exercising a discretionary function: “Having decided that there were facilities available, and having admitted her for treatment, the hospital authorities no longer had any discretion to exercise with regard to whether she was to receive careful or negligent treatment.”50 The discretion was exercised in admitting the patient; once she was admitted, the Government had the nondiscretionary duty of treating her with due care. The same rule was soon applied in a case involving a mental patient.51 As in Denny, there was no obligation to admit all patients, but here the plaintiff was admitted with the hospital both knowing of her unstable mental condition and directing a guard to watch her. When she was injured in falling or jumping from a hospital window while unguarded, the court found liability. Again, the only discretion had been exercised in admitting the patient; the usual duty of reasonable care then arose.52

Although this principle, similar to the “good samaritan” doctrine found throughout tort law, is most readily applicable in cases treating the sick, it was applied in some other situations in a few early cases.53 While these cases often gave broad meaning to the term “discretionary,” they did recognize a point where discretion in deciding whether to act ends, and actual performance begins; in the latter, reasonable care is required and liability arises from failure to exercise this care, despite the earlier exercise of discretion. The dividing line between a discretionary decision and its performance was not always clear, however, and no rule has ever been stated as to why the rule was applied in some cases and not others.

49181 F.2d 723 (5th Cir. 1950).
50Id. at 725. It should be noted, however, that the Denny problem was not here presented; the authorization to treat this particular patient was not qualified by the words “whenever practicable.” Of course, unlike Denny, in this case the task of treatment had undoubtedly been undertaken. See notes 44-45 supra and accompanying text.
51United States v. Gray, 199 F.2d 239 (10th Cir. 1952).
52Id. at 241; accord, Grigalauskas v. United States, 103 F. Supp. 543 (D. Mass. 1951), aff’d, 195 F.2d 494 (1st Cir. 1952) (Army wife admitted to give birth and child was injured); Dishman v. United States, 93 F. Supp. 567 (D. Md. 1950) (veterans’ hospital poured carbolic acid into the ear of patient).
53E.g., Hernandez v. United States, 112 F. Supp. 369 (D. Hawaii 1953) (Government erected a roadblock but failed to give an adequate warning); Hambleton v. United States, 87 F. Supp. 994 (W.D. Wash. 1949), rev’d on other grounds, 185 F.2d 564 (9th Cir. 1950) (Army sergeant interrogated a civilian until she became ill).
MANDATORY ACTS AND THE DUTY OF CARE

To the generalization that early cases tended to give wide application to the discretionary function clause, one other limitation must be noted. Just as the courts had little trouble concluding that if a duty was nonobligatory, failure to perform was a discretionary failure, so could they easily decide that if the act was mandatory, there existed no discretion whether to perform it. The Somerset Seafood Company, having had an oyster boat stranded on the wreck of a ship which the United States had sunk, complained that the Government had negligently created and marked the wreck. Since the Wreck Acts imposed an absolute duty on the Government to remove the wreck or give warning to others, the court held that no discretion was involved and the exception was inapplicable. Similarly, the Tenth Circuit held the exception inapplicable where the plaintiff alleged that federal agents encouraged other livestock owners to use grazing lands next to his, attempted to destroy his exclusive grazing privileges, and refused to cancel his predecessors’ permits. The court reasoned that no federal employee has the discretion to induce others to interfere with exclusive rights granted by the United States. Likewise, the Government, when acting as landlord, has been held to an absolute, nondiscretionary duty to keep common premises safe and sanitary for tenants. Moreover, the United States, as a landowner, must obey court orders.

In one strange and notable case, however, a court came up with reasoning quite opposite to the general rule. In Jones v. United States, a federal district court held that if a federal employee violates a statutory duty, the court may grant alternative relief. In this case, the plaintiff alleged that the Government had negligently created and marked the wreck of a ship which the United States had sunk. The court held that the exception was inapplicable. Similarly, the Tenth Circuit held the exception inapplicable where the plaintiff alleged that federal agents encouraged other livestock owners to use grazing lands next to his, attempted to destroy his exclusive grazing privileges, and refused to cancel his predecessors’ permits. The court reasoned that no federal employee has the discretion to induce others to interfere with exclusive rights granted by the United States. Likewise, the Government, when acting as landlord, has been held to an absolute, nondiscretionary duty to keep common premises safe and sanitary for tenants. Moreover, the United States, as a landowner, must obey court orders.

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prohibition, he is acting "on his own," thereby exercising his own discretion, and the exception applies. But discretion is usually taken to mean lawful judgment; other cases assume there is no discretion to violate the law, and the appellate court in this case decided the matter without considering the exception.

It is difficult to argue with the general precept of these decisions: Where a duty to perform an act, or to act in a particular manner, is imposed on the Government by law, the Government cannot be heard to argue it exercised discretion in failing to perform the duty, for it had no such discretion. The act, or failure to act, simply does not involve policy considerations and matters of judgment which would make it a discretionary function, regardless of the possibility that the original decision to impose the duty may have involved such considerations.

EXCEPTION CONSIDERED UNIMPORTANT

In Kendrick v. United States, officials of a veterans' hospital had discharged a patient who had been treated for mental disorders. Even though they had given the matter of release careful consideration and complied with all regulations, the veteran later killed a man. Finding no negligence on the part of the government employees, the court found no liability and thus no need to consider possible application of the discretionary exception. Perhaps placed in an optimistic state of mind by this "easy way out," the court remarked that the exception was probably unnecessary and inserted due to a surplus of caution. Although early cases giving wide and varying interpretations of "discretionary function" should perhaps have foreshadowed difficulties, a number of writers agreed with the Kendrick court that the exception did not appear to cause great difficulty. It was even said that all the exceptions were so worded as to leave little room for construction, and that if construction were necessary, the courts had had experience in interpreting "discretionary." Nothing in the Act indicated that the word was to be construed differently from its interpretation in situations involving municipal liability in tort, the personal liability of government officials,

82 Id. at 432. But see Hulen, Suits on Tort Claims Against the United States, 7 F.R.D. 689, 693 (1948).
82 Note, The Courts and the Federal Tort Claims Act, 98 U. Pa. L. Rev. 884, 901-02 (1950). Similarly, there has been a tendency to interpret the discretionary exception strictly and in the government's favor. Id. at 903.
82 Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum. L. Rev. 722, 729 (1947). Also pointed out, however, was the fact that the term had sometimes caused trouble, and had not been interpreted uniformly. Id. at 729 n.27.
or the use of injunctions against government departments.\textsuperscript{55} Thus, it was not patent error to think the exception of little use prior to 1953.

\section*{Supreme Court Applications of the Exception}

\textit{Dalehite v. United States}

The leading case on the discretionary function exception was decided by a divided Supreme Court in 1953. \textit{Dalehite v. United States}\textsuperscript{66} arose out of the Texas City disaster of 1947, in which fires and explosions erupted after the federal government had loaded ships with a fertilizer containing combustible ammonium nitrate. Negligence on the part of the federal government was alleged in adopting the plan to export the fertilizer, in controlling its manufacture, in handling and shipment, and in failing to police the loading and fight the fire. Suit was brought under the Federal Tort Claims Act, but the majority held for the Government on all counts.

The opinion began with the proposition that sovereign immunity must be clearly relinquished or it remains viable.\textsuperscript{67} It was not relinquished as to discretionary functions, and these, the Court reasoned, must include more than the administration of statutes and regulations since this is covered separately. Discretion was meant to refer not to the power of a judge to decide a case but rather to "the discretion of the executive or the administrator to act according to one's judgment of the best course.\textsuperscript{68} While declining to decide where such discretion ends, the Court held that it includes more than the initiation of programs: "It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.\textsuperscript{69} Furthermore, the Court found the discretionary exception to cover not only an official's exercise of judgment but also the acts and failures of subordinates in carrying out plans as directed.

Applying these standards, the Court concluded, with little discussion, that the decisions to conduct the fertilizer export program and to begin shipments without further testing of the explosiveness of the fertilizer were within the exception. Since the basic plan had been drawn

\begin{footnotes}
\item[1]\textsuperscript{Comment, Federal Tort Claims Act, supra note 10, at 545.}
\item[2]\textsuperscript{346 U.S. 15 (1953).}
\item[3]\textsuperscript{Id. at 31, citing United States v. Yellow Cab Co., 340 U.S. 543 (1951); Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381 (1939).}
\item[4]\textsuperscript{346 U.S. at 34.}
\item[5]\textsuperscript{Id. at 35-36.}
\end{footnotes}
up by the field director of ammunition plants, and the manufacture, bagging, and labeling were done in conformity with this plan, the Court opined that any negligence in these operations was committed in carrying out a high-level blueprint, not in an operational-level execution of details, where liability would exist. It concluded that since the program had been approved by the Cabinet, all decisions had resulted from delegation of authority from the top “planning” level. “Likewise, serious judgment was involved in the specification of the bag labels and bills of lading.” Finally, there being no strict liability under the Act, the Court held that the United States was not liable under such a principle for owning an inherently dangerous commodity or for engaging in an ultrahazardous activity.\(^\text{21}\)

\(\text{\textsuperscript{20}}\)Id. at 41.

\(\text{\textsuperscript{21}}\)Id. at 45. The possibility of strict liability under the Act is an interesting topic with a history that is often closely related to that of the discretionary exception. Although never specifically repudiated, it is arguable that the statements in Dalehite on this matter are dicta, since the exception and the no-private-liability rule alone would have prevented governmental liability. Furthermore, strict liability is not excluded by the Act’s own language as are, e.g., discretionary wrongs, intentional torts, and combattant activities. Subsequent to Dalehite, lower courts did impose strict liability under the Act where an applicable state statute provided for such liability. United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), cert. denied, 347 U.S. 934 (1954) (S.C. statute imposed strict liability where airplane crashed and did ground damage); Long v. United States, 241 F. Supp. 286 (W.D.S.C. 1965) (S.C. statute imposed strict liability when plaintiff injured by defendant’s helicopter blades); see United States v. Pendergrast, 241 F.2d 687 (4th Cir. 1957).

In Rayonier, Inc. v. United States, it was held that the United States would be liable for losses due to the Forest Service’s negligence in fighting a fire if the law of the state (Wash.) would impose liability on private persons under similar circumstances. 352 U.S. 315 (1957). The Court noted that Indian Towing, discussed in text accompanying notes 100-04 infra, decided that liability under the Act is not limited to that of a municipal corporation or other public body; anything Dalehite held to the contrary was said to have been rejected by Indian Towing, although the latter opinion said the former was distinguishable. Id. at 319. In support of this proposition, the Court cited those portions of United States v. Praylou which had to do with the government’s being held strictly liable under a state statute. 208 F.2d 291, 294-95 (4th Cir. 1953). This has been taken as an indication by one commentator that the Court would no longer apply the Dalehite rule. Peck, Absolute Liability and the Federal Tort Claims Act, 9 Stan. L. Rev. 433 (1957).

In addition, several pre-Dalehite cases had held the United States strictly liable in Federal Tort Claims Act situations. United States v. Gaidys, 194 F.2d 762 (10th Cir. 1952); Parcell v. United States, 104 F. Supp. 110 (S.D.W. Va. 1951). But the large number of post-Dalehite cases have concluded there is no strict liability under the Act. Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957); United States v. Ure, 225 F.2d 709 (9th Cir. 1955); Brown v. United States, 230 F. Supp. 774 (D. Mass. 1964); Stratton v. United States, 213 F. Supp. 556 (E.D. Tenn. 1962).

