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THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

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I. INTRODUCTION

Since its passage in 1947, one provision of the Federal Tort Claims Act (FTCA), 60 Stat. 812, *codified* at various sections of Title 28, U.S.C., has been a continuing source of difficulty. The FTCA partially waives sovereign immunity in tort suits against the federal government.

The "discretionary function exception" amends the jurisdictional grant in the FTCA, *codified at* 28 U.S.C. §1346(b) (1982), by making the Act's waiver of sovereign immunity inapplicable to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved [was] abused." 28 U.S.C. §2680(a) (1982). Interpretation of this exception to jurisdiction over tort claims against the United States has critical importance for the scope of government exposure to liability and implicates basic questions raised by judicial authority to assess tort damages against the government. . The text of the discretionary function exception does little to clarify the exact scope of the exception: this language manifestly allows various interpretations. At one pole, the language could be read as exempting the government from liability whenever the government actor whose conduct gives rise to the claim has any freedom of choice in his actions. If the existence of *any* discretion suffices to trigger the exception, it very nearly swallows the Act. At the other pole, if the exception covers only claims based on acts as to which the government actor had wholly unconstrained discretion, it virtually becomes a dead letter.

The story of the FTCA in large measure has been the search for tenable interpretations between these extremes. Unfortunately, the search lacks firm support at its inception and, hence, has produced tests that, even for those who applaud their results, remain somewhat problematic. Beyond the textual ambiguity, examination of the legislative history of the FTCA is unavailing for those who seek real guidance on the meaning of the discretionary function exception. The legislative history reveals the origin of the exception in a bill considered in the Seventy-seventh Congress, and it also reveals the importance attached to the exception. Further, the legislative history contains some examples of the activities thought to be within the exception. But most of the discussion of the exception during consideration of the various bills that preceded and matured into the FTCA simply restates the exception in equally unenlightening terms. Although legislative references to this exception,

thus, occasionally prove helpful, in the main the courts and others who must interpret the Act have been left on their own.

During the four-year period from 1953 to 1957, the Supreme Court addressed the discretionary function exception three times. In Dalehite v. United States, 346 U.S. 15 (1953), Indian Towing Co. v. United States, 350 U.S. 61 (1955), and Rayonier v. United States, 352 U.S. 315 (1957), the Court attempted to resolve differences among the circuits of the court of appeals regarding the proper interpretation of the exception. These Supreme Court decisions offer a number of disparate tests for the exception. The suggestion of different tests did little to constrain the lower federal courts to a single interpretation of the exception. Moreover, the tests suggested by the Court were sufficiently vague that even the Court's eventual identification of one as the exclusive test left the application of the exception in particular cases far from certain.

For the next 25 years, the Supreme Court allowed matters to remain pretty much as they were in 1957. A recent decision, however, offers the possibility of clarifying the exception. In 1984, the Court again addressed the discretionary function exception in the *Varig Airlines Case*, United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984). The Court's decision in *Varig*, finding a general legislative intent to except regulatory activities from the FTCA waiver, appeared to many observers to give the government an important tool for resisting claims arising out of the activities for which potential liability was most troublesome.

This report looks at the role of the discretionary function exception, at the judicial treatment of the exception (especially since the *Varig* decision), and at the implications of the exception for government and for persons affected by government. Part II of the report discusses the general considerations that emerge from the legislative history and the theoretical ground suggested by these considerations on which interpretation of the exception should build. Part III relates this framework to the judicial interpretations of the exception. And Part IV explores the effects of the exception.

II. GOVERNMENT LIABILITY: THE THEORETICAL CASE

A. Legislative History

Interpretation of the discretionary function exception, like any other statutory term, should be rooted in the text and history of the statute. Under most circumstances, it would be quite peculiar to begin any interpretive effort with abstract, theoretical considerations. In the case of the discretionary function exception, however, the text and history are so abstruse as to yield only modest direction toward just this sort of consideration.

The key congressional statement on the exception declares:

> This is a highly important exception, intended to preclude any possibility that the [FTCA] might be construed to authorize . . . a claim

> against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The [Act] is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common law torts of employees of regulatory agencies would be included within the scope of the [Act] to the same extent as torts of nonregulatory agencies.

H. Rep. No. 2245, 77th Cong. 2d Sess., at 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess., at 7 (1942); H. Rep. No. 1287, 79th Cong., 1st Sess., at 5-6 (1945). This statement largely rephrases the discretionary function exception without appreciably clarifying it.

The statement does, however, suggest a starting point for analysis of the exception by distinguishing three different categories of administrative activity. First, the legislative statement indicates that some matters may be so fully committed to administrative discretion as to preclude judicial examination of the substance of the administrative decision. Second, the statement suggests that other discretionary administrative decisions may be subject to judicial review for abuse of discretion or for negligence in the execution of the discretionary decision, but that private damage actions are not the proper vehicle for such judicial review. The generality of regulatory actions by regulatory agencies provides the paradigm for this second class. Third, the statement contemplates some administrative activities that are comparable to ordinary acts of employees of ordinary businesses and that, if performed by such employees, would subject their employers to liability for garden-variety common law torts. The legislative reports containing this language specifically identify "an automobile collision caused by the negligence of an employee" of the government as typifying this third class. The discretionary function exception is intended to screen out the first two classes of executive conduct from the statutory waiver of immunity from liability but leave the FTCA as a vehicle for securing damage relief against the third class of government actions.

At first blush, the rationale for the exception can be seen in the division between the first and third categories. The first category describes acts as to which judicial supervision is undesirable; for these acts, the administrative decisionmaker is thought to be better positioned to make the right choices than anyone else, including a judge. The third category describes acts as to which judges have a well worked-out stock of examples by which to separate proper from improper behavior. There is nothing in the selection process or training or working environment for administrators that

makes them likely to be superior decisionmakers with respect to these acts: a trial judge is certainly at least as trustworthy a social decisionmaker regarding the proper allocation of responsibility for an automobile accident as the supervisor of the government employee who was involved in the collision. The discretionary function exception, thus, appears to facilitate allocation of decisional authority to the actors best positioned to make each decision.

But what of the second class of acts? Why are judges trusted to overrule other decisionmakers when issuing injunctive or declaratory relief but not when asked to provide damages? Plainly, something more than decisional competence is implicated in the discretionary function exception. The exception also must be explicable on the basis of the differences between damage suits, or at least damage suits sounding in tort, and other forms of judicial review. Defining the boundaries of the discretionary function exception hence requires not only elaboration of the differences in judicial and administrative competence (a matter taken up *infra*) but also examination of the nature of the tort liability underlying the FTCA.

B. Liability Suits: Compensation and Deterrence Goals

1. Tort Goals: Gateway to an Open System

One avenue to understanding the nature of tort damage suits begins with the goals for such suits. The goals of tort liability are matters of broad consensus: liability serves both to compensate the injured and to influence the behavior of those who can cause injuries. These goals provide the jumping-off point for analysis of tort liability, but identification of the goals of tort liability is the only step in analysis of tort law that is relatively free from controversy.

Controversy over tort liability comes in part because it is not possible to treat tort law as a closed system. The absence of unique goals for tort law adumbrates the problem. Neither the compensation nor the behavioral (deterrence) function is the exclusive preserve of tort law. The compensation function can be performed through insurance (health care insurance, life insurance, disability insurance, and so on) or through programs administered by private enterprises (such as the American Red Cross) or by government (Social Security or Medicare, for instance). Indeed, many of the injuries for which damages are sought in tort litigation also trigger compensation from one or more of these other sources. (Multiple source compensation is allowed by the collateral source rule.) Similarly, a variety of means exists for controlling individual behavior, for bringing it into line with social good (as opposed to purely private good). This is true generally, but it is especially true for the behavior of government officials (a term I will use synonymously with employees). Their behavior is constrained by monitoring from other executive officials, by legislative directives *ex ante* and legislative oversight *ex post*, and by substantive judicial review as well as by government tort liability. More generally, officials' behavior is constrained by personal motivations and beliefs. The existence of alternative mechanisms for securing compensation and for deterring undesirable behavior must be taken into

account in structuring tort law, else tort law will be redundant, irrelevant, or misguided.

2. Compensation

Of the two goals, compensation provides the more manageable starting place. The compensation goal is advanced in tort law not simply by awarding money to anyone who is injured but by placing the burden of compensating for accidental loss on the (causally related) party most able to bear the loss. Thus, a party who can spread losses over a number of individuals or events is a better loss-bearer than a single individual who has no capacity to distribute losses over a class of similarly situated individuals or over a series of similar events. The availability of loss-spreading regimes other than tort litigation (such as insurance against injury) and of loss-spreading regimes that complement tort litigation (liability insurance) makes compensation analysis less straightforward in many cases than it at first appears. The issue becomes less one of finding money to offset the physical, psychic, or financial injury suffered by *this* plaintiff than of ascertaining whether the class represented by plaintiff is better-positioned (or worse) than the class represented by defendant to bear the *risk* of loss in a world where insurance and other mechanisms for spreading that risk are available.

Where the federal government is party to the potential tort suit, however, the compensation argument is simplified considerably. The federal government is a better loss-spreader and risk-bearer than any other party in almost every conceivable circumstance. So far as compensation is concerned, any exception to federal liability for harm causally-related to the government's activities bears a heavy burden of justification. Indeed, so far as compensation is concerned, the causal relation requirement can be dropped. Although the FTCA's legislative history contains a declaration that the Act is to serve broad remedial purposes, the existence of any limitations on the government's liability -- much less an extensive set of exceptions -- suggests the importance of behavioral concerns to definition of the Act's scope.

3. Deterrence

From the standpoint of tort law's behavioral goals, matters are much less clear than where compensation is the goal. The general, deterrence-based explanations for tort law posit some social ideal for behavior. When other incentives induce individual behavior that departs from the ideal, tort law can serve as a corrective. Typical examples concern an activity by one party that harms a second party (or group) that cannot induce ideal behavior without tort law's help. For example, the threat of liability to hapless pedestrians might cause an automobile driver with a taste for high speeds and controlled substances to increase his reliance on taxicabs or to make greater use of the Utah salt flats; or a business that would pollute a stream (as a by-product of the most efficient production process, legal controls over pollution aside) can be constrained by threat of liability to downstream parties to reduce its level of pollution.

Even the simplest cases now are recognized as presenting several difficult issues. The examples above involve what appears to be a harm-causing actor and a powerless victim. Yet, Professor Ronald Coase has demonstrated that both parties play a role in causing or in avoiding the injury. The pedestrian can take precautions against reckless drivers (including, at the extreme, never crossing a street -- a practice some New York denizens find expedient) and the downstream parties can use substitutes for the stream (they can fish in ponds, drink seltzer, and swim in man-made pools) or invest in purifying the stream. In many cases, the least costly means of avoiding injury is for the "victim" rather than the "injuror" to alter his behavior. That is, if the potential injuror and potential victim sat down together to decide how ideally to organize their competing activities (how optimally to reduce the risk of injury), there are occasions when the injuror would be willing to pay the victim (enough for the victim willingly to change his behavior) and not the other way around.

From this observation, Coase elaborates his now well-known argument that where the interested parties costlessly can negotiate and enforce agreements, liability rules may be unnecessary to effect ideal behavior and also will be relatively ineffective at inducing any change in behavior. Coase, *The Problem of Social Cost,* 3 J. L. & Econ. 1 (1960). Of course, tort liability rules seldom deal with situations in which parties can negotiate and enforce agreements costlessly. While this point is made with excessive regularity, Coase's work fruitfully suggests the importance (for assessment of the behavioral effects of tort law) of inquiry into the means by which each party can affect the situation, the values each party places on various outcomes, and the parties' capacities for extra-judicial resolution of conflicts, including conflicts arising out of legal entitlements such as those protected by liability rules. In the usual case, thus, behavioral analysis of tort law confronts the following series of questions: what is the ideal solution to conflicting interests? what can be done to bring about the ideal? what sort of liability (or nonliability) rule will induce each class involved in the conflict to contribute what it should to achieving the ideal solution?

4. Behavioral Goals and Tort Law

An extensive literature explores these questions and suggests answers to them. Many contributions to this literature have come from authors working within the paradigms of law-and-economics. These commentators generally take allocative efficiency as the goal for society. Efficiency can be used in different senses, but usually indicates the least costly means of implementing either (1) the solution to conflicts over the levels and organization of various activities that interested parties unanimously would endorse (Pareto efficiency) or (2) the solution that represents greater total value than any other solution (Bergson-Samuelson efficiency, sometimes referred to as Kaldor-Hicks efficiency). These concepts are not free from argument as norms, nor is their practical import readily assessed in situations where affected parties cannot easily display their preferences for conflict resolution (as they could if negotiating and enforcing an agreement were costless or if well-functioning, competitive markets existed for the goods in dispute). But

the goals endeavor to capture social consensus values, and much of the writing about torts from the perspective of law-and-economics is compatible with virtually any generally accepted set of behavioral goals. For the moment, discussion will elide the difficult issue of more precise specification of the social goal to be served by tort law.

