Government Liability - Federal Tort Claims Act - Discretionary Function Exception

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Recent Decisions

Government Liability—Federal Tort Claims Act—Discretionary Function Exception—The United States Supreme Court held that the discretionary function exception of the FTCA will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow.


On May 10, 1979, at the age of two months, Kevan Berkovitz ingested a dose of oral polio vaccine, Orimune, manufactured by Lederle Laboratories. This dosage caused Kevan to contract a severe case of polio, leaving him close to total paralysis and unable to breath on his own.

A suit was filed against the United States in federal district court by Kevan, joined by his parents as guardians. This complaint was filed under the Federal Tort Claims Act, (“FTCA”), 28 U.S.C. §§ 1346(b), 2674, alleging that the United States was liable

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2. Id. The communicable disease control center determined that Kevan contracted his polio from the vaccine he ingested. Id. at 1957.
3. Id.
4. Id. Lederle Laboratories was also sued by the petitioners in a separate civil action, which was settled prior to the filing of this case. Id. at 1955, n. 1 Throughout this Note, the term petitioners refers to Kevan joined by his parents.
5. 28 U.S.C § 1346(b) entitled “United States as defendant” provides in pertinent part:
Subject to the provisions of chapter 171 of this title, the district courts together with the United States District Court for the district of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C § 2674(1983) entitled “Liability of the United States” states: “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the
for Kevan’s injuries because the Division of Biologic Standards ("DBS"), had wrongfully issued a license to Lederle Laboratories to produce Orimune and additionally that the Bureau of Biologics, a division of the Food and Drug Administration, ("FDA"), "had acted wrongfully in sanctioning the release of the vaccine lot which contained Kevan’s dose." Petitioners alleged that the above acts constituted a violation of federal law and policy regarding the inspection and approval of vaccines for polio.

The United States moved to have the suit dismissed for lack of subject matter jurisdiction arguing that the alleged actions fell within the discretionary function exception of the FTCA. The motion to dismiss was denied by the district court stating that neither the release of a specific lot of vaccine to the public or the licensing of Orimune was a "discretionary function" included within the contemplation of the FTCA. At the request of the government, the district court certified its decision for immediate appeal to the Third Circuit, the court of appeals accepted jurisdiction.

In reversing the decision of the district court, the court of appeals stated that "the discretionary function exception is inappli-
cable to non-discretionary regulatory actions." Although rejecting the government's argument that all claims arising out of the regulatory activities of federal agencies are barred by the discretionary function exception, the court held that here there could be no basis for a suit against the government since the licensing and release of specific lots of vaccine to the public were discretionary acts. The court relied on *United States v. S.A Empresa De Aera Rio Grandese*, in making their determination that the approval of the release of the polio vaccine was a discretionary act.

Certiorari was granted by the Supreme Court to resolve a conflict which had arisen in the circuits regarding the discretionary function exception in relation to the government's regulation of polio vaccines. A unanimous Court reversed the dismissal of the suit by the court of appeals.

Since there was a dismissal in the Court below, the Supreme Court was presented with the question of whether or not the dismissal was proper and if the petitioners' suit should be barred by the discretionary function exception of the FTCA, 28 U.S.C. § 2680(a).

Writing for a unanimous Court, Justice Marshall noted that the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." The analysis by the Supreme Court began with an examination of the principles previously laid down by the Supreme Court as