The present situation thus seems to be that while the Dalehite dictum still stands, the Supreme Court has given indications that it will repudiate it. In general, applicable state statutes will be applied, imposing a stricter standard than that of ordinary common-law negligence. Where the common law itself, and not a statute, imposes strict liability, it is still doubtful the Court would apply absolute liability. But it could certainly be argued that there is no reason to distinguish between a statute and the common law in this regard.

A recent case, Emelwon, Inc. v. United States, posed the analogous question of whether the United States might be liable for the acts of an independent contractor employed by the
It has been stated that Dalehite held there was no negligence in dealing with the fertilizer;\textsuperscript{72} such a holding would, of course, weaken any statements with regard to application of the exception. But no such holding appears in the opinion. The Court premised its decision upon the application of the exception and the lack of private liability as to firefighting.\textsuperscript{73} As to the storage of the fertilizer, the Court specifically stated that it rested its decision on the Act,\textsuperscript{74} not upon the factual findings. The determinations on this matter were found to be "classically within the exception."\textsuperscript{75} The Court also noted that while storage and loading might have been done in a different manner, the power to adopt bylaws or ordinances to control such operations was within legislative discretion. It did indicate at one point that there was no negligence in the handling prior to storage: "The entirety of the evidence compels the view that FGAW [the fertilizer] was a material that former experience showed could be handled safely in the manner it was handled here."\textsuperscript{76} But even as to this one aspect of the situation, it did not rest its decision on a finding of no negligence; the Court was merely indicating that consideration of past experience—hence discretion—was involved in determining the manner of handling.

Because of the belief that the Dalehite majority carried the exception too far, and because of the subsequent narrowing of the Dalehite rule, the dissent is quoted as often as the majority opinion. Mr. Justice Jackson, speaking for the dissenters, acknowledged that the cabinet-level decision to send fertilizer abroad was not actionable but argued that this high-level decision had been executed carelessly and, therefore, there should be liability for negligence.\textsuperscript{77} The dissenters could not "agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence."\textsuperscript{78} There is no good reason, they contended, why the Government should be immune from liability in the mere housekeeping chores involved in Dalehite. The

\footnotesize{Government to do inherently dangerous work. 391 F.2d 9 (5th Cir. 1968). The court held that while the negligence of an independent contractor cannot ordinarily be imputed to the Government, the Government may (under Fla. law) incur liability for failure to halt operations or remove a danger if it knows of a dangerous situation created by an independent contractor, or if it is negligent in failing to supervise inherently dangerous work of such a contractor. Thus, the same law was applied to the United States as would have been applied to a private person in that jurisdiction.
\textsuperscript{23} U. Cin. L. Rev. 125 (1954).
\textsuperscript{346} U.S. at 43-44.
\textsuperscript{Id.} at 42-43.
\textsuperscript{Id.} at 43.
\textsuperscript{Id.} at 42.
\textsuperscript{Id.} at 57-58.
\textsuperscript{Id.} at 58.
handling, loading, and bagging were akin to activities of private companies, and the Act showed an intent to assume such liability; they contended that the long-debated statute must have been intended to do more than cover traffic accidents: "If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.' "

One commentator has suggested that part of the disagreement between the majority and dissent was over the interpretation of the facts. While this difference would seem to relate only to the extent of the negligence, there is a very real difference of opinion concerning the application of the exception to the execution of discretionary plans.

Shortly after the Dalehite decision, the House Committee on the Judiciary was authorized to investigate the merits of the private relief bills arising from the Texas City disaster. Relief eventually was granted by the following Congress in 1955. While this action may be taken as an indication of congressional disapproval of Dalehite, the fact that Congress merely granted relief in this particular case and did not amend the Act so as to prevent further similar results presents a strong argument to the contrary. The relief act itself indicates the Government was acting out of compassion, not out of any sense of legal obligation. Thus, it may well be that Congress intended to grant relief but not to abandon its immunity as to similar cases in the future. Dalehite made the legal profession more aware of the problems under the Act, causing some to think the legislation was not living up to its earlier promises, as indicated by a proposed new title: "The Federal Negligent Operation of Motor Vehicles Act."

Dalehite inspired a great deal of comment, most of it adverse. Particularly subject to attack was the statement that acts were

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9Id. at 60. Writers critical of the majority have found this an irresistible quotation.

10Matthews, supra note 14, at 28.


12Act of Aug. 12, 1955, Pub. L. No. 84-378, 69 Stat. 707. This act limited relief to those who were a party to the Dalehite suit. A maximum of $25,000 was set on each death, personal injury, and property damage claim. A report issued in Aug. 1957, indicated that payments had been made and the matter largely settled by the previous Feb. Thus, in 1957 the long litigation and controversy seemed finally over with close to $16 million paid to more than one thousand claimants.


14Section 1 of the relief law states: "The Congress recognizes and assumes the compassionate responsibility of the United States for the losses sustained by reason of the explosion and fires at Texas City, Texas, and hereby provides the procedure by which the amounts shall be determined and paid." Act of Aug. 12, 1955, Pub. L. No. 84-378, § 1, 69 Stat. 707. Since Congress regarded the awards as gratuities, no recovery was allowed insurance companies as subrogees.

discretionary if directed from a high, "policy" level. One objection was that this method ignored the nature of the act itself and concentrated instead on the status of the actor or originator, even though the exception gave no support to such a course. A compelling reason for concern was the ever-expanding activities of the Government; it was felt that when the Government engaged in work similar to private industry, it should bear the same degree of responsibility. Many writers even openly expressed the view that lower courts had dealt more effectively with the exception.

In attempting to rationalize the decision, some commentators felt the large amount of money at stake had made the Court reluctant to find liability. Others believed the Court had taken the Act to mean that there could be liability only where a statute outlined all the duties of the officials or agency involved. It was even suggested that Dalehite proved that the task of defining "discretionary function" was too much for the courts, who were forced to take the easy way out by applying the exception to any employee exercising the slightest judgment.

Although the majority of commentators severely disagreed with Dalehite, a few expressed only limited criticism. An even smaller number did not believe Dalehite had great significance at all, either because it could be fitted into preexisting decision patterns or because the factual situation seemed likely to remain unique.

1325, 1326 (1954). That article contains a good discussion of the bills introduced in Congress for Texas City relief. Id. at 1327-28 n.14.

Note, Discretionary Exception Under Federal Tort Claims Act: Sovereign Immunity Dies A Slow Death, 4 DUKE L.J. 34, 38 (1954). Also suggested is that the case renders liability under the Act even more speculative than in 1946. Id. at 39.

22 U. KAN. CITY L. REV. 176, 177-78 (1954). "This principle of government immunization because of discretionary acts of officials was instituted to protect officials making policy decisions of a regulatory or governmental nature, not decisions and actions of a private manufacturer and shipper as in this case." Id. at 177; cf. 101 U. PA. L. REV. 420 (1952). Distinguishable are regulatory activities, covered by the exception, and nonregulatory or governmental activities, such as the manufacture and shipping of fertilizer, covered, if at all, only by the "statutory," not the discretionary, part of § 2680(a). Id. at 423-24.

E.g., 3 BUFFALO L. REV. 163, 164-65 (1953).
Comment, Federal Tort Claims Act, supra note 83, at 70-71.
E.g., 12 J. MIAMI L. REV. 247 (1958); articles cited notes 86-92 supra.
E.g., 39 CORNELL L.Q. 134, 138 (1953); 38 MINN. L. REV. 175, 177-78 (1954).
23 U. CIN. L. REV. 125 (1954). Some believed the pre-Dalehite situation to be: If an act or omission was part of a plan or high-level policy, it was held discretionary; otherwise, it was not. Because of the close relation in Dalehite to the export plan, the decision did not change the trend. Id. at 126-27.

Heuser, Dalehite v. United States: A New Approach to the Federal Tort Claims Act, 7 VAND.
Dalehite also had an immediate impact upon the lower federal courts. In *Williams v. United States*, the United States announced that no witnesses would be called regarding the cause of a jet explosion because national security would be imperiled. Taking judicial notice that the flight was an experimental one, the court held, on the basis of *Dalehite*, that the accident must necessarily have been the result of a discretionary function. Thus, *Williams* exemplifies the view that *Dalehite* applied the exception to all acts of subordinates performed in furtherance of discretionary decisions of superiors, as opposed to the position that the exception was applied only to discretionary acts of subordinates. These seem to be the two basic interpretations that can be drawn. The former finds support in the statement in *Dalehite* that the exception covers the execution of plans; the latter is supported by the Court's statements that each act required judgment.

*Dalehite* brought many expressions of concern from writers and some confusion on the part of the courts; but neither was there complete uniformity or understanding prior to 1953. Astute observers quickly recognized that while the decision presented problems, it need not result in applying the exception where no plan was involved, where a plan was disobeyed, or where nondiscretionary execution of a discretionary plan was concerned. In the third situation, nonapplication requires taking the view that all acts held within the exception in *Dalehite* involved discretion in and of themselves. Dictum in that case, however, indicated that initial discretion could bring the entire performance within the exception, obviously calling for the application of the rule of nonliability to mechanical chores of implementation. Under another view, much difficulty would surround the situations in which lower officials were not merely executing a plan but were required to exercise some judgment, and *Dalehite* found discretion in almost any such exercise. Few acts are purely mechanical; usually some decisions are involved, and arguably any decision includes discretion. The problem of application was probably inevitable since the Court in *Dalehite* had specifically declined to set limits on discretion. A partial answer to this problem was handed down in a case which did not really concern the exception.

L. Rev. 175, 179 (1954).

*115 F. Supp. 386 (N.D. Fla. 1953), aff'd on other grounds, 218 F.2d 473 (5th Cir. 1955).

*See* authorities cited notes 93-94 *supra.*

*6 STAN. L. REV. 734, 736-37 (1954). It has been noted that all the decisions involved in *Dalehite* were found to have been made at the planning level and, thus, discretionary. This is a plausible interpretation, especially in light of later court statements on *Dalehite* and the language of *Dalehite* itself.*
In *Indian Towing v. United States*, the Government had conceded that no discretionary function was involved and that liability existed for some governmental activities at the operational level. It contended, however, that the Federal Tort Claims Act did not envision liability for a uniquely governmental activity, such as running a lighthouse. Noting that the Act was intended to make the Government liable for its negligence whenever there would be private liability, the Court refused to read in any distinction between "governmental" and "proprietary" activities such as appears in municipal law.

The government's contention seemed to be supported by *Feres v. United States*, which held the United States not liable under the Act for service-related injuries to military personnel. Ignoring *Feres'* dictum that the act had made the Government liable only where analogous private liability was present, the Supreme Court distinguished that case on the ground that special federal laws had always governed servicemen. Its disposal of *Dalehite* was even less informative: "The governing factors in *Dalehite* sufficiently emerge from the opinion in that case."

In remanding, the Court held that although the Coast Guard was not obligated to operate a lighthouse, once it exercised its discretion, it was under the duty to use due care in its operation. If the Coast Guard failed in this duty, the Government was liable. Thus, the Court adopted the rule that if discretion is exercised and an activity undertaken, it must be performed with due care.