While writings about tort law identify various features of current law that seem ill-suited to secure socially ideal behavior (assertions of a liability or liability insurance "crisis" with respect to medical malpractice or pharmaceutical products or municipal operations are the visible, popular analogues to these works), a large body of work finds tort law generally congruent with social good and suggests several aspects of tort law that help to align its behavioral effects with social good. These aspects of tort law can be sorted into four rough categories.

First, there are basic "gatekeeper" rules. To pass the first hurdle in tort litigation, a plaintiff must identify a personal injury suffered arguably as a result of conduct by the defendant in violation of a duty the defendant owed to plaintiff. More than a few potential suits fail to clear this hurdle. The personal injury, duty, and causation requirements provide an initial filter against suits where liability would be highly likely *not* to promote socially advantageous behavior.

Second, tort law consists largely of a series of sorting rules, channeling suits into categories according to predictions of consonance between particular private actions and public good. A first cut at the sorting-out process distinguishes between strong entitlements and weak entitlements. In some circumstances, even though it is appropriate to say, with Coase, that two actors jointly cause an injury, social good almost invariably will be advanced by having one of the two, and not the other, change his behavior. Protections against intentional injury and claims associated with property rights generally can be classed as strong entitlements fitting this description.

In the case of weak entitlements, the plaintiff who passes the first gatekeeper hurdle has some positive prospect of showing that not he but defendant should engage in different conduct, but not so strong a prospect as in the former case. Weak entitlements account for the lion's share of tort suits. Hence, a second sorting-out rule is called for. Tort law divides the weak entitlement cases into two groups. In one group are those cases where it seems more likely that the defendant will be able to reduce the risk of injury at lower cost than plaintiff. These are the so-called strict liability cases. The remaining group of weak entitlement cases, where it is less clear which party categorically will be better positioned to reduce risk of injury, require proof of defendant's negligence (that is, proof that defendant could at reasonable cost have avoided the injury).

Third, after suits have been sorted, each category requires that certain elements be proved by plaintiff to establish a sufficiently increased probability that recovery will serve social goals to sustain a strong presumption in his favor. Even after this showing is made, defendants have

an opportunity to establish that their behavior accorded with social good (as where justifications are offered for otherwise tortious conduct) or that plaintiff's behavior deviated sufficiently from the ideal to negate the presumption that recovery against defendant would advance social goals. The paradigm of this last defense is comparative negligence, which, when the socially optimal solution requires adjustment of both plaintiff's and defendant's behavior, pro-rates any damage award according to the degree to which each party's departure from ideal behavior contributed to the injury.

Fourth, tort suits are governed by procedures that are intended to promote the behavioral goals of tort law at relatively low cost. Thus, for example, doctrines such as *res ipsa loquitur* shift the burden of persuasion when it seems more likely that information rests with the non-moving party.

Obviously, the assessment of social good and of the behavior that advances it are difficult in many cases, but the sequence of rules that governs tort litigation provides at least a plausible route for obtaining socially useful behavior in the ordinary circumstances respecting private litigants to which this body of law generally applies.

C. Behavioral Concerns in Suits Against the Government:

Competence and Cost

1. Torts and the Government Defendant

The FTCA builds on this framework not by adopting *in toto* the states' common law of torts, but by allowing recovery against the government for negligence (and in some exceptional instances for intentional torts) "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674 (1982).

While signalling acceptance of the approach common to state tort law, those who enacted the FTCA plainly did not trust that law appropriately to resolve all claims against the government. The FTCA provides a different sorting process than common law: the Act, in effect, decrees that all suits against the United States begin with the assumption that the administrative arms of the government are not likely to have behaved improperly.

If the behavioral goals that inform tort law also inform the FCTA and if these goals can be presumed to be advanced by common law decisionmaking in ordinary circumstances respecting private litigants, what difference does importation of the government as a party defendant make? This question leads back to the decisional competence point raised earlier, but it also implicates a second concern. These concerns have supported a longstanding tradition of different treatment of suits against sovereign governments in the United States even though the notion of personal sovereignty has no application here. Judge Harry Edwards, writing for the U. S. Court of Appeals for the District of Columbia Circuit, makes the point in tying construction of the FTCA (in fact, the discretionary function itself) to the bases for sovereign

immunity, the background doctrine for most disparate treatment of government and private defendants:

> The modern policy basis justifying sovereign immunity from suit has three principal themes. First, and most important, under traditional principles of separation of powers, courts should refrain from reviewing or judging the propriety of the policymaking acts of coordinate branches. Second, consistent with the related doctrine of official immunity, courts should not subject the sovereign to liability where doing so would inhibit vigorous decisionmaking by government policymakers. Third, in the interest of preserving public revenues and property, courts should be wary of creating huge and unpredictable governmental liabilities by exposing the sovereign to damage claims for broad policy decisions that necessarily impact large numbers of people.

Gray v. Bell, 712 F.2d 490, 511 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Judge Edwards' dictum directs attention to the factors that make suits against the government special. These factors perhaps can be seen more clearly if they are recharacterized in terms of two variables: errors and error costs. The initial theme identified by Judge Edwards relates to the error term.

2. Minimizing Errors

DEFERENCE: A FIRST LOOK

Deference to "policymaking acts of coordinate branches of government" is justified only by belief that one branch of government is more likely than another correctly to identify the social ideal for a particular decision. Generally, the social ideal relevant to government conduct will not be deducible from abstract principles but will be given by positive law: putting aside questions of statutes' consistency with the Constitution, the social ideal will be defined by Congress. Where Congress has spoken clearly, the law at issue will detail the course to be taken by the administrator whose acts are at issue.

Unfortunately, Congress seldom identifies in clear and detailed language the administrative course to be followed. Instead, legislation commonly reflects the divergent interests that shaped it and the incompleteness of information necessary to decide how any one goal for the legislation should be implemented, much less how some harmonization of heterodox goals should be accomplished. Administrators, thus, routinely are assigned the task of giving effect to ambiguous legislative commands. So, too, are courts. The question relevant to FTCA analysis is which branch Congress intends to make a specific determination. Here, again, the Congress seldom speaks clearly.

Rarely does Congress plainly insulate administrative judgments completely from judicial review. The Administrative Procedure Act (APA), *codified at* 5 U.S.C. §§551-559, 701-706 (1982), provides a general right of judicial review for all final administrative action. The Supreme Court has interpreted the APA as authorizing judicial review in all but the truly exceptional cases in which the Congress explicitly proscribes review or cases in which the grant of administrative discretion is so broad and uncabined by legislative directives as to leave the reviewing courts "no law to apply." *See* S. Rep. No. 752, 79th Cong., 1st Sess., at 26 (1945); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Abbott Labs. v. Gardner, 387 U.S. 136 (1967).

But this general right to review is only half the picture. The APA gives ample evidence of Congress' intent to provide some insulation to administrative decisions, for instance allowing judicial reversal only for abuse of discretion where administrators are given some freedom to decide among a congressionally restricted set of options. 5 U.S.C. §706(2)(A) (1982). Some classes of administrative action, while formally reviewable, as a practical matter have effectively been placed off-limits because judges do not feel comfortable second-guessing those administrative decisions, notably those implicating prosecutorial discretion. *See* Heckler v. Chaney, 470 U.S. 821 (1985); Dunlop v. Bachowski, 421 U.S. 560 (1975). And both the APA and judicial decisions (of ambiguous basis) limit the occasions for judicial review by imposing standing requirements on those who seek review, requirements that often are informed by judgments regarding the relative competence of courts and administrators at particular sorts of decisions. *See* 5 U.S.C. §702 (1982); Linda R.S. v. Richard D., 410 U.S. 614 (1973).

These determinations of the appropriate occasions for judicial supervention of administrative decisions, for judicial abstention, or for deferential review have been the subjects of extensive commentary. Commentators' views on the appropriate dividing lines among these categories vary widely. Nearly all commentators, however, agree that for a broad range of cases, courts' dispositions of disputes over entitlement to or scope of judicial review defy organization into a clear pattern. Two veteran observers of this game state the complaint boldly: "the rules governing judicial review have no more substance at their core than a seedless grape." Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771, 780 (1975).

DEFERENCE: A CLOSER LOOK

Yet, surely, this overstates the case; the statutes and case law provide some guidance as to when judges do or should feel fully comfortable, slightly discomfited, or wholly out of place revising administrative determinations. For analytic purposes, six types of decision can be identified, each with a generally recognized level of judicial deference:

Category:	Level of Judicial Scrutiny:
(1) Law	No Deference
(2) Fact/Descriptive	Slight to No Deference
(3) Fact/Inferential	Slight Deference
(4) Judgment/Ordinary	Some Deference
(5) Judgment/Scientific	Significant Deference
(6) Judgment/Political	Substantial to Full Deference

Although it readily must be admitted that assignment of particular decisions among these categories is more a matter of art than of science, and plainly is not impervious to manipulation, the categories are by no means wholly indistinguishable. The Law category is in many ways the most problematic and will be taken up last.

The Fact/Descriptive category comprehends decisions on matters of descriptive or historical fact. In an unfair labor practice proceeding, the National Labor Relations Board might ask, did the employer make a particular statement to the union steward? Or the National Oceanographic and Atmospheric Administration (NOAA) at the Department of Commerce might ask, did the Weather Service attempt to repair a given faulty buoy? when, and how often? When the administrative decision at issue in court is a decision on the nature of an historic fact (as in the NLRB example above), it generally receives a slight measure of deference from the reviewing court, more as a matter of judicial economy than out of a sense of greater administrative competence. Challenges to an administrative decision of historic fact do not implicate issues peculiarly within the administrators' field of knowledge and when such decisions are contested (as in a suit against the Weather Service for faulty weather prediction due to negligent failure to repair a malfunctioning signal buoy), courts usually feel free to inquire into such matters without any reliance on the expertise of the administrator to answer the factual issue.

The Fact/Inferential category denotes decisions, usually predictive, that extrapolate from known facts. The Federal Trade Commission might predict, from what it knows about consumer reaction to advertising and from facts respecting the effects of smoking tobacco, that reference to mild taste will mislead consumers about the effects of cigarette consumption. Or the Occupational Safety and Health Administration may predict, from limited historical evidence, that a negligible number of workers in the gasoline refining industry will wear protective gear to reduce hazards from exposure to benzene. In every complex decision, numerous such factual inferences must be drawn. Generally, the courts give administrators greater leeway on this sort of decision than on matters of descriptive fact. Absent some special

reason for thinking the decision beyond the judicial ken, however, deference on factual inferences is limited.

The Judgment/Ordinary category is closely related to the preceding category. It differs in context, largely describing informal decisions rather than those made in conjunction with a formalized adjudication or rulemaking. The decision of a cartographer working for NOAA whether or not to depict a 150-foot high tramway cable on a sectional map is an exercise of ordinary judgment: the cartographer decides whether the cable constitutes a sufficient hazard to air traffic to offset the cost of adding to the crowding on the map (chiefly a cost in increased difficulty in reading the map for other hazards). No special scientific training or political instinct is required to make this sort of judgment, but the cartographer makes it more frequently than the judge and is reviewed by a supervisor who sees more such judgment calls than does a judge. Ordinary judgments of this sort get some deference, but they also are not infrequently overturned on direct review.

The remaining categories of judgment secure greater judicial deference. Scientific judgments -- how should the rocket boosters for the National Aeronautics and Space Administration's space shuttle be designed? what dangers are posed by use of dioxin-contaminated earth as residential landfill? how will the risk of leukemia be affected by a reduction of benzene exposure from ten parts per million parts ambient air to one part per million? -- often rest on information that is (or can be made) accessible to reviewing courts. But judges are not trained at evaluating such information, and scientists are. Courts at times reverse (and more frequently vacate) scientific judgments; in the main, however, these judgments (when made by officials with significant science training) arrive in court with a stronger presumption of validity than do ordinary judgments.

So, too, for political judgments. A variety of government decisions are more or less explicitly turned over to political judgment of administrative officials. The NLRB's resolution of most conflicts adjudicated under the NLRA, the FCC's choice between competing applicants for broadcast licenses, the FTC's decision to pursue a complaint against one company rather than another, the FAA's decisions to use its limited resources to conduct one type of inspection rather than another -- all these are decisions that involve political judgment. They present issues that cannot readily be resolved from descriptive facts regarding any given incident standing alone. The principal guarantee that these decisions have been made rightly lies in commitment of the decisions to politically selected decisionmakers, those who have satisfied the appropriate actors in our political system that they have the requisite instincts for resolution of these issues. When judges conclude that an issue is properly one of political judgment, they give the administrative decision considerable deference. Indeed, the "political question" doctrine is a judicially-created vehicle for granting complete deference to certain governmental decisions that are clearly matters of political judgment.

The final category, decisions of law, presents the one matter as to which judges are expert. Here, they give no deference to the administrative decision

as the APA and numerous court decisions make plain. It is the courts' mandate to determine whether the authority governing a particular decision has made the decision one of law or of judgment, whether there is a mandate that facts be found, and if so what type. The judicial law-declaring power, however, does not mean that courts ultimately decide all questions initially framed as legal issues, with no role for administrators. The courts often find that the law's ambiguity on a specific point combined with the commitment of broad authority to the administrator charged with the law's effectuation indicates the lawmakers' intent to make decision on that point a matter for the political judgment of the administrator. A classic example of this sort of judicial construction of law is National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111 (1944). In a sense, thus, the law-declaring power is a wild card, allowing the courts to construe statutes as granting administrators great leeway for judgment or little as the judges think appropriate in any given case. Yet, despite the apparent breadth of this judicial tool, Congress and the President (complain as they might about any specific judicial construction of the law) seem generally satisfied that the judges have been playing by the rules and sorting decisions into the apposite review categories.