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13. *Id.* (quoting Berkovitz v. United States, 822 F.2d 1322, 1328 (3d Cir. 1987)).
16. 108 S.Ct. at 1959 (1988). The court noted that the process used to release polio vaccines was similar to the "regulatory scheme" used by the Federal Aviation Administration (FAA) when they spot check airplanes for compliance with safety standards. This spot checking was found to be a discretionary action insulated from liability. *Id.*
18. 108 S.Ct. at 1958. Compare Berkovitz v. United States 822 F.2d 1322 (3d Cir. 1987), holding that the discretionary function exception barred a suit alleging the wrongful action in the licensing and approval of a specific lot of polio vaccine, with Baker v. United States, 817 F.2d 560 (9th Cir. 1987), *cert. denied* 108 S. Ct. 2845 (1988), holding that discretionary function exception did not bar suit alleging a negligent decision to license a polio vaccine: and Loge v. United States 662 F.2d 1268 (8th Cir. 1981), holding that discretionary function exception did not bar suit alleging negligence in both the licensing of a polio vaccine and the release of a particular vaccine lot.
20. *Id.* See supra note 9.
21. *Id.*, (quoting United States v. Varig Airlines, 467 U.S. 797, 808 (1984)).
well as the specific language and legislative history of the discretionary function exception of the FTCA.22 Previously, discretionary action had been viewed as some type of conduct which involved an element of choice, or judgment on the part of an individual.23 When an employee is required to follow directives, regulations or statutes his conduct will not be considered to be discretionary.24 If an employee’s conduct does not necessitate exercising any judgment or choice, then there is no discretionary action designed to be protected by the exception.25 If the alleged wrong does involve judgment or choice, the inquiry by the court will be to determine if that specific judgment or choice was the type of action contemplated to be covered by the discretionary function exception.26 “... [T]he discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.”27 The Supreme Court specifically rejected the argument presented by the Government in the courts below, that any and all suits arising out of conduct which is based on regulatory programs or federal agencies should be barred.28

In analyzing the claims against the government set forth by the petitioners, the court reviewed the process used for both the licensure and release of vaccines used for the prevention of polio.29 The petitioners’ argument was set forth in two main parts. The first claim alleges that when DBS issued a license to Lederle Laboratories to produce the Orimune vaccine it violated a federal statute

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23. Id. at 1959.
24. Id. See, Dalehite v. United States 346 U.S. 15 (1953), which stated that the exception protects “the discretion of the executive or the administrator to act according to one’s judgment of the best course. . . .” Id. at 34.
26. Id. See also Westfall v. Erwin, 484 U.S. 292 (1988) which recognized that conduct prescribed by law cannot be discretionary.
27. 108 S. Ct. at 1959.
28. Id. The court cited Varig as showing where the discretionary function exception bars a claim involving policy. Id. In Varig, there were tort claims which arose out of airline accidents. The victims of these accidents alleged that the FAA had been negligent in certifying specific planes to fly. The court held that the decision by the FAA to certify the planes the way they did was a discretionary act protected from liability claims. They also noted that the “spot-checking” program developed to enforce safety standard compliance was also a policy determination, discretionary in nature, which insulated the employees who administered the program from liability. S.A. Empresa De Viacco Aera Rio Grandese v. United States, 467 U.S. 797, 815-16 (1984).
and a federal regulation. In order to market a live polio vaccine a manufacturer must first receive a product license as required by federal law. In order to be eligible for a license, the manufacturer must first provide a sample of the product. The manufacturer must then administer tests which measure the safety of the product at various times in the course of manufacturing the product. When finished with this testing process, the manufacturer must submit a product license application to DBS along with the executed test results and a final sample of the vaccine. When making the decision to issue a product license, DBS must follow the guidelines set up by the various regulatory and statutory provisions.

The petitioners' claim alleges that DBS licensed Orimune without first receiving the necessary test data indicating that the product complied with safety standards. Issuing a license without the necessary test data would be a violation of specific regulatory and statutory provisions. Justice Marshall, in applying this allegation to the discretionary function exception, held that the petitioners claim would not be barred since the receipt of the test data on the

30. *Id.* at 1960.
32. 108 S. Ct. at 1961. To obtain a sample product the manufacturer obtains an original virus strain. From this, he then grows a seed virus from the strain which is used to produce monopools, from which portions are taken from the product that is used by the consumer for vaccination. The safety criteria for this process is set forth by several regulations for the production of the strain of the original vaccine: 42 C.F.R. §73.110(b)(2) (Supp. 1964); 21 C.F.R. §630.10 (b)(3)(4) (1987), and the vaccine monopools, 42 C.F.R. §73.114 (Supp. 1964); 21 C.F.R. §630.16 (1987).
33. 108 S. Ct. at 1961. Lederle laboratories was issued a license by DBS to produce Orrimune in 1963. Throughout the footnotes the first C.F.R. regulation referred to is the regulation in effect at the time Orrimune was licensed. If the current regulation is substantially the same, the parallel cite is given to the current regulation. *Id.* n.7
34. *Id.* at 1961. *See* 42 C.F.R. §§73.110,73.114 (Supp.1964); 21 C.F.R. §630.16 (1987).
37. 108 S. Ct. at 1961. 42 U.S.C. § 262(d) of the Public Health Service Act provides that:

Licenses for the maintenance of establishments for the propagation or manufacture and preparation of products [including polio vaccines] may be issued only upon showing that the establishment and the products for which a license is desired meet standards, designed to insure the continued safety, purity, and potency of such products, prescribed in regulations, and licenses for new products may be issued only upon a showing that they meet such standards. All such licenses shall be issued, suspended, and revoked as prescribed by regulations. . . .

vaccine is a prerequisite to issuing a license.\textsuperscript{38} DBS does not have discretionary powers in the area of issuing a license because this process is covered by specific statutes.\textsuperscript{39} The court concluded that the first theory on which petitioners’ based their claim imposes no bar to a suit against the government under the FTCA.\textsuperscript{40}

The second part of petitioners’ argument, which also refers to the licensing of Orimune, was not set forth in a clear and concise manner.\textsuperscript{41} The alleged misconduct revolves around the Orimune being licensed even though it failed to meet regulatory safety standards.\textsuperscript{42} The court saw this argument as proceeding in any of three ways, depending upon the facts presented.\textsuperscript{43} In order to properly analyze when the discretionary function exception would and would not apply, the court analyzed the three possible meanings of petitioners’ claim and how each possibility would be seen under the discretionary function exception clause of the FTCA.\textsuperscript{44}

If the allegation is construed to mean that DBS licensed Orimune when they: 1) knew it failed to comply with regulatory standards, or 2) never determined if the vaccine was in compliance; the discretionary function exception would not bar this suit.\textsuperscript{45} The court reasoned that these allegations would fall under the regulations set forth for licensing polio vaccines and these regulations specifically state that a license may not be issued without examining the product to be licensed and finding that it complies with all standards set forth in applicable regulations.\textsuperscript{46} The second part of the claim by petitioners addresses the liability of the government when an agency ignores a duty imposed by law.\textsuperscript{47} The court held that, “[w]hen a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary exception

\begin{footnotes}
\item[39] Id.
\item[40] Id. at 1962. See supra, note 34 and 42 C.F.R. § 73.3 (Supp.1964); 21 C.F.R. § 601.2 (1987), providing that an application for licensure shall be deemed as filed only upon receipt of relevant test data.
\item[41] Berkovitz v. United States, 108 S. Ct. 1954 at 1964 “Petitioner’s other allegation regarding the licensing of Orimune is difficult to describe with precision. . . . Neither petitioner’s complaint nor their briefs and argument before this Court make entirely clear their theory of the case.” Id.
\item[42] Id.
\item[43] Id.
\item[44] Id.
\item[45] Id.
\item[46] Id.
\item[47] Id. See 42 C.F.R. § 73.5(a) (Supp. 1964); 21 C.F.R. § 601.4 (1987).
\end{footnotes}
does not apply."\textsuperscript{48} If the second part of the petitioners’ claim is interpreted as meaning that DBS incorrectly found that Orimune complied with regulatory standards, then the court’s decision turns on a different analysis of the issue.\textsuperscript{49} If the policy, which guides the determination of assessing compliance with regulatory standards, involves judgment on the part of the agency it may be insulated from liability under the discretionary function exception.\textsuperscript{50} The issue of whether or not the policy involved is a permissible exercise of policy choice could not decided by the Supreme Court due to lack of necessary factual information regarding this claim, and will have to be decided by the District Court if this particular claim is pursued by the petitioners’ on remand.\textsuperscript{51} Since petitioners’ claim has two prongs it is important to note that there are different regulations for the issuing of a license, and the distribution of that product to the public. The release for distribution places a burden on the manufacturer, and not the Bureau of Biologics, ("Bureau"), to inspect lots that will be distributed to the public for compliance with regulations.\textsuperscript{52} The Bureau is allowed to determine the proper way in which to regulate the release of the vaccine much the same way that the FAA regulated the airplanes in \textit{Varig}.\textsuperscript{53} Any claim which attempts to challenge the policy set forth by the Bureau of Biologics in regulating the release of vaccines, will be held to be barred under the discretionary function exception of the FTCA.\textsuperscript{54} Any similar claim, attempting to hold individual employees liable, will be barred if the policies set forth by the Bureau allow for policy judgments to be made by employees on an individual basis.\textsuperscript{55} If the Bureau policies do not allow an employee to exercise his/her own judgment, and thus not use any discretion, the petitioners’