The significance of *Indian Towing*'s interpretation of the Act's liability section is clear: If the Government undertakes an activity, even one not required, it will be held to the same standard of reasonable care as a private person would be, even though private persons seldom engage in that particular activity. Its significance for the exception is less clear. The Court does say the alleged negligence was at the operational level, but there is no indication that this would necessarily prevent the exception's application. However, in disposing of the "uniquely governmental" contention, the Court does definitely endorse the "good

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101 *Id.* at 68-69. There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finepiped and capricious as to be almost incapable of being held in the mind for adequate formulation.* Id. at 68.
103 350 U.S. at 69. It should be noted that *Dalehite* was not overruled, nor has it ever been in its application of the exception.
104 See text accompanying notes 49-52 supra.
105 350 U.S. at 64.
"samaritan" rule requiring due care once discretion is exercised. For what the doctrine is worth, its endorsement in Indian Towing may indicate that the Supreme Court would recognize it even where the exception is argued. Certainly, the Court's language could be applied in that situation.\textsuperscript{106}

The dissent urged a more conservative approach, one in line with Dalehite and Feres. The four dissenters urged that the "uniquely governmental" principle be adopted; otherwise, they feared, all activities at the operational level could give rise to liability. Obviously, they were remaining loyal to the view that where there is any doubt as to proper construction, the Government should not be assumed to have waived its immunity. The majority opinions in Indian Towing and Dalehite, however, are not completely incompatible. In the first place, Indian Towing did not really raise the question of the exception; therefore, what was said on that point can have only limited significance. Secondly, Dalehite did involve an unusual factual situation. While the rather vague statements on discretion have not been repudiated, it is perhaps unlikely that discretion at, or extending to, so low a level, and exercised in so many varied matters, would again be found.

One result of Indian Towing seems clear. Any distinction under the Act between governmental and proprietary functions was flatly rejected. It had long been assumed that when a municipality acted in a public capacity, it enjoyed immunity from liability. When it acted in a proprietary capacity,\textsuperscript{107} however, it enjoyed no such immunity unless granted by statute. The Indian Towing rejection of the distinction indicated that no provision of the Act would be interpreted as including it.\textsuperscript{108} This rejection was generally hailed as a desirable step due to the conflicting and confusing applications of the local rules of municipal liability.\textsuperscript{109} Furthermore, the Court's indication that the Act was to be liberally construed in the claimant's favor seems in accord with the congressional purposes.\textsuperscript{110} Perhaps the greatest significance of Indian Towing was the Supreme Court's liberal application of the Act as a whole.

It was soon recognized that the case had imposed possible liability upon the Government wherever private persons could conceivably

\textsuperscript{106}"But once it exercised its discretion to operate a light . . . it was obligated to use due care to make certain that the light was kept in good working order . . . ." Id. at 69.

\textsuperscript{107}This area of liability usually included functions for which the municipality made contracts or received pecuniary compensation. See generally Blachly & Oatman, Approaches to Governmental Liability in Tort: A Comparative Survey, 9 Law & Contemp. Prob. 181, 189-90 (1942).

\textsuperscript{108}54 Mich. L. Rev. 875, 878 (1956).

\textsuperscript{109}31 Notre Dame L. Rev. 516, 519 (1956); 34 Texas L. Rev. 956, 958 (1956); 9 Vand. L. Rev. 882, 884-85 (1956).

engage in an activity, whether or not they actually did so. This seemed sensible, for *Dalehite* had apparently removed immunity at the operational level, where most activities could be performed by private persons. By a slight extension, *Indian Towing* could result in governmental liability wherever there is a duty to act; if there is such a duty, there can be no discretion whether or not to perform. Some commentators have pointed out that *Indian Towing* left the courts considerable leeway in determining governmental liability, e.g., to allow recovery for negligence whenever private persons could carry on the same or analogous activities. This can be rebutted, however, by arguing that the Court held only that the no-analogous-private-liability rule should not be applicable where the Government has undertaken to warn of a danger and thus engendered reliance. The rejection of the former rule in favor of the adoption of the latter one would, however, seem to be separate holdings of the case, not qualifying one another. Certainly the Court's language does not indicate it will apply its broad statements of possible governmental liability only where a duty to warn has been assumed.

More difficult is the task of determining the case's significance in applying the discretionary function exception. The opinion at least seems to make the exception only a qualifier of the general rule that the United States is liable for negligent performance if a private person in a similar situation would be. Beyond that, interpretative problems abound. On the one hand, it may be said that the case did not involve the exception at all and that the criteria for applying it remain the same as in *Dalehite*. Yet, *Indian Towing* can also be considered “an acknowledgment by the Court of the criticisms received as a result of the *Dalehite* decision,” and thus a limitation on the exception’s application—one not applicable if the Government has exercised its discretion in choosing a course of conduct. Perhaps the most valid conclusion is that *Indian Towing*’s liberal attitude simply makes doubtful the applicability of the broad

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25 FORDHAM L. REV. 167, 170 (1956). Of course, discretionary decisions might arguably still be involved in carrying out the duty, but most likely these would be what *Dalehite* characterized as “operational-level” ones, subject to potential liability.

32 E.g., 35 Neb. L. Rev. 509, 511 (1956).

32 IOWA L. REV. 130 (1956). “The line between the *Indian Towing* and the *Dalehite* cases should furnish lower courts a helpful guide in their efforts to give the act the beneficent and practical application Congress must be deemed to have intended.” Id. at 134.


7 SYRACUSE L. REV. 329, 331 (1956). There was no doubt in *Indian Towing* that the maintenance of the lighthouse was on the operational level.

manner by which Dalehite treated the exception.\textsuperscript{117}

Since the governmental-proprietary distinction and the no-analogous-private-liability rules are no longer valid defenses, the possibility arises that the Government will more often be held liable under the Act. As a result, the discretionary function exception becomes more important to the Government as a possible defense.\textsuperscript{118} This makes the situation all the more grave for the Government since the exception may be less often applied by the courts. The extreme language of Dalehite to the effect that discretion exists all along the line would seem limited by Indian Towing's statements that discretion was exercised in deciding to operate the lighthouse and that the maintenance was then at the operational level, defined, by Dalehite's terms, as outside the exception.\textsuperscript{119}

Since Indian Towing, there has been only one real discussion of the exception by the Supreme Court, and it was quite brief. The Court in Hatahley v. United States\textsuperscript{120} quickly dismissed the possibility of the exception's application on the ground that wrongful trespasses not involving discretion were the basis of liability.\textsuperscript{131} A more recent case\textsuperscript{122} granted a federal prisoner the right to sue under the Act for injuries suffered during his confinement. There the Court noted that the discretionary function might be a defense for the Government, presumably because discretion is involved in decisions concerning the housing and treatment of prisoners.

A far more important case was Rayonier, Inc. v. United States.\textsuperscript{123} There the Indian Towing doctrine was reaffirmed, the United States being held liable if a private person would be by the law of the state where the acts occurred. Anything to the contrary in Dalehite was rejected by Indian Towing,\textsuperscript{124} the Court stated in finding the exception here irrelevant.\textsuperscript{125} Rayonier is thus notable for its general attitude toward

\textsuperscript{117}The Supreme Court 1955 Term, 70 Harv. L. Rev. 83, 136-37 (1956).
\textsuperscript{118}Id. at 137.
\textsuperscript{120}351 U.S. 173 (1956).
\textsuperscript{121}Id. at 181.
\textsuperscript{122}United States v. Muniz, 374 U.S. 150 (1963), noted in 63 Colum. L. Rev. 144, 145 (1963).
\textsuperscript{123}352 U.S. 315 (1957); see note 71 supra.
\textsuperscript{124}Id. at 319. This is as close as the Supreme Court has come to overruling Dalehite. The trend toward a more liberal interpretation of the Act, indicated by Indian Towing and Rayonier, has been welcomed by Professor Pound. Pound, The Tort Claims Act: Reason or History?, 30 NACCA L.J. 404, 418-21 (1964).
\textsuperscript{125}This may be taken to mean that the firefighting actions were at the operational level and thus not within the discretionary exception, but the case's direct relevance to future interpretation of the exception seems slight. But see 11 Ark. L. Rev. 452, 455 (1957).
the Act and its reiteration of Indian Towing, but it left the exception no clearer. As to its application, lower federal courts have been given few guidelines.

LOWER COURT USE OF SUPREME COURT STANDARDS

Following the Indian Towing case, federal courts facing the discretionary function problem had three main choices: (1) apply the rule suggested by Dalehite that planning-level decisions are within the exception, and operational-level ones are not; (2) ignore the fact that the exception was not really argued or considered in Indian Towing, and apply that case's "good samaritan" rule; or (3) use a broad definition of "discretion" such as applied by Dalehite. In light of the unclear situation, it is not surprising that lower court cases are found using each of the three.

PLANNING VERSUS OPERATIONAL-LEVEL DISTINCTION

American Exch. Bank v. United States\(^{126}\) stands out as perhaps the most cited lower court authority for applying the first method. In that case, the plaintiff, injured on the steps leading to a post office, alleged that the lack of a handrail was the result of governmental negligence and the cause of her injury. The trial court held that the decision whether or not to install a handrail was a discretionary function. The appellate court reversed, stating that the decision to build a post office involved discretion, but that the noninstallation of a handrail was an operational-level act. Unfortunately, the court provided no guide to distinguish a planning-level decision from an operational-level one. Instead, it merely said that the Act should be liberally construed. Although it has been said that American Exch. Bank "personifies the present day trend of liberal interpretation of the Tort Claims Act,"\(^{127}\) it provided no precise meaning to the term "discretionary function."

One case, considered especially outstanding in this area, dealt with air traffic control. In Eastern Air Lines, Inc. v. Union Trust Co.,\(^{128}\) a domestic airline's plane and a Bolivian military plane collided while both were trying to land at a government-controlled airport. Even though the employees at the airport were in one sense exercising discretion, the court ruled that they were not performing a discretionary function within the
meaning of the exception.\(^2\) Despite the court’s mention of Dalehite, the discretion of the tower operators seems different from that of those who bagged or loaded fertilizer in that case;\(^3\) if anything, the tower operators would appear to have more discretion since careful judgment is imperative in bringing all planes to a safe landing. The Supreme Court’s concise disposition of Eastern Air Lines has been interpreted as an indication that the exception will be applied only to initial decisions with absolute liability at the operational level.\(^4\) The disposition of this case, considered together with Indian Towing, would indicate that Dalehite survives, if at all, only in its belief that discretion was involved in each act, not in its indication that discretion “carries over” into performance.\(^5\)

Similarly, the Government has been held liable for the negligent construction of a drainage ditch and sewage-disposal system in reactivating an Air Force base,\(^6\) but not for water damage caused by the government’s decision to renovate canals.\(^7\) The formulation of a general policy allowing mental patients at a veterans’ hospital grounds privileges has also been held within the exception while application to the individual patient was not.\(^8\) If the decision in the individual case is believed to be at the operational level, the Government is then liable for negligence.\(^9\)

These are the leading cases applying the first method. Yet, even a careful reading of them supplies no clear test. Application of the planning-operational interpretation usually requires asking a further question: Does this case allege negligence in a choice of policy or in carrying out the details of the policy? To answer that question requires