The benefit of the judicial sorting along these lines is its contribution to minimizing erroneous determinations of social good in settings in which the political process (subject to the Constitution) defines social good. If the courts reversed all the administrative decisions with which they disagreed, some significant number of court decisions would then be overturned by the political actors. Of course, as with Coasian bargaining among private parties, because this government action is costly, it will not take place in response to all court decisions that political processes would have made differently.

DEFERENCE AND TORT CLAIMS

The exceptions to the FTCA, the discretionary function exception aside, take out of judicial hands a number of decisions that appear to merit considerable deference. The Act, for instance, expressly precludes claims premised on injury from the government's fiscal policies or regulations of the monetary system. These policy decisions are quintessential political judgment matters. Just as plainly as these decisions would be deserving of strong deference from courts, so, too, it seems unexceptional that they would be removed from the ambit of government acts subject to challenge as tortious.

The exceptions, however, systematically go beyond acts that are clearly political. The FTCA does not except only policy decisions on fiscal matters or policy decisions on regulation of the money supply: it excepts "[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system." 28 U.S.C. §2680(i) (1982). Similarly, the Act does not except only tax policy decisions, but rather all claims "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. §2680(c) (1982). Rather than excepting only war policy decisions, the Act excepts "[a]ny claim arising out of the combatant

activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680(j) (1982).

These exceptions encompass not only acts of political judgment but acts of ordinary judgment as well; even simple factual mistakes are shielded by these exceptions. The negligent misassessment of a tax by a minor functionary in the Treasury Department is excluded from the FTCA. Erroneous execution of monetary regulations is excluded. Mistaken detention of persons or goods by customs officials is outside the Act. Negligent firing of a battery of ship's guns at our own shores during time of war would not be covered by the FTCA.

While some of the acts that fall within these and other exceptions to the FTCA are so fully committed to political judgment as to defy meaningful judicial review, most of the excepted acts involve judgment of a sort that normally would be reviewable directly by courts. If some deference is owed to the judgment of the executive officials acting in the first instance, courts nonetheless routinely scrutinize the basis for detention of persons or goods in a variety of contexts. The propriety of tax assessments, likewise, is generally subject to judicial review. Certainly, the exceptions to the FTCA extend well beyond the core "policymaking acts of coordinate branches of government" singled out by Judge Edwards as inappropriate objects for judicial review.

DEFERENCE, ERRORS, AND EXCEPTIONS

Why, so far as appropriate allocation of decisional authority is concerned, are the FTCA exceptions not more narrowly tailored? Although many of the acts covered by the exceptions seem to fall somewhere within the range of judicial competence, perhaps the context of the acts or of the review they receive alters the expectation of judicial accuracy in deciding their propriety.

Tort Liability, Resource Allocation, and Social Good

The exceptions focus on acts that, if not themselves immediate products of political judgment (which would merit strong judicial deference), are related to such acts. The direction in which a naval officer points a ship's gun is not determined definitively by considerations of high national policy; it does not follow inexorably from the decision of Congress to declare war. But it also is linked to a plethora of politically-charged decisions respecting investment choices, including the amounts to be committed to defense versus other goods, to naval forces versus other military forces, to training versus equipment, and so on.

These resource allocation choices inevitably are drawn into issue in tort litigation. This is the essential decision made by courts when assessing allegations that an accidental injury occurred because defendant negligently performed some activity. Then, for example, a court finds a private security services company liable for the negligent firing of a gun by one of its guards,

it implicitly makes the judgment that social good requires greater investment in selecting, training, or policing private security guards or a reduced level of the company's security guard activities. If the court asks whether firing of a ship's gun in the wrong direction was negligent, it must attempt a similar evaluation of public, resource-allocation decisions precedent to that incident.

A broad range of government activities in each of the areas noted above, thus, may be excepted from the Tort Claims Act in part because of concern that judicial decisions in this context will be in error. The implicit judicial judgment about the related investment choices implicated in these cases stands no greater chance of correctly identifying the social ideal than do the political and administrative processes that produced what, viewed in isolation and in retrospect, may seem an unacceptable level of risk of injury. In other words, even though the specific acts at issue are not of a kind that ordinarily would be insulated from judicial review, there is still a fear that courts would commit more errors in assessing these issues than would other branches of government.

This fear of judicial error is difficult to pin down. At one extreme, the argument insulates *all* government conduct from review. The degree of training and supervision the government driver receives, the hours he works, the frequency and duration of his trips and the care with which he is selected influence the likelihood that the government driver will be involved in an automobile accident. These matters, too, implicate political judgments on resource allocation. Surely, the FTCA cannot be read to insulate the government from liability for any act connected in any way to political decisions. Further, the fear of erroneous disposition of cases in which political judgments are seriously insinuated may simply be misplaced. Courts certainly have seemed in some instances acutely aware of the implications of their decisions for political judgments on investment of government resources, even where the claim before the court narrowly addresses a specific decision by a low-level official who assertedly has acted improperly. The cases on prosecutorial discretion are exemplary.

Pity, Hindsight, and Error

An alternative explanation for the apparent fear that judicial decisionmaking would err on the issues excluded from the ambit of the FTCA might look to the context of the review itself. Perhaps, judicial review of government action is more prone to err in damage suits than in direct review actions.

There are two parts to the argument, focusing on the *ex post* nature of damage claims and on the emotional appeal of injured parties. Although many review actions are brought before injury has occurred, damage actions almost never are. Because behavioral concerns in negligence cases compare the risk of injury to the cost of avoiding (reducing) it, damage actions require courts to assess *after* an injury the *ex ante* probability that it would occur. As the injury already *has* occurred, courts systematically may overestimate the

probability that it *would* occur. (It is not clear whether there is a systematic skew to assessment of risk *ex ante*.)

Moreover, when courts are confronted with an identified individual who has been harmed by conduct that, viewed alone, seems inappropriate, the courts may be more likely to find that conduct wrongful than if courts look at a class of government actions. Tort damage actions inevitably review defendants' actions in the former context. Of course, many direct review actions also present claims by identifiable, injured, individuals. But the influence of this setting on the judicial decisionmaker may be greater where the question is whether money should be paid to the plaintiff than where the issue is simply the propriety of the government's actions.

Thus, the concern over erroneous judicial decisions arguably supports exceptions of the breadth suggested by various provisions of the FTCA, but the argument that these exceptions minimize errors is certainly debatable. While consistency with other exceptions would suggest a sweep to the discretionary function exception that goes beyond insulation only of core political judgment calls, understanding the limits of the exception requires a better basis for the breadth of other FTCA exceptions than fear of judicial error. That basis is provided by the second variable identified above: error costs.

3. Reducing Error Costs

If concerns over judicial error only arguably support broad exclusions from the FTCA, are there stronger reasons for belief that the costs of judicial errors will be greater in damage actions against the government than in other contexts? Two possible bases for this belief exist, discussed below under retroactivity and process variables.

RETROACTIVITY AND ERROR COSTS: THE LINKAGE

Most legal actions other than damage suits operate prospectively. Declaratory and injunctive suits generally require one party to eschew a given course of conduct for the future, or to follow it only with the consent of another party. This form of relief allows considerable flexibility for parties to restructure their activities by private agreement or to overrule the (non-Constitutional) judicial decision through legislation (or to persuade another court to adopt a different rule). The capacity for such adjustments minimizes the impact of orders emanating from these forms of legal actions. If the judicial decision is in error, as judged by the affected parties' or political actors' preferences, thus, the error need not result in permanent misordering of social activities. Although "recontracting" costs may be sufficiently great in some contexts to preclude revision of erroneous judicial orders, other things equal, the most significant errors are likely to lead to revision.

Damage actions, however, are different. They provide monetary awards to successful plaintiffs as retroactive relief for actions already taken and injuries already suffered. Several consequences follow from this difference. Notably, retroactivity significantly raises the cost of erroneous judicial

decisions. As with prospective relief, so far as the circumstance can be characterized as part of a class of events predicted to recur, liability will lead to revisory efforts aimed at future incidents: private agreements or legislation will be deployed to alter the outcome suggested by the court when courts' liability rules err. Judicial errors in damage suits and non-damage suits alike, hence, generate two types of error cost: (1) the cost of recontracting (including legislative rule change) efforts, and (2) the cost in deviation from the social ideal of rules that are too difficult (costly) to revise by law or contract. In addition, however, erroneous decisions in damage actions impose social costs equal to the damages wrongly awarded or denied. The erroneous decision of itself confers a windfall gain or loss on the parties to the litigation While the parties may restructure activities or alter legal rules for the future, they cannot escape this immediate, case-specific cost of the decision.

The award of retroactive relief with attendant case-specific costs to erroneous decision, therefore, is likely to involve greater error costs than will other relief. This form of relief is not in fact confined to damage actions. Affirmative injunctive relief involves the same retroactive effect and error costs. *See, e.g.*, P. Schuck, Suing Government (1983); Diver, The Judge as Political Power Broker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43 (1979); Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980). But such increased error costs are the general case for damage suits and only the special case for other legal actions. Retroactivity, thus, provides a plausible basis for the belief that damage suits will generate greater error costs, even given a constant rate of errors for damage suits and other forms of judicial review.

RETROACTIVITY, SYMMETRY, AND ERROR COSTS

Association of higher error costs with damage suits brings us only part-way to the explanation for broader exceptions to government liability than to direct review. Error costs not only must be greater in damage actions; they also must be asymmetrically distributed. The erroneous refusal of damages as well as the erroneous imposition of liability creates case-specific error costs. Under standard assumptions about litigation, explored further below, symmetric distribution of these error costs should yield little net effect on prospective parties to litigation. If concern over error costs justifies broad exceptions to liability, there must be some reason to believe that the government (the public generally) will bear a disproportionate burden of this error cost.

The most obvious possibility is that errors systematically favor plaintiffs; were that so, even a symmetrical distribution of costs from error in any ;given case (costs of erroneous assessments of liability exactly equal to costs of erroneous failures to assess liability) results in an asymmetric distribution of costs overall, with greater total error costs from liability than from non-liability decisions. The discussion above indicates some, but not much, basis for that belief.

The alternative explanation is that erroneous findings of liability generate greater error costs than erroneous findings of non-liability, so that even an equal distribution of errors could produce greater error costs from liability. The costs of the windfall gain or loss in the individual case are symmetric, so the argument must be predicated on different reactions to the expected probability distribution of judicial errors.

The ordinary supposition is that expectation of positive (non-zero) rate of judicial errors will not significantly affect behavior (as compared with behavior under an error-free judicial system). Several rationales support this assumption. The expected error rate may be trivial. The (expected) errors may have offsetting effects. Or the efficient response to the errors may involve no alteration of behavior. Erroneous determinations of liability in strict liability torts, for instance, should not alter the amounts potential defendants expend on liability avoidance, as efficient accident-avoidance investments also are optimal liability avoidance investment with or without judicial errors. In negligence regimes, this may not be so, as the discontinuity in expected liability costs at the judicially determined negligence point may induce potential defendants who are concerned about judicial error to invest beyond the optimal accident-avoidance level. But in the ordinary case this last effect should be quite modest and may be countered by other factors not relevant here.

A few cases, however, involve peculiar reaction to the prospect of erroneous liability decisions. These cases begin with an atypical distribution of the costs and benefits of the activity at issue. Defamation is illustrative. The traditional tort law of defamation gave fairly generous protection to reputation on the assumption that, while reputations are fragile, the harm from injured reputations is difficult to prove. The constitutionalization of defamation law, beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), limited the protection of reputations out of a fear that discussion of public officials would be easily chilled by the threat of liability for defamatory false statements about them. The fear of chill derives from an asymmetry between the benefit of (true) statements about public officials and the costs of (false) statements. The public benefits from the former but, because of the difficulty of preventing the dissemination of information once disclosed, the originator of the information seldom captures a very large share of its values. The costs of false statements, however, so far as they are reduced to a damage judgment, are borne entirely by the defendant-originator. Hence, the Supreme Court intuited, the threat of liability for defamatory statements will lead speakers (who can not recoup the full cost of investing in greater investigation of truthfulness for some portion of statements about officials, even though the social value of those statements exceeds that cost) to reduce their output of speech about public officials.

The Supreme Court could have addressed this problem by requiring proof of negligence in these cases. Under this regime, no defendant would be liable unless it was unreasonable for him to make the defamatory statement. This standard could take account of the private costs and returns from investing in greater scrutiny of the offending statement's truth. Negligence

would protect all reasonable authors-speakers, however, only if this determination were free from judicial error. The prospect of any error leaves the speaker at risk, and valuable speech, thus, still would be deterred. The Supreme Court, therefore, concluded that liability for defamation of public officials is constitutional only if the defamatory statement is made with knowledge of its falsity or reckless disregard of its possible falsity. While the Supreme Court's analysis of defamation may be questioned, the Court rightly appreciated that some classes of defendants will be unduly apprehensive of liability, and that imperfect judicial decisionmaking exacerbates any tendency to such overreaction.