\textsuperscript{48} Berkovitz v. United States, 108 S. Ct. 1954, 1963 (1988). The government conceded at oral argument that the DBS has no discretion to issue a product license without an examination of the product and a determination that the product complies with regulatory standards. \textit{Id.} n.10.
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} \textit{See} 21 C.F.R. § 610.1 (1978). This is the regulation in effect when Lederle Laboratories released the lot of vaccine which injured Kevan. The current regulations are basically the same and have the same citation. Berkovitz v. United States, 108 S. Ct. 1954, 1961 n. 12.
\textsuperscript{53} \textit{Id.} at 1964.
\textsuperscript{54} \textit{Id.} \textit{See supra}, note 25.
\textsuperscript{55} \textit{Id.} at 1964.
Petitioners' second claim should not have been dismissed since they allege that there was a policy in effect at the time the vaccine was released, and that the Bureau would test all vaccines to make sure they were in compliance with set safety standards, and forbid the distribution of any specific lot which failed the testing. In sum, the Supreme Court concluded that petitioners' claim against the government should not have been dismissed since the alleged acts which caused injury to Kevan could be seen as involving acts that were not discretionary in nature but a result of following set policies which did not involve a permissible exercise of policy discretion, or in the alternative, regulations that mandate specific actions on the part of governmental agencies.

The factual allegations will have to be proven upon remand to the lower court in accordance with the findings set forth by the Supreme Court. In order to prevail upon remand, petitioners will have to prove that the actions which caused the harm to Kevan, fall within the parameters set down by the Supreme Court as an activity which does not fall into the discretionary function exception of the FTCA.

The justices, in formulating their decision in Berkovitz, took into account both the history of the FTCA as well as the case law that developed around the discretionary function exception.

To understand the FTCA it is necessary to understand the way in which this act evolved. The "King can do no wrong" was the prevalent view when the United States began as a country. Under this English common law theory of sovereign immunity, suit against the government and its employees for any negligent acts

56. Id. Cf. Varig v. United States, 467 U.S. 797, at 820 (1984), which held that negligent policy judgment regarding the proper inspection of planes on the part of FAA employees, is barred by the discretionary function exception.

57. Berkovitz v. United States, 108 S. Ct. 1954, 1964 (1988). See also Indian Towing Company v. United States, 350 U.S. 61, 69 (1955) which held that a negligent failure to maintain a lighthouse in good working order was not barred, even though the decision to maintain the lighthouse service was a discretionary policy judgment.


59. Id. at 1965.

60. 3 W. Holdsworth, A History of English Common Law, 458-69 (5th ed. 1942). This idea came into being from the concept that the king was infallible and to allow the subjects of the king to sue him in his court would contradict this infallibility. Id.

61. In the case of Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the United States adopted this theory of sovereign immunity. The court stated that according to the Constitution "a state [could] never be subjected, at the suit of any individual, to any judicial tribunal, without its own consent; for it can never be made a party defendant in any case, or by any party, except in cases between it, and another state, or a foreign state." Id. at 308.
was barred. In 1855 the United States Government began taking the first steps toward allowing itself to be sued by establishing the Court of Claims. In response to an extremely high number of private bills in the Court of Claims, against the United States, Congress considered and enacted the FTCA in 1946.

The FTCA was enacted to relieve Congress of the task of considering all the private relief bills and to give the courts the role of considering these bills. The FTCA was enacted as part of the Legislative Reorganization Act of 1946, with a purpose of "[providing] for increased efficiency in the legislative branch of the Government." While doing away with the concept of sovereign immunity, the enactment of the FTCA did not constitute a waiver of all rights on the part of the United States Government in suits brought against them.