\(^{12}\)Id. at 205, 221 F.2d at 78.
\(^{13}\)Matthews, supra note 14, at 32.
\(^{14}\)Wayne L. Rev. 119, 129-30 (1956). It is unclear, however, whether the Court would hold the Government liable for operational-level activity in which no private individual could possibly engage. Id. at 129.
\(^{16}\)United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962).
\(^{17}\)United States v. Gregory, 300 F.2d 11 (10th Cir. 1962). Since the plan to renovate was considered so clearly within the exception, any formulation of a test as to what is planning and what is operational was unnecessary. Id. at 13.
\(^{19}\)48 Va. L. Rev. 1480, 1485-86 (1962) (suggesting liability is the desirable result in such situations).
still further tests. The result is not a rule but rather a large number of examples—judicial applications of key phrases of the Federal Tort Claims Act. Furthermore, the examples are not even in agreement.\textsuperscript{137}

It might be thought, judging from the very terms of this test, that activities involving planning would be within the exception,\textsuperscript{138} but it has also been held that mere operational details are involved in the preparing of plans,\textsuperscript{139} some cases even indicating that planning, at least by government engineers and contractors, may be outside the exception.\textsuperscript{140} Despite the lack of clarity, however, certain rules or trends do emerge. Where no evaluation of broad policy factors is necessary and decisions concern routine, everyday matters, the exception will not normally be applied. This principle was articulated by a district court in \textit{Swanson v. United States}:\textsuperscript{141} "The planning-level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. . . . The operations-level decision, on the other hand, involves decisions relating to the normal day-to-day operations of the Government."\textsuperscript{142}

Therefore, where pilots were allowed to decide the course and altitude of their cross-country flight, their actions did not involve a policy decision, but rather were at the operational level.\textsuperscript{143} Likewise, the driving of a car is clearly a routine matter, outside the exception, even if the driver’s mission may in other aspects involve policy-level work.\textsuperscript{144}


\textsuperscript{138}E.g., \textit{Sisley v. United States}, 202 F. Supp. 273 (D. Alas. 1962) (planning of highway improvements); \textit{cf. United States v. Washington}, 351 F.2d 913 (9th Cir. 1965) (location and erection of power lines may be within exception).


\textsuperscript{141}\textit{229 F. Supp. 217} (N.D. Cal. 1964).

\textsuperscript{142}This is one of the few attempts by a court to define “planning” and “operational.”


\textsuperscript{144}\textit{Sullivan v. United States}, 129 F. Supp. 713 (N.D. Ill. 1955). There, a special agent of the FBI, pursuing a person whose arrest had been ordered by the Department of Justice, was involved in a collision. The case indicates that if the driving were performed as part of a plan or policy, not just in carrying out an order, the exception would apply. \textit{Id.} at 714.

The theory has been expanded to cover the decision to require a subordinate employee to drive. \textit{See Friday v. United States}, 239 F.2d 701 (9th Cir. 1957). A similar example is maintenance of government premises. \textit{See Jennings v. United States}, 178 F. Supp. 516 (D. Md. 1959); \textit{McCormick v. United States}, 159 F. Supp. 920 (D. Minn. 1958), \textit{appeal dismissed}, 257 F.2d 815 (8th Cir. 1958).
Another general rule is that a decision to apply a broad policy in a specific case is not within the exception; the discretion is considered exhausted by the original adoption of the particular policy. For example, the decision to issue notices to airmen whenever flying hazards warrant it is at the planning level, but the same decision in a particular case is operational. This rule may be considered an extension of the "routine" matters principle, since application of a policy in a particular case would normally be an everyday, routine action, not itself involving high-level planning.

For the Government to bring an act within the exception under the operational-planning test, it should be one which affects the national security and has been weighed against other policy considerations. Both the selection of certain vacant lots for deposit of spoil dredged from a river and the decision not to take precautions concerning escaping fumes from the spoil have been held discretionary functions. The court noted that an exhaustive search had been conducted for possible sites, that it was essential to find some site quickly to allow nuclear submarines to use the river, and that it was given high priority by the Secretary of the Navy. The Government may also bring itself within the exception by showing that the alleged wrongdoing concerned the promulgation of an unwise or invalid regulation, if it can establish that the alleged negligence involved decisions on the amount of supervision, not just performance of supervision or maintenance, or involved formulation or approval of plans, not their mere execution.

Thus, while at first glance it seems difficult to draw the line between planning and operational levels, court decisions have supplied some guidelines. The first method allows the Government protection in formulating its broad policies but provides for liability as to routine decisions and day-to-day execution of plans. One criticism of the test's

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14See text accompanying note 131 supra.
14Id. at 826. The court granted the government's motion for summary judgment, remarking that the selection of the deposit sites was "far removed from the operational level." Id.
14See Blaber v. United States, 332 F.2d 629 (2d Cir. 1964).
14United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), cert. denied, 380 U.S. 971 (1965); Mahler v. United States, 306 F.2d 713 (3d Cir. 1962). Once a project is in full-scale operation, it is beyond the planning stage, and there is no immunity for negligent activity. Kuhne v. United States, 267 F. Supp. 649 (E.D. Tenn. 1967).
14Often it is difficult to tell at an early stage whether any or all of the alleged acts of negligence involve planning-level discretion. See Huffmaster v. United States, 186 F. Supp. 120 (N.D. Cal. 1960); California v. United States, 151 F. Supp. 570 (N.D. Cal. 1957).
validity is that it is based solely on dictum in Dalehite, and that the
Supreme Court made only passing reference to the distinction stating
that it was not necessary to define where discretion ended. Although this
may be true, the test does have some Supreme Court support. Arguably,
no other test has any—certainly Dalehite laid down no other general
rule.

THE "GOOD SAMARITAN" RULE

The rule that once a task is undertaken by the Government it must
be performed with due care is well suited to the situation in which a
patient admitted to a government hospital receives allegedly negligent
treatment. The rule has also been applied in a number of other
situations: once a rescue operation is undertaken, it must be performed
with due care; if the Government contracts to maintain an irrigation
ditch, it is liable for its being an attractive nuisance; having decided to
place pilings in a canal, the Government must use care to see that the
submerged ones do not damage boats; after deciding to reactivate
ordinance works and construct substations, due care must be exercised
to protect those working in the substations. Analogous to the
operational-planning distinction, no set formula is stated, but the
examples indicate the manner in which courts have reasoned. The results
under the two different tests are similar: formulation of a general plan is
within the exception; application of the plan to individual situations
usually is not.

Under this rule, the Government may sometimes even be held
responsible for lack of due care in undertakings it was not obliged to
assume. Thus, where federal credit union bureau officials caused a credit
union to rely on examinations made by the bureau examiners, the
Government became obligated to use due care in discovering and

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12Fair v. United States, 234 F.2d 288 (5th Cir. 1956); Friedland v. United States, 209 F. Supp.
684 (D. Mass. 1962); Lange v. United States, 179 F. Supp. 77 (N.D.N.Y. 1960); Rufino v. United
13United States v. Lawter, 219 F.2d 559 (5th Cir. 1955).
14Foster v. United States, 183 F. Supp. 524 (D.N.M. 1959), aff'd, 280 F.2d 431 (10th Cir.
canal is a discretionary function although no attractive nuisance found).
16Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955), aff'd, 235 F.2d 466 (6th Cir.
1966); accord, Hopson v. United States, 136 F. Supp. 804 (W.D. Ark. 1956); Worley v. United
reporting embezzlements. The Government had no initial obligation to the union, but once it acted, it became bound to do what it led the union to believe it was doing. Logically, this rule has been applied to the execution of the undertaken task, even one of vital importance to national security. Along the same lines, the exception has not been applied where the Government decided not to remove a danger, but failed to use reasonable care in warning of that hazard.

If the operational-planning test rests on a questionable foundation, this is even more true of the “good samaritan” rule, for the latter relies on Indian Towing, which did not even deal with the discretionary exception. But it is actually no more than an extension of the generally accepted precept that a person, even one under no obligation to act, assumes the duty of using reasonable care once he does act. In these cases the United States is treated as a private person would be, a result in accord with the language of the Act. But there is a problem of determining when the undertaking has been assumed and performance begun. Many examples exist, but still lacking are key definitional terms, such as those found in delineating the operational and planning levels. Confronted with any case of first instance, it may be difficult to decide where discretion has been exhausted and duty begun. Thus, the due care test seems little clearer than the first one and possibly even more vague.

A BROAD INTERPRETATION OF “DISCRETION”

It may be that the principles involved in the third method do not constitute a real test, but rather an attitude. Dalehite indicated a very broad interpretation of “discretionary”, and it is not surprising that some courts have found this treatment irresistible. For example, Harris v. United States, the first post-Dalehite discretionary exception case, used a broad application of the term, holding that the decision to use a certain herbicide to destroy willows on government-controlled land was within the exception. Moreover, Harris implies that any decision made in the planning of an activity by the person who originally decided on it will be within the exception, even if the decision concerns only details of execution. This appears to be an extension of Dalehite.
Broad interpretations of discretion were not limited to early cases. In 1961 it was held that the manner and timing of carrying out condemnation were within the exception; two years later a Colorado district court held that "discretionary function" encompassed any participation by the SEC in corporate reorganization procedures. Perhaps the broadest interpretation ever made occurred in a 1963 Nebraska district court opinion holding that the handling of a troublesome national park bear came within the exception.

Generally, in cases involving national defense matters, and decisions on prosecutions of criminals or firing of employees, the courts' holdings have also been based on a rather wide interpretation of discretion. One court ruled that determinations as to the location of cannon-testing ground, the size of the cannon, the amount of explosive, the conditions under which the test should be made, and the location of firing positions, were all considered by groups of specialists exercising their discretion and thus within the exception. Similarly, where a plaintiff charged a railroad attorney with perjury and other crimes and the U.S. attorney decided not to prosecute, the decision was held a nonactionable discretionary one. Another complaint alleged a conspiracy among U.S. agents who had the duty of deciding whether or not employees should be discharged; it was held that the alleged actions would also be within the exception.

These cases clearly raise a number of problems. Certainly, it seems that in many holdings in which discretion was found present, this finding was the result of taking the term to include any exercise of choice, any

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64 Colorado Ins. Group, Inc. v. United States, 216 F. Supp. 787 (D. Colo. 1963). The allegation, however, also came within the libel and slander exception of the Act.
making of decisions, everything but purely mechanical chores, such as
granting a grazing permit,\textsuperscript{168} flooding surrounding land during the
construction of a dam,\textsuperscript{169} or conducting dredging operations.\textsuperscript{170} It may
be questioned, however, whether these are, in \textit{Dalehite}'s language,
"determinations made by executives or administrators in establishing
plans, specifications or schedules of operations" or whether "there is
room for policy judgment."\textsuperscript{171} Often the plans, specifications, and
schedules seem already to have been made, and the policy is merely being
executed. Thus, even \textit{Dalehite} seems somewhat extended in this context.

Use of the broad definition may bring within the exception activities
at the operational level, as well as the performance of tasks the Gov-
ernment has voluntarily and in the exercise of discretion undertaken;
thus, the test results in a stricter interpretation of the Act than under
the two previously discussed methods. This in itself might be justified
as carrying out the Act's literal intent, although it runs counter to con-
geressional and judicial statements in favor of liberal relief. But it pre-

tains an added problem to courts and prospective plaintiffs by failing
to provide a definition of discretion. The other two methods at least
articulate and employ certain distinctions; here we are simply told that
if there is discretion, the exception applies. The opinions give little help,
for they merely assert that discretion is, or is not, present. Where there
is no further explanation, one can only conclude that "discretion" means
\textit{any} exercise of judgment or choice.