The question in government torts cases is whether for some class of cases a similar asymmetry obtains. Undoubtedly, a variety of government decisions presents just this sort of problem. If for no other reason, this is so because the probable benefits of one course of action may be diffuse and invisible while its potential costs are concentrated and readily apparent; an alternative course of action may yield lower benefits but nearly invisible (if greater) costs. Sam Peltzman's evaluation of the 1962 amendments to the Federal Food Drug and Cosmetic Act makes the point. If a drug is approved by the Food and Drug Administration (FDA) for use in humans, the benefit of the drug will be experienced by its users as some increased probability of improvement as compared to an alternative drug. The cost will be some statistical probability of harm, such as the birth defects associated with thalidomide or diethylshilbestrol (DES). Few users of the drug will be aware of the extent to which their condition is made better by this, as compared to an alternative, drug. Fewer yet will applaud the officials at the FDA who approved the drug. If, however, a group of users is adversely affected, they will be quicker to associate their harm to the particular drug and to attach blame to the administrators who authorized its use as well as the manufacturer who produced it. FDA officials, thus, are said to have too great an incentive to delay drug approvals.

If these officials were *personally* liable for the harms from improperly authorized drugs, the rate of drug approval would no doubt, from a social perspective, be intolerably low. As with defamation, a negligence standard in theory could suffice to protect these officials: all they need do is act reasonably in approving drugs to avoid liability. Yet, every official recognizes the possibility that, *ex post*, a court may decide that his action was not reasonable. Even with only a very slight risk of an erroneous judicial imposition of liability, fear of this decision will cause the official to eschew not only actions that might be questionable but an array of actions that no reasonable person *ex ante* would dispute: given the high potential liability and the negligible (personal) costs of delay, the barest use of liability could dissuade the official from approval.

Peltzman's description of FDA incentives seems compelling (to one who has had no experience with the FDA), and the extension of his analysis to the liability context seems the unexceptional. To be sure, there must be some countervailing pressures on the FDA to approve drugs readily. Even though the individual benefits from such actions are not generally apparent, and

often not even to those immediately benefited, the benefits can be seen by those who would profit from the approval, the drug companies. If drugs are beneficial, the value of the improvement generally will be captured by the producer who for many purposes should be seen as the equivalent of a concentrated, visible affected group. Surely, the FDA official will be pressed by drug companies to act with at least all deliberate speed. Still, the persuasive powers of these companies seem generally overmatched in this context by concerns about more dramatic harm more dramatically visited upon the official from approval of a harmful drug. If the asymmetry is less than at first appears, it nonetheless seems likely to exist and to increase the cost of official reaction to anticipated judicial errors.

The reaction of officials to the asymmetric threat of liability will not be so strong where liability is visited upon the enterprise (the United States) rather than directly on the individual. At the same time, this difference easily can be overstated, especially where catastrophic injuries (enormous injury costs) are in issue. The individual official (usually) has tightly limited resources. Of course, he will worry considerably about the risk of a personal financial liability sufficiently large to induce bankruptcy. But from the fairly low level (in macroeconomic terms) at which this occurs to the dramatically higher levels of injury possible as consequences of his official actions, the individual will not make distinctions based on the threat of personal liability. *See* Shavell, The Judgment Proof Problem, 6 International Rev. L. and Econ. 45 (1986). If the enterprise is liable, however, these differences among levels of potential liability become meaningful. If damages for wrongful approval of Thalidomide or of DES or for failure to restrict use of asbestos or use of Agent Orange or similar large-scale potential liabilities are in issue, the costs in personal time, in career opportunities, and in public exposure for the individual official at the pivot of an enterprise liability exposure action well may approach or exceed the costs of involvement in litigation where only his own personal fortune is on the line.

The cases, then, in which error costs from damage suits against the government will be most problematic are those involving asymmetric official interests and large potential liability stakes. Construction of the exceptions to the FTCA must be sensitive to these factors as well as to the deference concerns that shape the likelihood of error. I will return to these factors below.

FREQUENCY, SUIT SELECTION, AND INVESTMENT

The error costs associated with damage suits differ from those associated with other review processes in part as the direct consequence of retroactivity and in part as the consequence of changes in the number and nature of the instances in which review is sought and the means by which it is sought when retroactive relief is available. These mediate process effects increase the likelihood that the review will yield a judicial decision adverse to the government that would not have emerged from the direct review process.

The first process variable is frequency of suit. This is not, of course, an independent variable. Frequency of suit depends upon a number of aspects of

the litigation process itself, so conclusions respecting this variable must be drawn with caution. One conclusion, however, seems fairly safe: other things equal, the availability of retroactive relief will increase the number of actions brought. Prospective relief changes litigants' posture for the future; the parties start their next series of activities with greater or lesser prospects as compared with a no-review world. Put differently, the options for contracting around or revising rules for future conduct can significantly alter (reduce) the yield from prospective relief. Retroactive relief does not offer similar opportunities for adjustment and thus does not simply provide a different starting point for the future; it yields a tangible benefit immediately. In this sense, retroactive relief is like found money. Whatever harm it compensates for already has been incurred; seen from the moment that an action for review is (or is not) filed, the opportunity to secure retroactive relief is akin to the prospect of winning a lottery -- apart from the cost of the ticket, you are getting something for nothing.

The analogy to a lottery also explains a second process variable, suit selection. The greater opportunity for gain from retroactive relief alters the mix of complaints about administrative action brought into court. Again holding other things equal, the availability of retroactive relief should induce plaintiffs to file suits with lower probabilities of success than would justify litigation seeking prospective relief.

This can be seen most easily when the role of attorneys as intermediaries is considered. When prospective relief is at issue, the value of the relief is less easily ascertained (especially by those, like the perspective attorney-representative, who are not so familiar as the parties with the context of the dispute and the potential for change associated with particular litigation outcomes) and less quickly (fully) capitalized (as a function of both uncertainty and remoteness in time). Attorneys, thus, are unlikely to undertake representation in prospective relief actions on a contingent basis. The plaintiff must be relatively certain of the outcome and have access to liquid assets, or be able to convince others with such assets of the probability of success, to pursue a suit for prospective relief. Damage actions, on the other hand, can be underwritten by attorneys who are to be paid out of the possible recovery. And, as with lottery tickets, a big potential payoff will induce players to invest the price of the ticket even when the prospect of success is quite low. Of course, risk-neutral players will not invest more than the potential payoff discounted by its probability, but this will suffice for large payoffs to assure takers at probabilities well below those generally required for suits seeking prospective relief.

The general bias toward increasing the proportion of low-probability suits should be especially pronounced in damage suits against the federal government. Extremely large judgments against other defendants run the risk of driving the defendant to bankruptcy, witness the recent saga of asbestos litigation and the Johns Manville Corporation. Not so, however, where suit is against the federal government. The certainty that this defendant will be able to pay a large judgment makes big ticket litigation against the government especially attractive. Given the trade-off between size

of potential recovery and probability of success, this will induce filing of suits against the government that have lower probabilities of success than would support suit against another defendant. Returning to the lottery analogy, the bigger the potential prize and the greater the certainty that, if won, it will be paid in full, the less likely success must be in order to justify purchasing a ticket of any given price.

This leads directly to the third process variable, investment in litigation or, in other words, the price of the lottery ticket. The amount that a plaintiff or plaintiff's attorney will invest in litigation varies as a function of several factors: the initial estimate of probable success, the anticipated level of defense expenditures, and the probable payoff if successful (discounted to its present value). Increased payoff value has an unambiguous effect, increasing the amount plaintiffs will spend on litigation. The other factors have a more complex relationship to the plaintiff's expenditure. Increased probability of success both supports greater investment in litigation and, at certain levels, reduces the effect of such investment. To take a polar case, the marginal return from an additional investment in litigation once the probability of success has reached unity is zero -- there is no reason to spend more when there is a one hundred per cent chance of success. For lower probabilities, marginal returns to litigation investment probably follow a bell shaped curve. The level of defense spending affects the ultimate probability of success, increased defense expenditures reducing plaintiff's likelihood of prevailing given any initial prediction of success but with non-constant effects.

As analysis of litigation investment is complex, I will not attempt a full exposition of the subject here. Instead, I will assert and only briefly support the intuition that low probability damage suits against the government will elicit high levels of litigation investment by plaintiffs relative either to non-damage suits against the government or to damage suits against other defendants. If marginal returns to investment increase with the potential payoff and also with probability of success until probability of success at least reaches fifty percent, any factor that increased either the payoff or the probability of success in a low probability damage suit should increase relative investment. As explained above, other things equal, damage suits yield higher payoffs than non-damage suits, and potential recoveries against the government are more valuable than potential recoveries against others. Moreover, again holding other things equal, it is at least arguable that the presence of binding budget constraints on government litigators decreases investment by the government (relative to other parties) in suits for which there is a low probability of plaintiff success. While there may be offsetting factors, it seems likely that some relative excess investment will be associated with plaintiffs pursuing damage suits against the government.

PROCESS VARIABLES AND ERROR COSTS

The direction in which these three process variables move when suit is for damages against the federal government suggests additional reasons for concern over error costs. The increased frequency of suit, standing alone, may be the least troublesome. While it augurs an increase in the absolute

number of errors and the absolute level of error costs, it does not presage a disproportionate increase in either. The differences in suit selection and investment in suit, however, suggest a greater escalation of error costs. With more claims of doubtful success filed and these claims more vigorously pressed than they would be against the government in a non-damage context or against a private defendant, more costly judicial errors seem likely. Some increase in plaintiff success on low-probability claims will occur, and this probably will generate increased error costs. The mere fact that a claim is improbable does not necessitate that its grant would be erroneous, measured against the standards of social good suggested earlier. But it does increase the *likelihood* that a grant would be erroneous. At the same time, as low probability is balanced against high payoffs in filing and litigation investment decisions, judicial errors in these low-probability suits also are apt to impose higher costs on the public than would be associated generally with errors in other contexts.

The concerns suggested here about error costs are cognate with concerns expressed by many government officials. Officials declare that litigants and lawyers often are in essence trolling for fat dollars, filing damage suits against the federal government in hopes that one will "get lucky" and land a large (if unexpected) judgment. Some officials voice the concern that fear of a large, unjustified potential damage judgment against the government affects the conduct of government business, and more opine that without strong protection against liability the government could not or would not carry out a variety of its current tasks. Even though potential litigants and their representatives see their actions (and these actions' effects) in a very different light, many will admit that they file claims against the government that stand relatively slight chance of success. They may elaborate the inherent justice of the plaintiffs' position and may find officials' reactions self-serving, yet still not argue that the changes they urge in the content or application of current rules advance social good as judged by political processes and even by individual agreements.

Discussion of effects from tort litigation has been organized around the notion that judicial decisionmaking can err, and indeed some imperfection (or some expectation of decisions that would be found erroneous under the assumed standards of social good) is critical to interest in excepting matters from judicial jurisdiction. But to some extent the effects indicated by changes in process variables can be abstracted from concerns over judicial error and even from concerns over administrators' reactions to potential judicial decisions. If numerous, low probability, high potential yield damage suits are brought against the government, the government incurs substantial cost simply in responding to the suits.

D. Summary

The legislative history of the discretionary function exception, while opaque, points the direction for inquiry by suggesting congressional interest in disparate treatment of three classes of acts. Some acts, presumably those that are based on political judgments discretion over which has not yet been

cabined by constraining legal rules, are to be free of judicial supervision. Other acts, readily analogous to ordinary acts of private citizens (for instance, driving an automobile during civilian employment with the government), are to be exposed to judicial regulation in tort suits. The intermediate category is composed of acts that often are subject to judicial review but for which no tort liability was to attach. This division strongly indicates that congressional concern with the behavioral effects of tort litigation dominated interest in use of tort liability to compensate those who are harmed by government employees' actions. Other compensatory schemes might be utilized, including reliance on private contracts, but the use of tort liability outside the category of acts fairly assimilable to private conduct was to be avoided.

By placing beyond the FTCA's purview acts of the type regularly subject to direct judicial supervision as well as acts that properly are exempted from judicial review, Congress signalled its belief that special concerns about the effects of review apply when tort litigation is the vehicle for judicial review . The role of the discretionary function exception -- indeed all the exceptions to the FTCA -- in large measure is to reduce the peculiar ill effects of government tort liability. The problem for analysts of the discretionary function exception is the absence of real guidance on the effects about which the Congress was concerned. The breadth of the clearly stated FTCA exceptions indicates that the effects are not linked solely to revision of major policy decisions. At the same time, congressional acceptance of a substantial slice of state tort law as a mechanism for policing behavior of federal employees engaged in routine activity is at odds with general suspicion of tort law's behavioral effects.