\textbf{CONFUSION IN APPLICATION OF THE TESTS}

The cases thus reveal a variety of views as to the correct method for
determining application of the exception. Some courts are content to use
the exception whenever they are able to cite examples of the exercise of
some choice by the allegedly negligent officials. In one case, the decision
not to line the entire length of an irrigation canal was held discretionary
since there was testimony that safety and economic factors had been
weighed before deciding the amount of concrete to be used.\textsuperscript{172} There the

\textsuperscript{169}Cooley v. United States, 172 F. Supp. 385 (D.S.D. 1959). The court held that even if there was
a fifth amendment taking or a trespass, there could be no remedy because of the discretionary
and maintenance of dike involve discretionary functions).
\textsuperscript{172}346 U.S. at 35-36.
\textsuperscript{173}United States v. Ure, 225 F.2d 709 (9th Cir. 1955). "Problems of the nature which confronted
the Reclamation Service in this instance are matters necessarily calling for the exercise of discretion
on the part of the governmental agency in charge." \textit{Id.} at 713.
court was also impressed by the fact that the regional director participated in the allegedly negligent decision.

Where high-level officials have participated in decisions,\(^\text{172}\) some courts may certainly feel free to find "discretion" without further consideration. Theoretically, however, the nature of the function performed, and not the importance of the official involved, should determine the exception’s applicability. Although the amount involved in the case or the possibility of liability in similar or related cases should not enter the picture, it is possible that these considerations have been weighed not only in Dalehite, but also in other cases.\(^\text{174}\) In such cases, courts may exhibit a willingness to apply the exception because of the additional factor that such matters can be more effectively handled by administrative bodies, with the judiciary exercising only limited control.\(^\text{175}\) Similarly, where a governmental agency has gone to considerable effort to decide the best course to take, a court may also be reluctant to "interfere" by determining whether there has been negligence.\(^\text{176}\) This, in turn, raises the issues of whether judicial scrutiny is really interference and whether, even if it is, it may not be justified by the need to do justice to the persons harmed. Arguably, liability in large amounts may impede some governmental operations that are vitally necessary; the courts, however, may be even more influenced by the fact that they lack experience and standards in determining what is a "reasonable and prudent government." Despite the admonitions of the Act itself, and of Indian Towing and Rayonier, that the Government is to be liable as a private person would be, it is difficult to apply the "reasonable man" standard to activities seldom, if ever, performed by individuals.\(^\text{177}\) It may once have been true that governmental activities were at least comparable to those of individuals; today, this is not necessarily the case. Thus, to some extent the governmental-proprietary distinction may survive even though rejected in Indian Towing.\(^\text{178}\)

The opinions in this area contain a number of holdings and dicta that

\(^\text{172}\) Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957) (cooperation between legislative and executive departments in the conduct of atomic tests), noted in 35 N.D.L. Rev. 168 (1959).

\(^\text{174}\) E.g., United States v. Morrell, 331 F.2d 498 (10th Cir. 1964), cert. denied, 379 U.S. 879 (1964). The court spoke in terms of "subject[ing] the Government to inconsistent recurring liabilities," if it made a certain decision. Id. at 502.

\(^\text{176}\) Id.; accord, Lawrence v. United States, 381 F.2d 989 (9th Cir. 1967); cf. Powell v. United States, 233 F.2d 851 (10th Cir. 1956).

\(^\text{177}\) E.g., Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965) (exhaustive search for site on which to deposit spoil considered a vital time factor).


\(^\text{179}\) See text accompanying note 101 supra.
must be considered highly questionable. For example, one case\(^1\) denied recovery for property allegedly stolen by migratory workers while in a reception camp, stating that even the details of transportation, housing, and processing of the workers involved discretion and therefore were within the exception. Another, more recent, case held discretion to extend even to the orders of a military installation’s commanding officer regarding construction of dwelling units.\(^2\) That case extended the exception’s coverage to matters whose performance is required, and to routine matters, totally bereft of discretion or policy factors. In *Morton v. United States*\(^3\) the exception was applied to alleged actions that, it would seem, no government employee is given discretion to perform. There a prisoner alleged that he was transferred from jail to a medical center, held there as a mental defective, deprived of food, medical services, and access to the mails, and subjected to physical and mental cruelty. The court held that the complaint simply charged improper exercise of discretionary functions.\(^4\) These cases are all quite questionable; yet, the varying standards that the Supreme Court has applied, the differing ways of applying each one, and the lack of precise definitions make confusion almost unavoidable.

One more point of uncertainty should be noted: Is the exception jurisdictional or merely a defense for the Government? This long-debated question received an answer from the Supreme Court in *United States v. Muniz*,\(^5\) where the Court stated that the discretionary function exception could be a governmental defense. A good discussion of this question appears in *Stewart v. United States*.\(^6\) After a summary judgment for the United States was reversed by the court of appeals,\(^7\) the Government, in its brief on petition for certiorari, raised the issue of the exception for the first time. Certiorari was denied, but the United States attempted to raise the issue again in the district court. That court rejected the defense, considering it to have been presented too late and

\(^{199}\) Goodwill Indus. v. United States, 218 F.2d 270 (5th Cir. 1954).

\(^{200}\) Builders Corp. of America v. United States, 320 F.2d 425, 428 (9th Cir. 1963), cert. denied, 376 U.S. 906 (1964).


\(^{203}\) 374 U.S. 150 (1963), noted in 63 COLUM. L. REV. 144 (1963).

\(^{204}\) 199 F.2d 517 (7th Cir. 1952).

\(^{205}\) Stewart v. United States, 186 F.2d 627 (7th Cir.), cert. denied, 341 U.S. 940 (1951).
also waived. The appellate court, in affirming, noted that the exception does not raise "jurisdictional" questions in the true sense of that term. As a court cannot give judgment to a plaintiff if the exception applies, so will it not, for the most part, decide for the plaintiff upon a finding that contributory negligence exists. The question may thus be considered a threshold or preliminary one. A decision adverse to the plaintiff will end the case; it is not, however, a jurisdictional question which the plaintiff must avoid in order to obtain a hearing. Noting that the exception has sometimes been called jurisdictional by the courts, the Stewart court stated that such courts had not normally found themselves without power to act when the exception applied. Indeed, they had usually rendered judgment for the Government.8

Holdings on this issue are rare, but language in a few cases does support the conclusion that the exception is a defense of the Government rather than being jurisdictional.87 In any case, this jurisdictional problem will almost never affect the outcome. What will make a crucial difference is the test used to determine what is a discretionary function, and the confusion as to this has caused conflicting and sometimes questionable court decisions. For this reason one commentator was compelled to suggest: "Perhaps the most intelligible suggestions on this problem have come from legal writers."88

SUGGESTIONS OF WRITERS

PROPOSED RULES OF APPLICATION

There has been no great dissatisfaction with the Federal Tort Claims Act as a whole; moreover, Congress has shown little disposition to amend the discretionary function exception. Nonetheless, that provision remains troublesome and subject to widely varying interpretations. Thus, a number of writers, unhappy over judicial application to date but recognizing that satisfactory amendment might be difficult to achieve, have suggested how the exception might be better interpreted. These tests, however, often lack the simplicity of those courts have already

8This is in effect what the lower court held in Dalehite. In re Texas City Disaster Litigation, 197 F.2d 771, 778 (5th Cir. 1952), aff'd, 346 U.S. 15 (1953).
8Comment, Federal Tort Claims Act, supra note 83, at 72.
employed. One example is the suggested “governmental discretion” interpretation:

The proof required of the Government to establish the defense should be that the acts and omissions of which the plaintiff complains were specifically directed, or risks knowingly, deliberately, or necessarily encountered, by one authorized to do so, for the advancement of a governmental objective and pursuant to discretionary authority given him by the Constitution, a statute, or regulation—that is, authority to make a decision that the act, omission, or risk involved was one which it was necessary or desirable to perform or encounter in order to achieve the objectives or purposes for which he was given authority. So long as the act or omission is one which a Government employee was authorized to direct, and did direct, it is within the exception . . . .

In addition to its complexity, this test presents the problem, conceded by its author, of imposing a large burden of proof on the Government. Its acceptance could possibly lead to application of the exception wherever any governmental employee, however lowly, exercised some discretion, however slight. The governmental-objective requirement could be subject to differing constructions, even reviving the governmental-proprietary distinction with all its difficulties. Although this test might not improve the situation greatly, it does focus attention on the basic need behind the exception: to keep vital government operations from being obstructed and to prevent the judiciary from having to make decisions in the political arena.

It has been suggested also that since the exception was placed in the Act partly because of a desire to give the executive and legislative branches freedom to act, in accordance with the theory of separation of powers, the exception should be applied if, and only if, the alleged negligence involves a function that had to be performed in the particular manner in which it was performed in order to carry out a general policy or program. This may be considered a variation on the operational-planning distinction. Presumably the decisions on what programs to pursue and how they must be conducted will be made at the planning level. One problem with this test might be that the exception would apply to determinations believed necessary to the general plan made by low-level officials in executing the general program, determinations

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190 Id. at 226.
191 Indeed, Peck recognizes that his suggestion does not present a panacea, but implies that when the present legislation has been made clear, it would be desirable to have additional laws to distribute the burdens and costs of government. Id. at 241-42.
192 These fundamental considerations should not be obscured by undue concern over the defining of statutory language. See id. at 209.
which might well be considered outside the exception if the operational-
planning or "good samaritan" test were used. The proposed test al-

lows the Government complete immunity as to its basic policies, not
only as to their initial determination but to all acts essential to
achieve

ment. Thus, a compromise is reached on the problem posed by
Dalehite; immunity is not limited to the decision to undertake a course
of action, and the Government is not burdened with liability when it
merely takes the steps necessary to implement an immune decision. But

whether does immunity cover all actions purely on the ground that they
bear some relation to a policy. Unfortunately, the determination of
what is essential to carrying out a policy, as opposed to what is a choice
among alternative means of proceeding, is seldom easy and may pre-

sent a court with questions of how social goals may be realistically
sought. Within constitutional limits, it is for the executive and legisla-
tive branches, not the judicial, to determine which, if any, alternatives
are available. Further, this test, while protecting all government poli-
cies, ignores the statutory language by granting immunity to an official
who merely carries out policy decisions made at a higher level while
imposing liability on the official who chooses a line of action, i.e., exer-
cises some discretion. It is also true that if an action is truly essential
and must be performed in only one manner, performance in that man-
ner undoubtedly would be found reasonable under the circumstances,
one of those circumstances being the need to achieve the policy objec-
tives.

Also suggested was the theory that the exception be applied when-
ever the alleged injury may be considered to have been "contemplated
by congress as a possible consequence of its legislation and implicitly
authorized." The exception, under this view, would not apply merely
because Congress vested an official with some discretion, but rather
because it granted power to cause the particular injury. Of course,
anything necessary to carry out a general plan would no doubt be
considered "contemplated by Congress;" hence, this test is similar to
the last one. The emphasis on congressional intent might add problems
since such intent is difficult to determine. Furthermore, it could always
be argued that Congress did not foresee or authorize any given injury.
It does seem that where Congress did contemplate, and thus impliedly
authorized, an injury, the discretion involved in passing the legislation
should bring that injury within the exception. Thus, the test might well


194 It would not seem that this test would carry the exception farther than Dalehite does.
195 39 CORN. L.Q. 134, 137 (1953). In the same respect, this could likewise apply to the executive
as a consequence of its program.
be used in instances where such congressional foresight is clearly shown. It is at least arguable, however, that lack of congressional contemplation should not automatically remove the exception as a barrier to recovery. Legislation might vest officials with general powers to carry out a program which might in turn require them to exercise discretion in dealing with initially unforeseen problems. Congress might have realized, of course, that some such problems would occur and that the officers would have to solve them, but it probably did not foresee the specific difficulty. To attempt to restrict the exception to those problems actually contemplated would be to disregard the processes of legislative drafting.

One of the most cited articles on the subject has proposed that discretion be limited to the main decision and not extended to incidental details. This, as has been noted, merely rephrases the question and leaves unresolved the problem of drawing a line between a primary decision acted on by others and the mere execution of another's decision. It is, again, the operational-planning distinction stated in even more vague a manner, supplying no definition of "details." The article, however, does attempt a definition of discretionary: "functions . . . carried on for the public interest, or where the discretion is more or less expressly given by a regulation or order, or when the function is part of the duties of a high governmental official." This is a valid, though not all-inclusive, summary of what many cases have held to come within the term. Unfortunately, it does not give any guide to what should be, or what was intended to be, covered. The author goes on to state that the exception should be interpreted to embrace only governmental functions or those in the public interest—a test largely rejected in Indian Towing. Further, the meaning of "public interest" is left unclear; presumably all government acts are intended to benefit the public in some way. Nor is it definitely desirable that an official, merely because of his high position, should be within the cloak of immunity when performing routine, though obligatory, tasks. Thus, this definition has a number of ambiguous terms. The basic distinction between the initiation of a program and the carrying out of details may, however, despite its vagueness, supply an additional guidepost in this confused region.

Commentators have emphasized certain key points. The courts

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198Comment, Torts, supra note 196, at 96.
199See 38 Minn. L. Rev. 175, 177 (1954).
should look to the nature of an act to determine if it is discretionary, not merely the status of the actor, for even high officials should not come within the exception when doing routine chores. The exception definitely covers judicial or quasi-judicial decisions, such as those in which courts and regulatory agencies must weigh facts and settle disputes, since immunity in this area is long-established and little-questioned, and discretion is clearly essential. Beyond this, several writers have contended, the courts should proceed cautiously so as not to interfere with the legislative and executive departments' efficiency. Little else, to judge from the writings, can be said with certainty.

An oft-recognized difficulty in interpretation lies in the inconsistency of the terms "discretionary" and "duty." One way of getting around the problem is, we have seen, to say that discretion lies in choosing a course of action, after which there is an absolute duty to carry out the action carefully. It has been noted unfavorably that this interpretation treats separately the function and the breach of duty; perhaps this criticism shows a failure to recognize, as the courts often do, two distinct duties: choosing the course of action and performing it without negligence. Admittedly, such reasoning is difficult since it fails to indicate the point at which discretion ends and performance starts. The indicated dichotomy between choice and performance may often be nonexistent since the two are interrelated in most situations. Choices of new or additional courses of action, and modifications of the original choice, may occur throughout performance, thus presenting further difficulty in classification.

Dissatisfaction over the need to apply "discretionary" is indicated by the pre-Indian Towing, but post-Dalehite, suggestion that the governmental-proprietary distinction be read into the Act. Considering the problem of finding the fine line between these categories, however, one would think this a difficult way of achieving greater governmental liability than Dalehite allowed. The reaction to Dalehite included a number of suggestions for a more liberal reading of the Act.

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202E.g., Note, Discretionary Function Exception, supra note 197, at 498. This note lists various factors the courts have used in deciding whether to apply the exception. Id. at 491-97.


204Id. at 308. It is also suggested that while cases are usually decided on some factor other than discretion, most cases allowing recovery do involve an absolute duty imposed by statute, regulation, or common law. Id. at 309.

205Note, Discretionary Function Clause, supra note 46, at 724.

206Id. at 730.
Most involved looking at the amount of leeway given officials by the statute that created the agency concerned, or following the reasoning of Indian Towing. It has also been suggested that the court’s initial determination should be whether or not it is “capable of judging the utility and reasonableness of the Government’s conduct.” The difficulty here lies in judging the reasonableness of governmental conduct because of the lack of a basis of comparison; the federal government is a unique organization, participating in unusual tasks. Courts may vary greatly in having confidence in their ability to judge governmental conduct, thus creating little in the way of uniform standards. Basically, this test returns to the presumption against interference with the legislative and executive branches. If this is its main purpose, why not use the planning-operational test developed by the courts themselves? This would allow judicial scrutiny of the performance of details, even where decisions are made, but prevent scrutiny of the formulation of broad policies which are beyond the court’s competence to weigh.

The various suggestions have considerable merit, and some illustrate more clarity than those adopted by the courts. Most writers, however, have found themselves forced to use such words as “direction,” “planning,” and “details,” which are as difficult to define as is “discretion.” In any case, the courts have largely ignored these suggestions, simply choosing a line of precedents to apply. One result has been that some commentators have turned with more hope to Congress, suggesting that the exception be modified or abolished in order to improve the confused situation.

**SUGGESTED MODIFICATIONS OF THE ACT**

“The increasing use of the exception as a defense should serve as an adequate admonition that resolution of the growing complexities would now be the proper subject of legislative reform.” This suggestion, made in 1951, is typical of those which writers have been making since difficulties concerning the discretionary function exception first became apparent. It suggests reform, but does not say what type of reform. It

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201 E.g., 8 Rutgers L. Rev. 412 (1954).
202 See, e.g., 3 Buffal L. Rev. 163, 165 (1953) (pre-Indian Towing suggestion that the due care rule be used); 25 Fordham L. Rev. 167, 170 (1956).
204 Id. at 345.
had become clear even at that early date that the exception offered only a vague guide to what should be excluded from the Act's coverage. In looking at the nature of a function, the court could consider only its overall character or it could focus on particular, minute aspects.\(^\text{212}\) Thus, the great need was for a definition of "discretionary function," and some writers feared that the courts were proving incapable of supplying it.\(^\text{213}\) The suggestions of the commentators on how the exception may be interpreted might serve as possible guidelines for amending the statute. Except for these ideas, however, writers themselves have not supplied definitions, but rather have called for "additional legislation" to lend the Act "more certainty and predictability."\(^\text{214}\)

Several writers have made a concrete proposal for amendment—abolish the exception. Contending that the exception has extended beyond reasonable bounds in certain cases, one observer proposed that the following factors be considered in determining whether to hold the Government liable: (1) "massive and widespread claims" from a single act might imperil the Government financially; (2) the United States should be liable for conduct similar to that making a private person liable; and (3) the Government should normally be held responsible for negligent invasions of tangible interests.\(^\text{215}\) Where personal immunity is granted public officials, two additional factors are to be considered: (1) people would hesitate to accept government jobs out of fear of liability for their every mistake; and (2) officials would be deterred from, or intimidated into, certain activity by fear of suit. But, as that observer has discerned, these factors are not present to the same degree when liability of the Government is being considered; moreover, the purposes of immunity which do remain would not seem to justify the existence of the exception,\(^\text{216}\) especially since the cases have not satisfactorily

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\(^{212}\)Id. at 795-96. The courts, it is suggested, in applying the exception as it stands now, might well look to the degree of responsibility given the allegedly negligent official in performing the task concerned. If he were entrusted with only ministerial work, the Act could be assumed to give his activity only limited protection; at the top of the government hierarchy, protection might be almost absolute. "However, only if this inquiry looked to the function in its relationship to the whole, not controlled by titles and labels, would this approach be of value in clarification." Id. at 796. Certainly, there is no reason, or language in the Act, requiring that a very high official be considered within the exception for his every task. The amount of choice an official is given in a particular area may be helpful information in discretionary function cases, but the basic question remains the type and amount of discretion actually used in making the allegedly negligent decision.

\(^{213}\)1 J. AIR L. & Con., 269, 274 (1965); Comment, Federal Tort Claims Act, supra note 83, at 71.

\(^{214}\)E.g., 6 ARIZ. L. REV. 165, 169-70 (1964).

\(^{215}\)Note, Discretionary Function Exception, supra note 44, at 128-29.

\(^{216}\)Id. at 125-26.
explained its purpose or their reasons for applying it. The courts would then apply normal common-law rules of liability to the Government except where a claim would interfere with government activity. This, of course, gives little attention to the view that as to political matters, policy decisions, and perhaps some other areas, the judiciary should not sit in judgment on the legislative and executive branches of the Government. But it may be contended that here again the courts could, through exercising restraint, prevent an undesirable situation from developing without the exception. Since the exercise of discretion by private industry is fully reviewable and the Government is increasingly involved in comparable business undertakings, the Government should arguably be liable for nonpolitical decisions concerning such activities. Repeal of the exception might prevent immunity from being imposed in those nonpolitical areas and, at the same time, leave the courts free to deny liability where necessary to ensure independent political action. It cannot be said that courts are unable, or should be unwilling, to review any governmental function that involves some exercise of choice or discretion; thus, the exception, because of the implications of the term “discretionary,” goes too far. At least, so runs this argument.

It is undoubtedly true that the use of the word “discretionary” presents problems and furnishes a good argument for those who would like to see the exception repealed. 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. A precise definition of the term so as to encompass only the power of judgment is extremely difficult. Thus, good arguments have been proffered that the confusing exception should simply be abolished, leaving to the courts the task of carving out the areas in which governmental immunity should remain. After all, if the exception is no help to the courts in this task, and only produces immunity where there seems no sound reason for it, we would be better off without the troublesome phrase. Other countries have

21 See id. at 126-30. “It would seem that the whole exception might well be removed without jeopardizing government efficiency and economy . . .” Id. at 130.
25 Id. at 172.

certainly survived without such a discretionary rule in their statutes.222

THE NEED FOR A "DISCRETIONARY" AREA OF SOVEREIGN IMMUNITY

IS IT NECESSARY?

Three predominant reasons may be advanced for the continuance of discretionary immunity. First, such immunity promotes the separation of powers which is one of our constitutional keystones. Lawsuits due to the alleged mistakes of administrators or legislators not only lead to the harassment of these officials but also result in much of their time being spent in court explaining their official actions. Necessarily, they will then start acting with an eye to possible courtroom questioning, resulting in the loss of much of their independence, regardless of the fact that they cannot be held personally liable. Such officials should be subject to the test of the ballot box, but should not have their every action weighed by the courts' reasonable man test.223 The formulation of a policy to guide the nation in its international, defense, and major domestic concerns requires a trial and error process. Occasional unsatisfactory choices will inevitably be made, and some of these a court might find unreasonable, i.e., negligent. The maximum freedom to plan, experiment, and negotiate is needed, however, for the Government to effectively operate. It may be inaccurate to call lawsuits against the Government "judicial interference," but possible liability does tend to reduce the freedom and independence of government agencies, and concomitantly reduces their efficiency. The possibility of suit for every move creates an atmosphere of fear and pressure in which certain government employees must each day make many decisions affecting countless persons.224 The fear, it is true, may be different from, and of a lesser degree than, that arising from possible personal liability; but the waste of time and effort in preparing for and participating in courtroom battles will be as great as the fear of

222See Jacoby, Federal Tort Claims Act and French Law of Governmental Immunity: A Comparative Study, 7 Vand. L. Rev. 246, 258-59 (1954). French and German law are shown to have no such exception; in France at least, there is clearly liability for abuse of power even if it is discretionary. Dalehite noted that the explicit exception is "unique in Anglo-American jurisprudence." 346 U.S. at 32 n.27.


losing one's job. Agencies, executives, and legislators under our system should answer, directly or indirectly, to the electorate, not to the courts.