The concerns implicated in the discretionary function exception -- associated specially with review of government decisionmaking through tort suits -- must be derived from the same ground as the traditional doctrine of sovereign immunity. These concerns focus on avoiding erroneous decisions and limiting the ill effects of such decisions. Although there is some basis for belief that courts might reach erroneous decisions -- measured against private and political determinations of joint or social good -- more often in tort suits, the evidence is weak. From the error minimization vantage point, the exception should be tailored to complement the deference accorded administrative decisions on direct review. Concern over reducing error cost, however, supports a broader sphere of judicial deference in tort than in direct review. The retroactive effect of tort liability judgments increases the cost of errors. It also increases the amount of litigation, and, particularly where suit is against the government, it prompts more doubtful suits to be brought and to be pressed more vigorously. The reduction of error cost would be facilitated by precluding suits that may prompt overreaction by federal officials where mechanisms do not exist for effective moderation of this reaction. Such suits present claims with some, but relatively low, probability of success seeking large potential damages from an official act that, made differently, fairly safely could escape liability or other similar constraint.

III. JUDICIAL CONSTRUCTION: THE FUNCTION OF DISCRETION

Putting these theoretical principles into practice requires construction of a test for the discretionary function exception that allows easy application before trial to minimize the number of low- probability suits moving forward, that clearly excludes matters on which strong judicial deference is appropriate, and that reduces the likelihood of adverse (undesirable) administrative reaction to the threat of suit. The judicial treatment of the exception has shown some sensitivity to all these concerns, but the tests that have emerged fall short of the goals suggested in Part II above. This Part examines the tests used by the courts and the issues in which differing judicial judgments have been reached.

A. Judicial Tests: Eight is Enough

From the outset, courts have made plain the difficulty of articulating a test for the discretionary function exception. The first Supreme Court decision to deal with the exception, *Dalehite*, offered no fewer than four possible tests in the majority opinion alone. Other decisions have added at least four more. This section briefly sketches the eight tests and their current postures. Two tests focus on the status of certain actors. Six others focus on the nature of the activity in question, three more narrowly inquiring into specific acts and three looking more generally at the functional category to which the suspect acts might be assigned.

1. Status: Initiating Official

One of the tests suggested implicitly in *Dalehite* looks to the status of the official who initiated the program that gave rise to the claims of injury. *Dalehite*, also known as the Texas City Disaster Case, involved the explosion of unstable fertilizer compound being loaded at Texas City, Texas, for shipment overseas to boost food production following World War II. Justice Reed, writing for the Court in *Dalehite*, noted the conditions that had prompted the "cabinet-level decision to institute the fertilizer export program" and suggested the importance of the high-level initiating officials. 346 U.S. at 19-20, 37-38, 42. The Court's decision in *Dalehite* , however, did not rest on this ground, and subsequent decisions have not relied on the status of officials who initiate the overall programs by which injury is caused to decide the scope of the exclusion.

2. Status: Proximate Decisionmakers

A second status-related test suggested by *Dalehite* has played a larger role. The district court that originally passed on the claims from Henry Dalehite's estate (among others) had found the government negligent in various actions involving the manufacture, labelling, and loading of the fertilizer. The Supreme Court found that various, specific, assertedly negligent actions were products of decisions "all responsibly made at a planning rather than operational level." 346 U.S. at 42. Most of the critical decisions were made by the Army's Field Director of Ammunition Plants and set

forth in the Plan he drafted to guide the fertilizer manufacturing process. Other decisions found to be negligent were not specifically set out in the Plan or in similar rules or regulations but were consistent with the existing rules. The Supreme Court's opinion does not make clear whether the level of the decisionmaker, the timing of the decisions (in advance of actual implementation), the generality of the decisions (applicable to all manufacture of fertilizer), or the nature of the decisions was controlling. The operational-level/planning-level test was again endorsed by the Court in Indian Towing Co. v. United States, 350 U.S. 61 (1955), and Rayonier v. United States, 352 U.S. 315 (1957). Lower courts subsequently relied heavily (or, at least, invoked frequently) the operational versus planning-level distinction, often looking to the status of the official whose decision proximately caused the injury at issue. The Supreme Court's *Varig Airlines* decision, however, specifically rejects the notion that the discretionary function exception's application depends on the rank of the official whose acts are challenged. 467 U.S. at 813. Lower court decisions following *Varig*, while still referring to the distinction between decisionmaking at the operational level and decisionmaking at the planning level, have paid less attention to officials' status and more to the nature of their conduct. *See, e.g.*, Henderson v. United States, 784 F.2d 942 (9th Cir. 1986); Drake Towing, Inc., v. Meisner Marine Constr. Co., 765 F.2d 1060 (11th Cir. 1985). Other courts after *Varig* have pointedly rejected the planning-level/operational-level test. *See, e.g.*, Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187 (D.C. Cir. 1986).

3. Conduct: Discretion and Choice

Perhaps the broadest view of the discretionary function exception is that it precludes liability for any action that required a choice among alternatives by the acting official. Some passages in *Dalehite* emphasize the fact that conscious choice, rather than mere inadvertence, accounted for the actions that led to the Texas City Disaster. Some lower courts have made the existence of discretion on the part of the official whose acts are challenged the sole test for invocation of the exception. *See, e.g.*, Smith v. Johns Manville Corp., 795 F.2d 301 (3d Cir. 1986); Bergmann v. United States, 689 F.2d 789 (8th Cir. 1982); Barton v. United States, 609 F.2d 977 (10th Cir. 1979); National Carriers, Inc., v. United States 755 F.2d 675 (8th Cir. 1985); Butler v. United States, 726 F.2d 1057 (5th Cir. 1984). Other courts have looked to discretion as indispensable, though not necessarily a complete basis for the exclusion, finding the absence of discretionary authority to take the challenged action sufficient to defeat the exception. *See, e.g.*, Drake Towing Co., v. Meisner Marine Constr. Co., 765 F.2d 1060 (11th Cir. 1985). Still other courts have found the exception applicable only if tests, beyond the existence of discretion on the part of the particular official whose acts proximately cause harm, are met, *e.g.*, Thompson v. United States, 592 F.2d 1104 (9th Cir. 1979), or have specifically rejected the existence of individual discretion as relevant, *e.g.*, Collins v. United States, 783 F.2d 1255 (5th Cir. 1986); Jackson v. Kelly, 537 F.2d 735 (10th Cir. 1977). After *Varig Airlines*, courts have placed somewhat less emphasis on the existence or absence of discretion and more on other factors. *Compare* Hylin v. United States, 715 F.2d 1206 (7th Cir. 1983), *vacated and remanded*, 469

U.S. 807 (1984), *with* Hylin v. United States 755 F.2d 551 (7th Cir. 1985) (on remand).

4. Conduct: Timing and Scope

A second conduct-based test generally is phrased in *Dalehite*'s language as distinguishing between operational-level and planning-level activities. This test does not, however, turn on the *level* at which the critical decision in made -- instead of the *rank* of the official, the *nature* of the decision is the crucial factor. Of course, these considerations often are intertwined, and the courts have been notoriously unhelpful in explaining what distinguishes planning from operation or implementation. Rather than detailing the considerations that differentiate these categories of administrative action, the courts generally describe the actions in other terms, for instance speaking of "day-to-day" decisionmaking or "normal" decisions or "ordinary" actions in lieu of "operational-level" actions. The decisions embracing the conduct-oriented form of the planning-operational test nonetheless do seem to turn on three variables. One, which often is specially discussed by courts is treated below as the third conduct-based test. The other two are the timing and scope of the critical decision.

If the harm-causing action is directed by a decision that is more remote in time from the harm and more general in its application, it is relatively likely to be deemed to be the product of a planning level decision, hence immune from liability. For example in Madison v. United States, 679 F.2d 736 (8th Cir. 1982), amended on other grounds *sub nom.* Harrison v. United States, 715 F.2d 1311 (8th Cir. 1983), the court found that the discretionary function exception barred a suit by survivors of persons killed at a government contractor's munitions plant alleging in part government negligence in prescription of standards for the contract. The court noted that the relevant standards were set out in the contractor safety manual promulgated by the Department of Defense. The generality of standards and remoteness from the specific incident both seemed to influence the court. In contrast, in Henderson v. United States, 784 F.2d 942 (9th Cir. 1986), the court of appeals found that the exception did not bar a claim for damages by a trespasser injured while trying to steal copper cable power lines in a remote section of a naval base. The decision not to de-activate the power lines in that area, formerly a missile test site, was not part of a general plan to keep power on-line to such sites but an individual failure to de-energize not conforming to the Navy's general approach to out-of-use sites. *See also* Lindgren v. United States, 665 F.2d 978 (9th Cir. 1982).

5. Conduct: Policymaking

The third test focusing on the particular harm-causing acts also at times is phrased as separating operational from planning decisions but more often appears as an independent test. This test declares that the discretionary function exception shields the government from liability only so far as the triggering act is the authorized exercise of policymaking authority. *See, e.g.*, Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187 (D.C. Cir.

1986); Begay v. United States, 768 F.2d 1059 (9th Cir. 1985); Miller v. United States, 583 F.2d 857 (6th Cir. 1978); Downs v. United States, 522 F.2d 990 (6th Cir. 1975). Some courts explicitly restrict the ambit of policymaking to decisions that implicate significant choice based on "social, economic, or political" considerations. *E.g.*, Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986); Collins v. United States, 783 F.2d 1225 (5th Cir. 1986); Alabama Elec. Co-op., Inc., v. United States, 769 F.2d 1523 (11th Cir. 1985). The phrasing of this point that is most often quoted is Judge Edward Becker's from Blessing v. United States:

> Statutes, regulations, and discretionary functions, the subject matter of §2680(a), are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts have no substantive part to play in such decisions Rather, the judiciary confines itself -- or, under laws such as the FTCA's discretionary function exception, is confined -- to adjudication of facts based on discernible objective standards of law. In the context of tort actions . . . these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions.

Blessing v. United States, 447 F.Supp. 1160, 1170 (E.D. Pa. 1978) (footnotes omitted). Judge Becker, in a note, contrasted two claims that might be asserted in a test suit complaining of property damage suffered from dam-related flooding. One claim would be that building the dam was improper, flooding naturally resulting from its construction. The other claim would be based on improper methods of construction or operation. Only the first claim, Judge Becker declares, is barred by the FTCA: "If an individual suffered property damage not because too much sand was negligently mixed into the concrete used in constructing the dam, resulting in the dam crumbling and his land being flooded, but simply because the dam was constructed at all, his injury would be the result of policy decisions made by executives and/or legislators whose function it is to weigh competing policy considerations -- economic, social, political, etc. -- and to make decisions based on their evaluation of those relevant considerations." *Id.*, n. 14. This test was increasing in popularity over the decade preceding *Varig Airlines* and appears still to be on the rise, although there is arguable tension between this approach and that taken by the Supreme Court in *Varig*.

6. Function: Regulatory

The three remaining tests divide suits by reference not to the particular harm-causing acts but instead by reference to the function the acts can be said to represent. *Varig Airlines* is central to this approach. The Supreme Court's decision in *Varig* can be read as adopting a (non-exclusive) regulatory functions test. Chief Justice Burger, speaking for the Court, recounted the legislative history's references to insulation of the government from liability for actions taken in its role as regulator of the activities of private persons and

and declared that "whatever else the discretionary function exception may include, it plainly was intended to encompass, the discretionary acts of the Government acting in its role as a regulator." 467 U.S. at 813-14. Burger stated that the *Varig* case presented two types of complaint. One was based on the structure of the Federal Aviation Administration's program for airplane inspection and certification, which largely relied on "spot checks," paper records, and manufacturers' self-scrutiny, and which allegedly was inadequate to assure safety. The other complaint was that the inspection of the particular type of plane involved had not been conducted with sufficient care.

The Supreme Court found both these complaints barred by the discretionary function exception. The first complaint plainly implicates the sort of discretionary policy judgment that would be protected by several of the status or conduct-focused tests. The second complaint, however, arguably states grounds for suit that would not be barred by most other discretionary function tests, as, indeed, the Ninth Circuit held below in *Varig*. *See* S.A. Empresa de Viacas Aereo Grandense v. United States, 692 F.2d 1205 (9th Cir. 1982), *reversed*, 467 U.S. 797 (1984).

The cleanest test that *Varig* might stand for is a broad regulatory functions test: when government acts as a regulator of private conduct, it is exempt from FTCA liability without need for further inquiry into the status of the employee whose actions lead to the harm complained of or into the nature of those particular actions. It is not clear, however, that the Court intended to embrace such a test. Most of the opinion's references to the regulatory activity at issue also suggest that some importance attaches to the fact that the particular conduct at issue was discretionary or involved the exercise of policy judgment. *See* 467 U.S., at 813-14, 819-20. For instance, rejecting the grant of jurisdiction over claims of negligence in the particular spot-check inspections, the Court declares: "The FAA employees who conducted compliance reviews . . . were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the 'spot-check' program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals." 467 U.S., at 820.

Lower court decisions after *Varig* show increased concern with regulatory functions but division over the significance of the functional category. Construction of the discretionary function provision as creating a special "regulatory functions" exception, has been adopted by other courts in the wake of *Varig*. *See* Wendler v. United States, 782 F.2d 853 (10th Cir. 1985); Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986); Proctor v. United States, 781 F.2d 752 (9th Cir.), *cert. denied*, 469 U.S. 1228 (1985). Some of these post-*Varig* decisions have construed the exception as broadly excluding any liability for performance of regulatory functions, even if a government employee violated an established rule, or otherwise acted without due care in performing that function. *See, e.g.*, Cunningham v. United States, *supra*; Hylin

v. United States, *supra* (any discretionary action in regulatory program protected); General Pub. Utils. Corp., v. United States, *supra*. Other decisions have required that substantial policymaking authority accompany the specific regulatory acts at issue. *See, e.g.*, Collins v. United States, 783 F.2d 225 (5th Cir. 1986); McMichael v. United States, 751 F.2d 303 (8th Cir. 1985). It is not clear that the actual applications of these tests fully conform to the rhetorical formula chosen by the court.