The second reason advanced is closely akin to the first. In areas of policymaking, courts are not organized to investigate and weigh all the factors which enter into the decisions of the other branches. They are poorly equipped to "second-guess" the wisdom of executive or legislative conduct.\textsuperscript{222} The normal rules of liability cannot be applied easily to the unusual and gigantic tasks that few but the Government perform—tasks such as waging wars and building flood control projects. Liability normally rests on fault, and courts cannot satisfactorily judge whether a political or policymaking blunder has been made, and whether it resulted from unreasonable conduct under the circumstances.\textsuperscript{226} Thus, it becomes nearly impossible to determine negligence; often, if any judgment can ever be soundly made, it is only by hindsight, and then only after the various factors known to the government officers are available and are accorded their proper weight. The judiciary is designed for deciding individual cases, laying down general rules, and necessarily considering social and economic factors to some extent. It cannot launch full-scale investigations or studies and cannot set rules except when a controversy presents the occasion.

Arguably, both these grounds could be considered by courts even if there were no discretionary function exception. The result might be that courts would refrain from subjecting the Government to liability for policy decisions, which need to be made fearlessly and independently, and the wisdom of which courts cannot well judge. But this is only a possibility; courts, left without any statutory provision, could hardly be expected to reach greater uniformity or accuracy in choosing methods to achieve these purposes than they have with an explicit statutory provision. Courts and public alike should be reminded that here, at the discretionary level, the line is drawn on what matters may be judicially determined, if such a line can be firmly drawn. Recognizing this, a court would be less likely to attempt to "second-guess" what it is not qualified or intended to judge; largely removed would be the fear that a court would impose liability for political blunders.

The third suggested purpose of the exception is the prevention of "enormous and unpredictable liability which could result from judicial re-examination of major executive and legislative decisions."\textsuperscript{227} There is obviously a strong public interest in keeping the Government solvent so

\textsuperscript{222}WASH. L. REV. 340, 344 (1966).
\textsuperscript{226}James, supra note 218, at 190.
\textsuperscript{227}Comment, \textit{California Tort Claims Act}, supra note 223, at 471.
that it may continue to defend and improve our society. The Government each day makes decisions that conceivably could cause huge losses to millions of people. The possibility of so great a burden will be removed if major decisions requiring much discretion remain cloaked with immunity. Of course, the exception is not literally aimed at preventing such liability; but it can, and inevitably will, serve that purpose as well as the former two. In interpreting the vague phrase “discretionary function,” the judiciary has shown a willingness to protect the Government from liability that could hamper vital operations; even without an interpretation actually directed to such a goal, however, the necessary immunity normally will result if the aforementioned two purposes are observed. If a mistake in routine operations results in great liability, the exception clearly should not be applied.

The government’s liability would then be the same as that of the private individual—it may be great in that rare instance where a simple act causes tremendous harm. The proximate cause principle will protect the Government, as it does the private person, from having to answer for consequences far removed from its activities. Again, the purpose might be achieved without the exception if the courts refrained from finding liability for major policy decisions, whether on the ground of avoiding crippling liability, a public policy argument some courts may be reluctant to employ, or on the basis of the separation of powers doctrine. The exception, however, supplies a statutory basis on which the courts may operate in achieving these three desirable and necessary purposes. Thus, even if not absolutely essential, the exception at least gives potential recognition to principles extremely helpful to effective government action and brings about needed results where they might otherwise not occur.

These three reasons show the need for a discretionary area of immunity, but the exception has sometimes been extended beyond the achievement of these purposes. Whether this can be justified depends upon whether a solution to the problem of defining the limits of discretionary immunity can be found.

WHAT SHOULD BE THE EXCEPTION’S SCOPE?

Clearly, a literal interpretation of discretionary function, one that would cover all exercises of judgment and conscious decisions, must be avoided if the Act is to achieve its basis purpose—allowing recovery for those injuries negligently caused in the performance of government
programs. Otherwise, liability would exist only for inadvertence.\(^2\) One possible way to limit the exception's scope and yet achieve its purpose is to ask in each case whether tort liability would considerably hinder the government's operation.\(^2\) The problem would be, however, that the Government could very often be expected to show some degree of interference; further, no aid would result from the courts' being forced to distinguish a great from a small hindrance. This test also ignores one purpose of the exception—to keep the courts out of the political or policymaking arena—and leaves to them the question of whether governmental objectives can be achieved despite the threat of liability. Such a decision requires considerable investigation into policy aims and the ways in which they can be achieved. Though possible liability might not prevent the government's success in developing a program, the court still might be ill-equipped to judge the program's wisdom.

Under almost any test, it must be recognized that potential liability begins after decisions have been made and the process of implementation is underway.\(^2\) The courts, under such circumstances, will not be judging policy, but rather will be dealing with negligent conduct, as they have long been trained to do. Concomitantly, the huge liability that could arise from the initiation of large-scale projects will be avoided.\(^2\) Besides considering the basic purpose of the Act, however, it is important to remember that the Government, even without the exception, is afforded the same protections from liability that the law gives any individual defendant—no liability without negligence and no actionable negligence without proximate cause. Therefore, further limitations on the Act's coverage have to be based on the notion that certain practical factors prevent the Government from having to compensate for all the losses it directly and negligently causes.\(^2\) The three purposes of the exception rest upon such factors. On the other hand, there is no need to apply the

\(^{2\text{a}}\)Note, Discretionary Function Exception, supra note 197, at 490; see Matthews, supra note 14, at 34.


\(^{2\text{c}}\)Cf. 22 Geo. Wash. L. Rev. 496, 499 (1954).

\(^{3\text{a}}\)Arguably, prevention of huge government liability is not a proper task for the courts any more than deciding whether or not liability would impede government operations. 35 Neb. L. Rev. 509, 514-15 (1956). Under the Act, as at common law, it is insufficient to show unreasonable conduct without showing it proximately caused harm. See Swanner v. United States, 275 F. Supp. 1007 (M.D. Ala. 1967).

Such a statement as that there is “absolute liability at the operational stage” cannot be technically correct. 2 Wayne L. Rev. 119, 129-30 (1956). The most that the cases hold is that the discretionary exception does not apply at the operational level. Whether there may be strict liability under the Act is a moot point. See note 71 supra.

\(^{3\text{b}}\)42 Iowa L. Rev. 130, 134 (1956).
exception in all situations in which there would be personal immunity; factors such as the need to encourage persons to accept government employment are here irrelevant.\(^2\)

While it is possible to argue that the Government should be as legally responsible as a private person,\(^2\) the Act clearly did not contemplate such liability. Three grounds for immunity, each having at least some validity, have been delineated. There would appear to be no reason to go beyond these and apply justifications for immunity carried over from other areas. Thus, the scope of the exception should be limited to the achievement of the three needs. The problem evolves in attempting to do this by making the most effective use of the Act’s language.

**Making the Act Serve the Need**

As one commentator noted: “It is the ‘discretionary’ acts which have caused the trouble in the interpretation of the Act.”\(^3\) In order to carry out the Act’s primary purpose, the exception must be construed to cover only what is clearly within its wording.\(^4\) That, however, only adds to the problem presented by the term “discretionary.” The dictionary defines the word as: “Power of free decision; individual judgment; undirected choice; as, subject to the President’s discretion.”\(^5\) But the many factors that may influence a government employee in choosing a course of action make it hard to say whether a decision was “free.” Since freedom is relative, a line must still be drawn somewhere between the extremes of unquestioning obedience and complete freedom. Neither extreme is actually presented in our system. There is no slavery and hence no absolute duty to obey, though the duty to obey the law may be considered nearly absolute. Complete freedom does not exist; there is always the requirement of having to answer, at least indirectly, to the electorate.

Just as new problems of interpretation would arise under any of the suggested tests of the writers,\(^6\) so additional troubles might occur if a statutory definition of “discretion” were attempted. New words, such as “free,” would merely be substituted for former sources of difficulty. A workable statement of the exception’s purposes, or a definition of

\(^{22}\)See text accompanying note 216 supra.


\(^{25}\)This theory is well expressed by the statement: “In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception.” 35 N.D.L. REV. 168, 169 (1959).


\(^{27}\)See text accompanying notes 189-210 supra.
“discretion” that would help produce the desired results, might, if attainable, make worthwhile an attempt at statutory amendment. It would probably not, however, eliminate all the difficulties. The problem is not merely one of a poor legislative vocabulary but rather one of articulating and applying a rule that achieves a hard-to-reach result—allowing the Government immunity in those cases where it continues to feel the need. “Discretionary” is not the perfect word; but no word would be, and the important question remains whether the language chosen can be used to achieve the desired results. If a satisfactory change is derived, it might then be added to the statute.

Congress has shown an awareness that not every injury caused by government negligence should be redressed, for constant adjustments between the United States and individual citizens would be impractical. The exception supplies a way of avoiding this. It is perhaps impossible to establish a precise rule of application; and it is probably inevitable that the courts in each case will weigh competing interests, considering matters such as the foreseeability of damage, the amount of money involved, and the administrative difficulties that liability might present. This does not mean that it is impossible to establish guidelines for the courts’ use.

“Discretion” alone could be used as the test if it were defined in advance. This requires only a definition, without judicial embroidery. The word alone, however, would not be the problem; it would be its past usage in related but different contexts that would make confusion almost unavoidable. The term itself contains no guides regarding the proper place to draw the line, and the cases that have used the term have been notably lacking in explanations of their conclusions. They have said simply: Discretion exists; thus, the exception applies, or vice versa. Rationality and certainty are both substantially impaired by the use of such a “test.” The only Supreme Court authority is the broad use of the exception in Dalehite, now of questionable authority. Further, the use of the “discretion” test alone tends, as evidenced by

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218Vaughan, The “Discretionary Function” Exception of the Federal Tort Claims Act: Some Reflections on Sovereign Immunity, 1 WM. & MARY L. REV. 5 (1957). “It is submitted that changing the wording of § 2680(a) and arriving at some sort of a definition of the ‘discretionary function’ is not going to solve the problem. What is needed is a thorough-going re-examination of the doctrine that ‘the King can do no wrong.’” Id. at 14-15.

219Note, Discretionary Function Exception, supra note 44, at 128.

220See Street, Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act, 47 MICH. L. REV. 341, 366-67 (1949). The author concludes that the cases must be handled empirically and that patience is necessary since a firm body of rules cannot be quickly developed. Id. at 368.

221See text accompanying notes 160-171 supra.
Dalehite, to cause the near destruction of the entire Act. Unless the term is somehow limited, the exception could be applied to every situation involving any choice or judgment.