7. Function: Governmental

A second functional test asks not whether the offending activity regulates the conduct of private individuals but more generally whether it is part of a particularly *governmental* function. *See, e.g.*, Mitchell v. United States, 787 F.2d 466 (9th Cir. 1986). This test, too, was suggested in *Dalehite*, both in the majority opinion and in the dissent, but it was not clearly developed in that case. The sense of the test, which derives in part from the pre-FTCA law governing municipalities' responsibilities in tort, is that even negligent performance or non-performance of actions that, of themselves, involve no significant discretionary authority will not give rise to liability if that is peculiar to government.

Courts that explicitly have embraced this test generally have combined interpretation of the discretionary function exception with some other source of law, such as negative inference from the FTCA's general grant of jurisdiction (because it provides for government liability when a private actor would be liable in like circumstances, it precludes liability for purely governmental functions) or interpretation of the scope of public duties. *See, e.g.*, Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983) (no private analogue to CPSC decisionmaking); Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977) (FAA officials, even when directed by superiors to take certain actions, owe no enforceable duty to public; government air traffic controllers, operating under rules that also govern private air traffic controllers, do owe duty to air travellers). Other courts, not explicitly articulating a government functions test, find actions that would not pass the conduct tests stated by the court nonetheless are covered by the exception when those actions are "inextricably intertwined" with discretionary activities of a sort that seems uniquely governmental, such as law enforcement, civil commitment, or construction of public works. *See, e.g.*, Pennebank v. United States, 779 F.2d 175 (3d Cir. 1985) (municipal sewer project); Abernathy v. United States, 773 F.2d 184 (8th Cir. 1985) (civil commitment); Ostera v. United States, 769 F.2 716, *rehearing denied*, 775 F.2d 304 (11th Cir. 1985) (law enforcement); Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (law enforcement); Payton v. United States, 679 F.2d 475 (11th Cir. 1982) (*en banc*) (parole).

Construction of the discretionary function exception as encompassing a government function exclusion seems to have gained some momentum after *Varig Airlines*. The momentum has not, however, moved all courts along the same path. Some decisions have done this through an expanded form of the regulatory function test, *see, e.g.*, Jet Industries, Inc. v. United States, 777 F.2d

303 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1971 (1986), and other decisions have retained strong requirements for the particular conduct even when closely associated with discretionary activity of a peculiarly governmental nature. *See, e.g.*, Lindsey v. United States, 778 F.2d 1143 (5th Cir. 1985).

The judicial treatment of this exception has a checkered past as well as a checkered present. The Supreme Court initially assumed that peculiarly governmental activities that were insulated from liability under state tort law -- firefighting, for instance -- also were outside the FTCA's scope. One of the claims rejected in *Dalehite* was for negligence in combatting fires after the explosions that were the central focus of that case. *See* 346 U.S., at 43-44. The *Indian Towing* decision two years later, however, specifically rejected analogy to municipal liability and its governmental-proprietary distinction as a predicate for FTCA liability. The four dissenting justices complained that, followed to its logical conclusion, the *Indian Towing* approach would allow liability for peculiarly governmental activities, singling out firefighting as their example of such an activity that should not give rise to tort liability. 350 U.S., at 76 (Reed, Burton, Clark, and Minton, J.J. dissenting). Two years later, in *Rayonier*, the Court approved FTCA liability for exactly this activity. 352 U.S. 315 (1957).

Despite *Indian Towing* and *Rayonier*, the courts have been influenced by references in the legislative history of the Act suggesting congressional intent to abolish distinctions between government and private parties performing essentially identical acts (as with the automobile accident example) but not to allow liability suits to challenge "the propriety of [regulatory decisions or] . . . administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like." Hearings on H.R. 5375 and H.R. 6463 before the House Judiciary Committee, 77th Cong., 2d Sess. 65 (1942) (testimony of Ass't Atty. Gen. Francis Shea). Without often adopting a government functions test, courts often have referred to this language when granting acts carrying out government functions broader insulation from liability.

8. Function: Discretionary (Non-Mandatory)

The final, and (along with the first test) least followed, of the eight tests takes the language of the discretionary function exception literally. It immunizes the government from liability for acts taken in pursuit of an activity that the official or government enterprise is permitted but not required to perform. The broad form of this test would exempt from liability all acts, whether discretionary or not, in furtherance of a non-mandatory government activity. No court has adopted this test. One court, however, has embraced a narrow form of this discretionary function test (which, to avoid confusion, will be labelled the "non-mandatory function" test).

The Tenth Circuit of the U.S. Court of Appeals has held that the exception applies to *acts* that constitute the exercise of discretion in furtherance of *activities* (or functions) that also are discretionary. *See* Weiss v. United States, 787 F.2d 518 (10th Cir. 1986); Jackson v. Kelly, 537 F.2d 735 (10th Cir. 1977) (*en*

banc). In Weiss v. United States, the court found this test satisfied: NOAA cartographers who did not show an aerial tramway cable (about 150 feet high) on an aeronautical sectional chart were given discretion by the interagency cartographic committee to decide whether to chart obstructions lower than 200 feet; and the cartographic function itself was discretionary. In Jackson v. Kelly, however, the court held that the test was not met: although the government doctor whose acts were in question had exercised discretion, it was not "governmental discretion" of the sort required by the exception because he had a "mandatory duty" to treat the patients involved.

These cases reflect conflation of the discretionary function exception with two other concepts: first, with the duty of care required as an element of any negligence-based cause of action, and, second, with the standards employed to assess the availability of mandamus or until recently to assess the exposure of lower-ranking executive officials to damage liability (both mandamus and damage immunity have relied on a division of ministerial from discretionary acts). Although these concepts are related one to another, they are not wholly coextensive. The court's analysis, hence, might be sharpened by unpacking the different concepts. Were this done, it seems unlikely that the non-mandatory function test would survive.

B. Grading Tests: Caution When Passing on a Curve

The various tests evidence at once considerable judicial sensitivity to the concerns that should inform construction of the discretionary function exception and equally considerable difficulty crafting an appropriate legal rule out of those concerns. The tests all present, to some degree, problems of inconsistency with the FTCA's legislative history and of incompatibility with goals described by theory. This section describes some of the problematic aspects of the test. The problems, although interrelated, are discussed here under three headings: coherence, fidelity, and complexity.

1. Coherence

An obvious problem to those who read judicial opinions about the discretionary function exception long has been the seeming inconsistency of judicial decisions. Judge Becker aptly states (or understates) the problem: "despite the Court's efforts, the Supreme Court's pre-*Varig* decisions seem to have left the meaning of the discretionary function exception somewhat unclear, with the result that lower court decisions . . . do not comprise a particularly coherent body of case law." Blessing v. United States, 447 F. Supp. 1160, 1172 (E.D. Pa. 1978). After citing examples of conflicting decisions, Judge Becker continues: "In part, this confusion may stem from the fact that the Court's planning/operational distinction, instructive as it may be on a theoretical level, can become exceedingly problematic when applied to concrete facts." *Id.*, at 1173.

In fact, the problem is more general than difficulty with the planning/operational distinction. The problem of coherence in this area of law has two complementary aspects. One aspect of the problem is that courts

have used at least seven of the eight disparate, sometimes incompatible -- indeed, sometimes mutually exclusive -- tests discussed above to decide the exception's applicability. Consistency in outcomes across an array of very different constructions is implausible if not impossible.

A second aspect of the problem is internal to the various tests. Judge Becker rightly notes that courts have had difficulty discerning what conduct should be characterized as planning and what as operation, an inevitable difficulty given the intrusion of planning judgments into many actions that seem simultaneously to be concerned with implementation of more general, abstract plans. *Blessing*, *supra*, at 1173-74, n. 19. Similar difficulty attends most of the other tests, including the policymaking test Judge Becker feels constrained to apply in *Blessing*. Policymaking is no more readily segregated from policy implementation than planning is from operation; the cases adopting a policymaking test for the discretionary function exception seem no more consistent than those employing a planning/operation test.

The problem appears in another form in decisions endeavoring to separate governmental functions from other functions performed by government employees. The analytical problem (which, as explained below, is only part of the coherence problem) in the policy/implementation and planning/operation contexts requires division of conduct that combines two features into groups with greater or lesser amounts of the critical feature. In the governmental function cases, the analytical problem is pushed one step back: the first task is describing the critical features that make an activity peculiarly governmental. The government is never the only enterprise to engage in all aspects of a given activity -- firefighting is a private business as well as a publicly-operated one; private security forces largely replicate the activities of public police; private association set standards and, regulate members adherence; even the lighthouse has a private enterprise double -- so that simple analogical tools are of limited utility. Only after identifying the factors that make an enterprise governmental will one encounter the sort of slippery slope problem that frustrates application of the conduct-focused distinctions.

The tests that perhaps are least subject to these analytical difficulties are those that concentrate on the status of official actors. It is easier to rank relative levels and responsibilities of the government actors and to assign importance to particular divisions among the ranks than to separate types of conduct or function. Even though these status considerations still play a role in some decisions, the courts have been moving away from explicit reliance on them. The *Varig Airlines* decision continues, and possibly accelerates, this trend.

The hope many government officials have expressed that the *Varig* decision will increase decisional coherence appears unlikely to be fulfilled. *Varig* undermines the more easily applied status-based tests. It mixes language suggesting different tests. And it expressly recognizes that discretionary functions cases may not all be soluble under a single test. Not surprisingly, courts after *Varig* continue to apply various tests and also to apply individual

tests in varying ways. The contribution of *Varig* principally has been increasing the scope of the exception in cases involving regulatory activity. Even here, however, the cases continue to be mixed. *See, e.g.*, Baker v. United States, 55 U.S. Law Week 2648-49 (9th Cir., No. 86-5578, May 18, 1987) (discretionary function exception does not insulate government from liability for negligence in regulating drug company's testing of polio vaccine where negligence was not in the substance of the applicable regulations but in their implementation); Collins v. United States, 783 F.2d 1225 (5th Cir. 1986) (discretionary function exception does not preclude suit for negligent decision to terminate "imminent danger" order for mine, and for decision not to reclassify mine as one that should be closed, where no substantial policy reason supported rescission order and where failure to reclassify was found to countervane governing regulations); McMichael v. United States, 751 F.2d 303 (8th Cir. 1985) (discretionary function exception does not bar suit alleging negligent failure of Defense Department to supervise safety at contractor's plant where negligence was in implementation of Department's safety regulations).

2. Fidelity

JUDICIAL TESTS AND LEGISLATIVE COUNTER-EXAMPLE

A second problem is fidelity to the legislative intent behind the FTCA. Sketchy as it is, the legislative history does provide some specific examples of activity that was to be included in or excluded from the Act's waiver of sovereign immunity. The judicial efforts to craft comprehensive tests almost invariably focus on a sub-set of these examples, generating interpretations of the discretionary function exception that fit well with those examples but not with others.

Again, Judge Becker's opinion in *Blessing* is useful. Supporting the Third Circuit's adoption of a policymaking conduct test, Judge Becker notes that the legislative history of the exception reveals an intent broadly to shield discretionary policy determinations but to insulate only non-negligent efforts to implement policy. He cites both the first clause in 28 U.S.C. §2680(a) (excepting "[a]ny claim based upon the act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid") and the congressional declaration, in reports accompanying bills that evolved into the FTCA, the "exception intended to preclude . . . suit for damages against the government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid." 447 F. Supp., at 1170-1171. Judge Becker further notes the congressional statement that the section is "designed to preclude . . . claim[s] against a regulating agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority." He concludes that these examples demonstrate the intent to exempt only policymaking conduct, either in the

form of statues, regulations, or discretionary executive policy choices, and not to exempt the execution of those choices from judicial scrutiny in a tort suit. *Id.*, at 1169-70. A broader exception, after all, would conflict with the requirement that, in the irrigation project example, there be "no negligence on the part of any government agent."

This explanation distinguishes the legislative example that probably was used to illustrate the provision that immediately precedes the discretionary function exception (the application of law exception) in the list of FTCA exceptions, and also distinguishes one illustration of action within the discretionary function exception, from actions not analogous to either of these illustrations. But it ignores other illustrations of the discretionary function exception that appear in the very same paragraph of the same congressional reports and that would not satisfy the policymaking conduct test. The relevant paragraph, quoted earlier, declares that "negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted." The negligent *administration* of blacklisting or freezing powers hardly seems to fit the definition of policymaking conduct.

The congressional reports further associate the discretionary function exception with other exceptions, explaining that each leaves the government exposed to liability for ordinary common law torts: "Thus, [the sections specifically] exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions." What an odd illustration that would be if Congress intended to subject the government to FTCA liability for negligence in all aspects of the administration of its various activities save only the creation of policy! Surely the Congress could have come up with some more apt example of negligent administration had it wanted broadly to create liability for all actions that did not constitute the formulation of general policy. Surely, too, the language of the discretionary function exception seems peculiarly ill-chosen if the intent were to exclude only general policymaking conduct.

The problem of incomplete fidelity to the known indicia of legislative intent is by no means confined to proponent of the policymaking conduct test. All of the tests suffer from this problem to some degree, with the possible exception of the non-exclusive form of the regulatory functions test. The planning-level/operational-level tests (whether focused on status or conduct) and the discretionary conduct test conflict with the same legislative history as the policymaking conduct test. The governmental function test, and even the non-mandatory function test, is at best a strained fit with congressional suggestion that FTCA liability would attach to negligent execution of government activities such as flood control or irrigation projects. The initiating official status test also runs afoul of this suggestion.

LEADING BY EXAMPLE: LEGISLATIVE HISTORY AND THE FIDELITY PROBLEM

In part, the fidelity problem derives from the nature of the legislative history. The materials comprising the history occasionally declare what seem to be goals for the FTCA and for particular provisions such as the discretionary function exception. Yet, to divine the purpose of that provision, the legislative history requires interpreters seriously concerned with congressional intent to construct its meaning by extrapolation and interpolation from illustrations rather than by reconciliation of competing, comprehensive theses of the appropriate ambit for government liability. Courts must decide what the examples stand for and then decide how to link them one to the other in a fashion that allows application of the discretionary function exception to the heterogeneous situations in which it is implicated. This can be done, as in Part II above, by giving cursory attention to the congressional examples and extended consideration to the theoretical linkage, or it can be done by carefully examining the examples and essaying to work out from them to situations not plainly resembling a specific example. Whichever route is taken, however, should produce a test that is not inconsistent with the examples relied on by Congress when it passed the amorphous language of the Act: whatever the language means, it should mesh with the most concrete information about its intended application.

LEGISLATIVE EXAMPLES AND SUGGESTIONS

The legislative history contains four illustrations that indicate what specific conceptions of discretionary functions informed drafting of the FTCA and two general statements that provide less directed addenda. The first is the discussion of public works (irrigation and flood control projects) in connection with the application of law exception. The negative implication of this illustration is that negligent execution of public works projects are actionable even though their designs are not.

Second, regulatory enforcement programs, characterized by broad administrative authority (initially), governed only loosely by statute (the FTC and SEC references) are to be exempted in fairly sweeping fashion from FTCA purview. Allegations of lack of authority, of procedural delict, or of negligent execution of superiors' orders in implementation of these programs, all would seem insufficient to bring a tort claim within the scope of the Act.

Third, other administrative enforcement powers, exercised under somewhat stronger legislative constraints (freezing and blacklisting authority of the Treasury), also are broadly insulated against challenge through tort suits. Assertions of negligent execution or of excess of authority at any level would seem to be unavailing to tort plaintiffs so long as the existence of a general enforcement authority, arguably applicable, was made out.

Finally, the legislative history repeatedly contrasts, on the one hand, claims of wrongdoing in the course of exercising governmental authority and, on the other, the garden variety tort, (not involving any serious government decisionmaking high or low-level, policy- or practice-oriented), which is a

basis for tort liability regardless of the program that gives rise to it. This is the automobile collision/negligent driving example. To this list of specific examples, Assistant Attorney General Shea's testimony added two general descriptions of activity he took to be within the compass of the discretionary function exception. These are "the expenditure of Federal funds" and "the execution of a Federal project." He did not elaborate the contours of these exclusions, but described both as the the sort of "discretionary administrative action" that the Act did and should safeguard from scrutiny in damage suits.

ELASTIC PHRASES AND EASY CASES

These illustrations plainly leave much open territory to be charted. They do not explicitly reach wide expanses of federal action -- land management, welfare benefits administration, or much licensing administration, for instance -- even if they seem to suggest the appropriate treatment of these categories implicitly. And the illustrations are worded in a way that guarantees dispute. Take the first illustration, involving "an authorized activity, such as a flood control or irrigation project, where no negligence . . . is shown." The phrasing of this illustration is unfortunate as the notion of an "authorized" project is elastic. At one end, it could be simply the general authority to proceed with a project -- to build a dam on a given river at a generally described location subject to an initial budget constraint. At the other end of the spectrum, authority could require compliance with all the particular legal rules that govern environmental and safety concerns, procedures for approval of pleas and expenditures, employment constraints and so on. The reference to an absence of negligence likewise can be elastic.

At the same time, the illustrations indicate that, whatever one makes of the ambiguous phrases and empty spaces in the Act's legislative history, judicial construction of the discretionary function exception must comprehend at least two disparate classes of suit. Suits that challenge the application of government power to constrain the activities of private parties or to withhold government benefits from them as penalty for past misconduct (the generic categories to which the FTC, SEC, and Treasury examples belong) are outside the Act's scope. These functions should give rise to FTCA liability only at the periphery, as the auto accident example indicates. Suits that arise from public works projects, however, can secure recompense for negligence of government employees in at least the mechanical aspects of constructing or operating a dam or similar facility.

HIGH FIDELITY: DEFERENCE AND THE FIT BETWEEN HISTORY AND THEORY

This division is consistent with the theoretical analysis articulated earlier. Judicial supervision of regulatory functions is likely to generate more errors and higher costs, and produce less benefit, than will review of decisions associated with public works projects.

The relatively low benefit is most easily shown. In the regulatory arena, most decisions implicate complex, polycentric, politically-informed judgments. These rarely are constrained tightly by legislative command --

mandates that the FTC act to prevent "unfair or deceptive trade practices" throughout the American economy or that the FCC allocate use of the radio spectrum in a manner that promotes "the public interest, convenience, and necessity" are not atypical statutory directives -- and there is ample basis for belief that congressional influence is channeled more into selecting the agency jurisdiction to which these authorizations attach, influencing appointment of high-level agency officials, and monitoring agency funding than into articulation of legal standards.

Against this background, courts frequently accord substantial deference to the initial administrative choices on implementation of legislative commands. Although administrative actions produce increasingly strong legal guidelines for application as one descends from the highest-level policymakers to lower-ranking administrators, similar choices are implicated to some significant degree in an extraordinarily wide array of regulatory decisions. Even at the "operational level," many of these decisions continue to receive significant deference from courts. Insofar as courts would defer, a clear exception efficiently reduces litigation without sacrificing the interests of those plaintiffs who will be probable victors in court. Moreover, when regulatory action subject to legal constraints substantially and directly affects a discrete class of persons, identifiable *ex ante*, those almost invariably are accorded some form of direct judicial review, further reducing the benefit of *ex post* tort suits.

ERROR RATE AND THE REGULATORY EXCEPTION

The likely error rate and costs for judicial review of regulatory decisions are less easily shown but more important. Each has two aspects.

First, as to error rate, the insinuation of political concerns into the general run of administrative decisions in the regulatory arena provides ample opportunity for judicial misapprehension of the governing legal rule. Congress usually will not have articulated a clear rule, and the administrative rule, if clearer on its face, often is fleshed out by unwritten rules reflecting shifting concerns about matters such as resource allocation that are not readily reduced to hard-and-fast formulae. Does adoption of a rule declaring propensity for violence to be among the grounds for denial of parole mean that the Parole Board in fact has decided not to release prisoners who have any propensity for violence? Obviously, legislative decisions on funding prisons, the size of prison populations, judicial constraints on confinement conditions (including crowding), and the prevailing political winds will influence interpretation of this rule. There is no readily analogous body of common law decisions that will enable courts to feel comfortable examining these interpretations. If they examine them *ex post* for signs of error -- as when a paroled prisoner murders a witness against him immediately after his release -- even deferentially-inclined courts well may misconstrue the relevant rule.

Further, the sort of polycentric, complex decisions involved in regulatory programs interlock with so many other decisions that the proximate causation issue becomes an analytical nightmare. Hadley v.

Baxendale, 9 Ex. 341, 156, Eng. Rep. 145 (1854), the hoary old chestnut familiar to everyone who has experienced the first year of law school, is illustrative. Was the delay in delivery or the shipper's failure to take precautions (mechanical or contractual) against the interruption of work the proximate cause of his losses? Common law limitations on consequential damages from breach of contract (the principle for which *Hadley* stands) respond to the same instinct that supports restriction of liability for government regulation. The myriad affected actors, engaged in a range of activities, often are better positioned to know the effects on them of various potentialities and to take steps to prevent, limit, or insure against loss.

If the postal exemption of the FTCA is on all fours with Hadley v. Baxendale, the discretionary function exception's general exclusion of liability for regulatory functions is largely analogous. The parties affected by regulatory actions often will be sufficiently numerous, their activities and values sufficiently heterodox, and their options for protecting themselves against loss from the regulatory action sufficiently accessible, that a party other than the government should be found proximately to have caused the harm associated with the regulatory action.

This does not, of course, mean that *every* other party will be so positioned. Take the *Varig Airlines* case, for example. The passengers killed in the crash could, of course, have insured; they could have read extensively on air plane design and safety; and they could have bought higher-priced tickets on a carrier with newer, safer planes. But that does not make them the actors best positioned to avoid the loss. The manufacturers and purchasers of the airplane have more information than passengers on its safety, its design, its use, and its maintenance, and more information than the government on many of these issues as well as more options for risk-minimization.

Pressure to see the government regulator as the proximate cause of harm in this setting comes from the depth of the government's pockets and the certainty of their availability to passengers who were injured or to the estates of passengers who died. The Ninth Circuit's decision in *Varig*, reversed by the Supreme Court, may be a reflection of the same human impulses that have led to expansion of the joint tortfeasor concept with attendant application of the rule on joint and several damage responsibility. These impulses account for the very real concern about errors in this context.

ERROR COSTS AND REGULATORY FUNCTIONS

The concern over error costs from tort-based judicial review of regulatory activity is similarly real. In general, damage suits challenging regulatory activity will be more likely than those in other areas to generate undesirable incentive effects. Much regulatory behavior already is characterized by asymmetric incentives which potential tort litigation will exacerbate. The FDA example referenced earlier is paradigmatic. *See, e.g.*, Gray v. United States, 445 F.Supp. 337 (S.D. Tex. 1978). In some instances the risk of damage suits can be minimized by official action that is overly zealous in protecting health and safety (especially where the duty to comply with

regulatory commands is the only penalty visited on parties who are immediately and negatively affected by such action). In many instances, damage suits can be minimized by reduced levels of regulatory activity. This is particularly true where any affirmative action carries a litigation risk: administrative paralysis is simply a special case of asymmetric incentives.

Opening the courthouse door just a crack to damage suits arising from regulatory functions may seem appealing as a means of controlling egregious behavior while deferring to the sort of political judgments or scientific judgments that merit judicial acquiescence. But this effort entails process costs of sufficient magnitude not only to translate back into unfortunate incentive effects but also to be cause for concern in their own right. Virtually any bureaucratic exercise of regulatory authority can be disaggregated into component parts such that one part arguably falls outside the ambit of a narrow regulatory conduct exception, no matter how that more limited exception is defined. So long as an agency rule is not challenged on its face, some operational, legally-constrained behavior will be found to have contributed to the challenged exercise of authority. That will not assure that the "suable" behavior either exceeded the bounds of authority (violated some binding constraint) or had enough causal connection to the asserted harm to provide a basis for liability. It will, however, provide a set of triable issues, a problem taken up in the section immediately following.

ERRORS, ERROR COSTS, AND PUBLIC WORKS

The construction of public works projects stands in contrast to exercise of regulatory authority on all of these counts. First, while judicial review often is available for challenges to politically-linked judgments about such projects, *see, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), there seldom is opportunity for judicial scrutiny of the execution of such projects. Among other reasons, rarely will any plaintiff have standing to sue in this context before an injury has occurred. Whatever benefit attends judicial superintendence of these decisions, hence, is not already provided by means other than tort litigation.

Second, judicial errors are less likely in the public works context, as the decisions subject to review have relatively close private conduct analogues. Although sometimes scientific judgments are involved, more often these cases will present issues of fact and of ordinary judgment without significant policy components being implicated directly.

Third, tort-based review of decisions related to the construction of public works projects will have lower error costs. The incentives associated with public construction projects probably are not asymmetrical, but any asymmetry is apt to be ameliorated rather than exacerbated by potential liability. Construction projects generally have one visible input -- cost -- and many less visible material inputs. Given the strength of the budget constraint generally associated with these projects and the difficulty of monitoring in detail the other inputs, both the government supervisors and the private contractors have, at the margin, incentives to economize even at the expense

of some increased risk of quality degradation. Tort liability compensates for this tendency by marginally increasing incentives for risk reduction.

EASY CASES AND HARD TESTS: COURTS AND THE LEGISLATIVE CATEGORIES

The two categories marked out by the legislative history do not exhaust the possibilities. Much administrative activity may not be assimilable to either category. And much may be assigned to one or the other category only on the basis of analysis that surely will not be free from debate. But the division between regulatory functions and public works does provide some guidance to courts.