On the other hand, the “due care” rule does contain a standard—the vague one of distinguishing between a decision to act and performance—and has the advantage of prior development in the nongovernmental areas of tort law. One difficulty is that governmental action is a continuous chain of decision-making; the question always remains: At what decision should the line be drawn and the determination made that performance has begun? The answer could be reached by merely considering the exception’s purposes, as “discretionary” could likewise be defined to cover them. But if that be the case, we need only apply the purposes; the test itself becomes superfluous. Yet, if we do not so define the “due care” rule, we have little assurance of limiting liability to situations where governmental independence is not vital, where the courts are qualified to weigh the matter, and where huge, unpredictable liability is unlikely to occur. Without such an assurance, undesirable results could occur after an initially nonobligatory undertaking has been assumed. Furthermore, possible Supreme Court authority for this rule is weak. The Indian Towing dictum may, however, be strengthened by the citation of that case in Eastern Air Lines, which may be taken as indicating that the due care rule is applicable whether the exception is argued or not.\(^{24}\)

The difficulty under this test of drawing the line between undertaking and performance may be minimized by adopting the rule that the exception does not apply once the Government has decided to carry out a nonobligatory task, or once there is reasonable reliance on their stated intention to do so. That the Government begins work on a task need not mean it must continue and complete that task; it may often be allowed to withdraw, and the decision to continue or withdraw will often involve discretion, indicating that the area of discretion does not necessarily end once the initial decision is made. This test would take discretion to mean “the primary decision to assume an obligation,” and nothing more. After this decision, there would be a requirement of “due care under the circumstances,” presumably even in withdrawing from the activity. Unless it is assumed in advance that the “due care” standard limits the Government after its initial decision, however, it cannot be said that the Government lacks the power of free decision after that point. Thus, this rule does violence to the dictionary meaning of “discretion.” Further, the

\(^{24}\)Note, however, that Indian Towing also referred in its dictum to the operational-level distinction, and thus Eastern Air Lines could be citing it for that reason.
three purposes of the exception would by no means be served if the exception is limited to initial decisions to perform nonobligatory tasks.

The test may well be used in cases, such as *Indian Towing*, where there was not only a primary decision but also a course of performance engendering reliance; there a strong case could be made that the government's conduct had limited its discretion to withdraw. Even in such a situation, discontinuance could be justified by policy matters, as to which the Government would have freedom of choice. A more basic difficulty with this test extends to all cases: A plaintiff will always win if he can frame the situation so that the court views it as involving a task that has previously been undertaken and negligently performed. A defendant can allege, however, that the performance nonetheless involved discretion; if the court is willing to give that term a broad meaning, *i.e.*, use the first test rather than "due care," the defendant will succeed. These two "tests" are in essence opposite sides of the same coin and seem to be more rationalizations of a broad or narrow definition of discretion than they are legal principles. Better than using either one would be the mere asking of the three questions framed by the three purposes.

The operational-planning level distinction also rests on Supreme Court dictum, though it is buttressed by a strong foundation of federal appellate level decisions. It seems the best method for achieving the exception's necessary aims. As to policy matters, it would allow the Government to act independently and without constant fear of litigation. As to overall planning, not performance of details, it would exclude from judicial surveillance political factors which are beyond the usual judicial competence. Furthermore, it is the framing of long-range policies that raises the possibility of widespread liability much different in nature and degree from private situations of greater harm than that which might have been expected. Use of this test does present several difficulties. In the first place, it will not definitely lead to achievement of the aims, unless they are defined in advance. Hence, it could be abolished and the three questions again substituted. But this test has the practical advantage of being already in use and provides a method by which the three factors, in the varying degrees presented by different cases, may all be weighed. Certainty will never be achieved; a partially empirical

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24 If the Government wanted to insulate itself of immunity from widespread liability, it would have to insert a clearer limitation in the Act. Operational acts will usually have limited effect. The first two purposes of the exception are directly and nearly always achieved by use of this test; the third is normally a side effect, but not necessarily. See generally A. Rosenthal, H. Korn & S. Lubman, *Catastrophic Accidents in Government Programs* (1963).
method is necessary. Because of its use in numerous cases, the operational-planning test is a more definite criterion than any that could be formulated in light of the purposes. The determination of what are "political questions" or "huge liabilities" is, after all, a difficult matter itself, involving vague terms. But the purposes should be kept in mind when courts apply the operational test, and these aims can be attained through its use.

Secondly, the terms "planning" and "operational" are indefinite; the problem of drawing a line remains. But all interpretations involve drawing distinctions. The present situation is aided by terms which have a considerable history of application. They have been used, with varying degrees of consciousness, by the courts to achieve the three desired purposes. "Planning" has come to mean the formulation of basic policies and the designation of long-range goals that are considered politically desirable. "Operational" encompasses routine activity and implementation, such as choosing a particular building material. It is true that formulation is mixed with implementation and application in government workings, but separation and classification are not impossible. Eventually, a plaintiff must allege negligence not just in general terms but as to some particular acts, failures, or occurrences. The questions then to be asked are: (1) What is the crux of the complaint; and (2) is the alleged act or failure essentially a matter of formulation of a scheme or course of action, or is it mainly an implementation, application, or execution thereof? Thus, the operational-planning test causes one to look to the essence of the complaint, and then to the essence of the complained-of act.

One example may better illustrate this concept. In the course of constructing a dam, private land may be flooded and damaged. A landowner, choosing not to claim a taking of his land but instead to assert a tort claim for the damage, may allege that the United States was negligent in attempting to harness the river. Clearly, this negligence is in the formulation of a plan. The owner may also allege negligence in the selection of a site. This is a closer question, but there exists authority which would indicate that the choosing of a construction site is not a mere detail of implementation.\Footnote{Cf. e.g., American Exch. Bank v. United States, 257 F.2d 938 (7th Cir. 1958).} Even without such authority, it would seem logical that this choice is one of the essentials of a plan, not a detail or execution of a course of action. It is an important and basic decision, requiring the weighing of many interests. Perhaps the plaintiff might choose to allege that the dam was not built high enough, or a spillway was made too small. Measurements for the dam may or may not have
been included in the original plan, but this is not a controlling factor. Arguably, this original decision to construct a dam at a certain point is now merely being implemented by necessary decisions on specific measurements. A course of action is not being chosen, but rather only the detailed method of performing it. The plan in its general outline has been formulated; the precise details are now being supplied. There are, of course, some counter-arguments. Deciding on measurements could be called a part of planning or formulation; it does require some exercise of judgment and makes precise the broad plans, becoming a part of the plan itself. A decision on measurements, however, is in essence a decision to achieve the desired, already chosen goal—a dam at a given point for a certain purpose. Finally, the plaintiff may allege that the workmen building the dam did a shoddy job. Here the workmen were only executing a plan already made, and were definitely not being called upon to weigh broader objectives.

Thus, there exist fairly well-defined areas of formulation and application, although some room remains for argument concerning implementation. As the example indicates, the act of giving detail to a basic plan presents the most difficulty; its borders are often unclear. When the Government formulates its plan to control or dam a river, it clearly exercises much discretion and is making a policy decision that it alone is capable of judging. When a workman pours the concrete for the structure, he is carrying out the plan and his care, or lack thereof, can readily be judged by the courts. Before the construction actually occurs, however, the basic plan must be supplied with details.

The line between “formulation” and “implementation” will not always be clear. Decisions essential to the basic plan, such as location, may be considered formulation; those farther removed may be termed “details.” Any valid separation of the two requires that consideration be given to the reasons for continued immunity: Is it an area of basic policy where maximum freedom is necessary? Is the program so broad that vast liability would occur if there were no immunity? Most importantly, does the act require political judgment, or may its reasonableness be readily weighed by the court? Simply because it is made part of a plan does not mean it should be within the ambit of immunity. If the act does not involve a choice of basic direction, the reasons for immunity will probably be absent. Employing these purposes as guidelines in difficult cases, one may classify an act within the realm of formulation or implementation-application. This would provide immunity according to the amount of discretion or policy factors present, and would not base decisions upon the presence of some slight discretion, remote policy, or the temporal position of the action involved. Furthermore, this method
of classification looks to the essence of the act of alleged negligence, not to the status of the actor, and thus is in accord with both the statutory language and Supreme Court interpretations. Merely showing some connection with a plan or policy would be insufficient to justify applying the exception; the issue rather becomes whether the alleged act was performed in devising the basic plan, or only in giving it detail, and the position of the person who made the decision is not controlling. The presence of a decision means little; decisions are necessary for many details, and are not necessarily part of formulating a line of action.

A final problem with the operational-planning test is that, like the "due care" rule, the former was designed to deal with situations that, as the Dalehite Court observed, involved the discretion of an executive, legislator, or administrator, not that of a judge. The discretion of the exception has usually been assumed to be nonjudicial. Suits, however, are occasionally brought against judicial officers. When an appellate judge enunciates an opinion, or a trial judge rules on the admissibility of evidence, is this "planning" or "operational"—is a rule being formulated or applied? Quite possibly, it may involve both formulation and application. Arguments over which element predominates may be endless, and separation impossible. Decisions in an individual case apply rules to that particular situation, but also establish general precedent to govern future cases. Whether the essence of a ruling or opinion is the settling of the immediate controversy or the laying down of a principle for future use is subject to strong philosophical arguments. The general principle may be considered a mere by-product, but its potential importance is great. The various tests were not constructed to be applied here; in fact a court would do better to rely on the obviously great amount of discretion involved and the absence of indications that the Act was meant to destroy so old, little-questioned, and necessary an immunity.

Outside the judicial area, the operational-planning test is much more workable. "Planning" involves formulation of goals and the broad courses of action to be used in pursuing them; "operational" covers implementation of the plans by means of supplying precise details for them to be carried out. Applied in this manner, the test in the great majority of cases achieves the desired purposes. The courts do not interfere with legislative or executive choices of broad plans, second-guess political wisdom, or impose crippling liability, but instead apply the usual standards to program executions.246

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246Courts, and the Supreme Court in particular, do, of course, decide policy ques-
The basic rule of the Act is that governmental liability exists wherever there would be private liability, but the exceptions and legislative history show that this principle is not always followed. The operational-planning test, by giving meaning to "discretionary," will prevent liability for planning activities even though some of these are performed by private persons also.

The exception must be given some meaning; it should not, however, be allowed to swallow the Act. Since the legislative intent is so unclear, other guidelines are essential to prevent the caprice of the judiciary from being substituted for the whim of Congress. Even if the remedy granted by the Act is considered a matter of grace, the Supreme Court, in Indian Towing and Rayonier, has clearly rejected a strict construction that would allow recovery in only a narrow range of cases. Many suggestions are unwieldy, vague, or lacking in authority, or all three. The planning-operational test is relatively simplistic; further, it has considerable support and definitional guides provided by case law. It is a formula already in use that can achieve the purposes for which the exception is needed. It will not turn the "twilight zone" of the Act into bright day, but it will permit the basic purposes of both the Act and the exception to be achieved.

But where the other branches of the federal government have already set policy, the courts do not question, at least in theory, the plan's wisdom, only its constitutionality. Cf. Smith v. United States, 375 F.2d 243 (5th Cir. 1957) (allowing immunity wherever there is some connection with a basic national policy). Although Smith disapproved of the Dalehite decision, its suggested test could produce similar results by providing immunity all the way down the line in carrying out an important policy.

The Supreme Court has always been reluctant to decide political questions, though numerous cases may be cited in which they have arguably done so. See C. Post, THE SUPREME COURT AND POLITICAL QUESTIONS (1936). See also M. RAMASWAMY, THE CREATIVE ROLE OF THE SUPREME COURT OF THE UNITED STATES (1956).