The division between these categories, however, while congruent with theory, is at odds with the explicit structure of several commonly used judicial tests. The actual *decisions* by courts are more compatible with the distinction of regulatory functions from public works. Many courts seem to recognize this division. While striving to create a unifying construction of the exception, their application of the test often varies in ways that increase fidelity, albeit at the expense of coherence. Thus courts that have adopted conduct tests that emphasize policy-planning requirements still can reach results that appear far more congruent with a regulatory function test. *See, e.g.*, Shuman v. United States, 765 F.2d 283 (1st Cir. 1985) (asbestos-related death of shipyard worker held barred by discretionary function exception; government failure to warn contractors about asbestos hazards reflects discretionary decision to have no policy about asbestos warnings). Other courts, however, resist this trade-off of consistency for accuracy.

3. Complexity

A third problem for many of the tests, especially for the conduct test, is their complexity. Simple as the underlying concept might be, application of the tests often require a trial to ascertain whether the conduct in issue qualifies for exception. *See, e.g.*, Blessing v. United States, *supra*. As the waiver of sovereign immunity (which the exception vitiates) is jurisdictional, this yields the anomaly of courts being unable to decide whether they have jurisdiction over a claim until after trial on the merits is concluded. The fact-dependency of tests such as those concerned with conduct -- which require courts and parties to develop information on the particular actions taken, and the basis for them, and the scope of each government official's actual authority before passing on the discretionary function claim -- also contributes to the incoherence of this body of law.

The problems of complexity and incoherence take on special significance given the concerns that prompt adoption of a discretionary function exception. To avoid the costs attendant to excessive, "trolling" litigation, as well as costs associated with officials' reactions to the threat of litigation, what is needed is a simple, easily administered test. Tests that are not readily administered inflict penalties on all who are subject to them. And uncertainty over outcomes decreases the likelihood that potential adversary parties will compromise rather than litigate. *See* Landes & Posner,

Adjudication as a Private Good, 8 J. Legal Stud. 235 (1979). A test that decides the discretionary function issue imperfectly at the summary judgment level, hence, may be far more responsive to the FTCA'S baseline concerns than a test that, after trial, perfectly divides cases that should be discussed under the discretionary function exception from those that should not. A test that does not always distinguish properly among cases, that yields unpredictable results, that often requires a trial, fails on three counts.

IV. DISCRETIONARY FUNCTIONS: THE EXCEPTION'S EFFECTS

Although the effects of the discretionary function exception are not easily discerned, given the courts' inability to settle on a single test, certain generalities about the exception's consequences seem plausible. Four observations about the exception are offered below. Conclusions are presented in the final section.

A. Observations

First, the very ambiguity of the discretionary function exception at present -- the lack of certainty regarding which test will be applied combined with the protean quality of most of the tests -- makes the exception attractive to government litigators. A respectable contention for the exception can be made out in nearly every case.

The frequency with which the exception is invoked also is increased by the prospect for summary judgment. This may at first blush appear to contradict the statement in Part III, regarding the undue difficulty of securing a decision on summary judgment, above, but in fact merely takes a look at the same information from a different vantage point. While the Supreme Court's *Varig Airlines* decision makes summary judgment in regulatory functions cases somewhat more likely, the prevalence of conduct-oriented tests and of regulatory functions tests that are narrowed by requirements of actual authority or of discretionary conduct limits the degree to which government lawyers can prevail on this ground without trial. Still, other available defenses -- defense on, for instance, no duty of care, no causation, or no negligence grounds -- offer even less probable bases for summary judgment.

Second, while the exception will be invoked often, as presently construed it seems not to exert a significant deterrent effect on litigation against the government. Without a sophisticated empirical study (and probably even with one), the exception's impact on filings against the government must be the object more of surmise then of evidence. But there are two bases for conclusion that the exception now exercises scant dissuasive effect. One is mildly empirical: observation that more than a few suits that seem to raise claims at the core of the discretionary function exception's protected zone have been pursued to judgment, even through the appellate stage. *See, e.g., Varig Airlines, supra;* Baker v. United States, 55 U.S. Law Week 2648-49 (9th Cir., No. 86-5578, May 18, 1987) (negligence in regulating and licensing manufacture of polio vaccine); Proctor v. United States, 781 F.2d 752

(9th Cir.), *cert. denied,* 106 S.Ct. 2918 (1986) (negligence in FAA regulation of airline safety); Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986) (negligence in OSHA regulation of chemical plant safety); Collins v. United States, 783 F.2d 1225 (5th Cir. 1986) (negligent regulation of mine safety); Wendler v. United States, 782 F.2d 853 (10th Cir. 1985) (FAA suspension of pilot's license); Taitt v. United States, 770 F.2d 890 (10th Cir. 1985) (parole); Baxley v. United States, 767 F.2d 1095 (4th Cir. 1985) (FAA failure to promulgate safety regulations for ultralight aircraft); Gabarino v. United States, 666 F.2d 1061 (6th Cir. 1981) (FAA safety regulation of hang gliders); Emch v. United States, 630 F.2d (7th Cir. 1980), *cert. denied,* 450 U.S. 966 (1981) (bank regulation); Gray v. United States, 445 F.Supp. 337 (S.D. Tex. 1978) (drug regulation). The other basis is theoretical as well: the relative propensity of damage plaintiffs to pursue low-probability/high payoff suits against ultra-solvent defendants makes it difficult to deter suit absent an extraordinarily fail-safe defense, and the confusion over application of the exception not only allows plaintiffs some significant prospect of success even in these core cases. Plaintiffs, indeed, prevailed at the court of appeals level in *Varig*, *Baker*, and *Collins* , cases clearly within the core of the exception's intended scope.

This last observation can be restated in terms of the expected returns of litigation and the expected utility of litigation. Uncertainty does not necessarily produce aggregate litigation outcomes more favorable to plaintiffs: if the uncertainty generates increased variation in litigation outcomes that is randomly distributed, windfall losses should offset windfall gains, and litigation still would have the same expected return. The same is true if, in addition to increasing the *number* of departures from the pattern of litigation outcomes, legal uncertainty increases the *magnitude* of departures (increasing the dollar gains and losses). Again, assuming random distribution, expected returns remain unchanged. That would not be the case if departures from the norm systematically fall on one side of the line. This might in fact be the case with FTCA suits, but, as discussed earlier, the point cannot be made with any confidence.

The departure from the standard rational expectations model of litigation introduced by analogizing high-stakes litigation to a lottery, however, illustrates that even with constant expected returns, increased uncertainty can prompt additional suits. At low probabilities, increases in the dispersion of outcomes will increase litigation, ceteris paribus, for the same reason that lotteries with very high payoffs appear to be sustainable with relatively low expected returns (a fact not lost on owners of gambling establishments in Las Vegas, Atlantic City, or elsewhere, or on the treasurers of an increasing number of states). As the spread between the amount bet and amount that might be gained increases, potential players exhibit increased risk preference.

If this behavior is put into the rational expectations framework, and not in terms of foolish optimism, the change in volatility can be seen to contribute to potential litigants-bettors' utility: the disutility of a relatively certain small loss appears less than the expected utility of a large, uncertain gain even when the probability-weighted terms are equal or (within some tolerance)

incline against the gain. Hence, as all litigation, FTCA suits included, becomes increasingly a high-stakes affair, increased outcome uncertainty will produce more litigation. The current law on discretionary functions may be more certain than it was before *Varig Airlines* (by no means an easy conclusion to substantiate), but it can hardly be said to be among the clearest bodies of federal law.

Third, the focus of some courts on the delegation of discretion to the officials whose actions are proximately linked to the harm has prompted efforts to reduce specificity in written agency directives. The Department of Justice rightly advises officials at agencies where significant numbers of large-money damage actions are likely that these agencies' exposure to damage liability (or, more accurately, the government's exposure to damage liability) can be reduced by substitution of non-mandatory guidelines for mandatory instructions to subordinates. The corollary of a reduction in clear, written instructions is an increase in informal control or in unchecked administrative discretion. It is not clear that "line" officials at the agencies -- those who are responsible for directing the agencies' day-to-day operations rather than for litigating when those operations give rise to suit -- have been responsive to these suggestions, although possibly they have adjusted to the prospect of federal liability in other ways. To the extent current judicial constructions of the FTCA do induce movement away from clear written directives, or similar adjustment, the movement seems an unfortunate by-product, not a desired result, of the courts' decisions.

Fourth, following from the observation about line officers' uncertain disinterest in formally altering their behavior to reduce the risk of government liability, the current law seems to have surprisingly little discernible effect on most government business. Department of Justice officials, while dismayed by some court decisions, generally approve the courts' handling of discretionary function claims. Other government officials are less cognizant of the sweep of judicial decisions, focusing more narrowly on decision affecting their particular agency, program, or program type. These officials express confidence that the judicial system, despite occasional lapses, will not visit liability on the government on account of the actions of responsibility performing officials. Some opine that even if the courts misinterpret the discretionary function, other FTCA provisions or tort doctrines (such as duty of care principles) will generate results similar to those a well-constructed discretionary function exception will yield. The sample of officials I have interviewed is small and perhaps unrepresentative; conclusions should be drawn from this set of conversations with extreme care and considerable skepticism. Yet, in light of the widespread concern about liability -- among product manufacturers, doctors, municipal officers, news enterprises, and so on -- the relative calm of government officials was striking.

B. Conclusions

The usual end-part to articles and reports presents the author's final thoughts under the singular heading "conclusion." That form seems

inapposite here, as two different conclusions are suggested by the material discussed above.

First, the discretionary function exception should be clarified. The use of numerous, incompatible tests for application of this exception plainly signals a problem with current law. The inconsistent results reached by various courts are not products of differences in the underlying state tort law, but instead reflect federal courts' failure to clarify a single provision of federal law. Some ambiguity necessarily accompanies the effort to delineate the appropriate occasions for federal liability, but the current state of the law certainly extends confusion well beyond its natural bounds.

Clarifying the exception will not be easy, but some improvement can be made relatively painlessly. The original meaning of the exception probably best is captured by combining the test focused on policymaking conduct with the exclusion of liability for regulatory functions. This combination will not fully eliminate the problems of unclarity and complexity associated with current interpretation of the exception. This move would, however, both bring the explicit construction of the exception more in line with its intended meaning and better assimilate it with the theoretical framework suggested in Part II. Making the regulatory function element more explicit also should facilitate summary judgment.

The second conclusion addresses implementation of this suggestion. Put simply, the conclusion is that there is little likelihood of accomplishing this change.

In one sense, this may appear paradoxical. After all, no legal impediment to accomplishing this reform by judicial construction exists. The "change" would conform to legislative history for the present statute. Further, it would conform to what most courts now *do* most of the time, although it is less congruent with what courts *say* they are doing. The continued failure of courts to converge on a consensus meaning for the exception, however, makes this solution unlikely.

Legislative restatement would be the more direct route to this clarification, but this too is unlikely. Were the proposed change widely accepted as sensible, a result I will not forejudge, that would not suffice to overcome a critical difficulty: no significant constituency is interested in working to correct the problems presented by current construction of the discretionary function exception. Partly, the lack of interest reflects the fact that, by and large, judicial decisions have not veered badly off the mark. Partly, it is due to the nature of the problems judicial misinterpretations have spawned.

The adverse effects from misinterpretation of the exception may be serious, but they have been channeled into relatively invisible forms. Alteration of government behavior to avoid potential suits, if it has occurred, will rise to public view only in extraordinary circumstances. And even then, the causal link to construction of the exception is inherently problematic.

Increased frequency of suit against the government and increased cost of suit similarly are not likely to be demonstrably connected to decisions on the discretionary function exception. Even if they were, who would object? The increased cost from more, and more expensive, suits is apt to be a trivial part of the federal budget and even of the budget for the Department of Justice, which bears principal responsibility for litigation over federal tort claims. Taxpayers surely would not mobilize to argue against this expenditure or to lobby for a change in the law to make the expenditure unnecessary: so far as their individual interests are implicated, that would be the ultimate trivial pursuit. Public interest groups, whose interests often parallel those of plaintiffs litigating against the government, are similarly unlikely advocates of change.

Of course, those who litigate these claims on the government's behalf would prefer a different provision with greater certainty and less chance of an occasional defeat in a suit that seems to concern the very sort of activity the exception sought to protect. But, for several reasons, government officials also are unlikely to favor a change. As it now stands, the body of judicial decisions interpreting the discretionary function exception, while imperfect, generally reaches results acceptable to the government and is the strongest defense to FTCA liability government litigators now possess. If this provision is open for reexamination given the uncertainty of the political process, officials doubtless will be concerned about the shape a new provision would take. There is, indeed, something quite comfortable about the devils you know. Finally, even if a provision these officials thought better were enacted, some uncertainty inheres in any new statutory language. Alteration of the exception well may reduce uncertainty about its application, but *ex ante* the amendment process increases uncertainty, especially for the short term.

There should be no doubt that the discretionary function exception is in disrepair. Judicial decisions have exacerbated the law's uncertainty and, to a lesser degree, have exposed the government to damage liability in cases that appear clearly assimilable to the congressional examples of activities the exception was intended to insulate. But, if the current discretionary function exception is not perfect, it also, in the language familiar to politicians and bureaucrats, "ain't broke." Getting it fixed now seems a bit much to ask.

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