Section 2680 of the FTCA, referred to as the discretionary function exception, is just one example an the area where the government has shielded itself from liability. The inclusion of this exception in the FTCA was seen as a way of protecting the Government from liability in tort for acts which are the result of errors in discretionary functions and administration. As an Assistant Attor-

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62. Id. "a state [could] never be subjected, at the suit of any individual, to any judicial tribunal, without it's own consent..." Id.
63. Ch. 22. 10 Stat. 612 (1855) This was an advisory body which heard claims and then would prepare a bill which awarded what they considered to be just compensation. This bill was then presented to Congress who had the choice of enacting it into law or doing nothing about the bill. Baer, Suing Uncle Sam in Tort, 26 N.C.L. Rev. 119 (1947) For further information regarding the evolution of the Court of Claims See: Baer, Suing Uncle Sam in Tort, 26 N.C.L. Rev. 119 (1947).
64. See H.R. Rep. No. 1287, 79th Congress., 1st Sess. 2, reprinted in 1946 U.S. CODE AND CONG. & AD. NEWS 807 (which discusses the policy and goals of the FTCA). In the 77th Congress, 1,829 private bills were introduced into Congress and 593 were approved. The total amount of compensation was approximately a little over one million dollars. Id. In the 70th Congress, 2,268 bill were introduced, $562 million was paid out in tort claims, and 336 of the bills were approved. Id. See also; Reynolds, The Discretionary Function Exception and the Federal Tort Claims Act. 57 GEO. L. J. 81 n. 5 (1968) (the author suggests that the private bill system was unresponsive to the needs of the claimants and was also very cumbersome.).
65. Downs v. United States, 522 F.2d. 990, 995 (10th Cir. 1975) (Discussing the legislative history of the FTCA).
67. An Assistant Attorney General explained to the congressional committee that the purpose of § 2680(a) was to avoid the possibility that courts would authorize suits against the United States for the negligent performance of legally authorized activities, on the basis that a private individual would be liable for the same actions. "It was not intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort." Hearings on H.R. 5373 and H.R. 6463, before the House Committee on the Judiciary, 77th Cong.,
ney General said when giving testimony before the House Committee on the Judiciary, the exception was “designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission, or the Securities and Exchange Commission, based upon alleged abuse of discretionary authority by an officer or employee.”

The term “discretionary” was not defined when the FTCA was enacted. Congress’ failure to define discretionary, coupled with limited legislative history, regarding what is and is not discretionary, has resulted in the courts having to determine when the discretionary function exception is to be applied.

Although the FTCA and the discretionary function exception have been in place since 1946, the first time the Supreme Court addressed the application of § 2680 to an action under the FTCA was in Dalehite v. United States. The government was sued as a result of an explosion in the port of Texas City, Texas which leveled the city and killed and injured numerous people. Fertilizer had been loaded onto two ships for shipment to Europe under a program created by the United States to increase the supply of food under post-war military occupation. “[F]ertilizer had been produced and distributed at the instance, according to the specifications and under control of the United States.” The fertilizer was sold to the French government and loaded onto the ships by independent stevedores who were hired by the French government. No single individual act of negligence being shown, the petitioners based their claim on the fact that the United States Government “had brought liability on itself for the catastrophe by

68. Downs v. United States, 522 F. 2d 990, 996 (10th Cir. 1975).
70. 346 U.S. 15, (1958). The Supreme Court did address the FTCA prior to 1953 however, this was the first case dealing specifically with the interpretation of § 2680. Prior to Dalehite the courts usually interpreted the FTCA liberally, which prevented the court’s from interpreting something which Congress left unclear. See Feres v. United States, 340 U.S. 135, 139-40 (1950) and United States v. Aetna Casualty and Surety Co., 338 U.S. 135, 383 (1949).
71. 346 U.S. 15 (1958). The petitioners sought damages for the death of Henry G. Dalehite who died in an explosion of fertilizer with an ammonia nitrate base. This case is referred to as a “test case” by Justice Reed representing 300 separate personal and property claims in the aggregate amount of two hundred million dollars. Id. at 17.
72. Id. at 18.
73. Id. at 22.
using a material in fertilizer which had been used as an ingredient of explosives for so long that industry knowledge gave notice that other combinations of ammonia nitrate with other material might explode. In a four-three decision the Court held that the government was not liable to the petitioners and the activities upon which the petitioners wished to place liability on the United States Government falls within the exception of § 2680.

The Court first discussed the legislative history of the FTCA. Their next inquiry was into the interpretation of the Act itself. They reiterated the standard that an action against the government will only lie where it has been authorized by the legislature. The Court, while defining the activity as discretionary in this particular case, did not specifically define discretionary. The Court did not totally avoid the issue of what is to be considered a discretionary activity, rather they set forth some guidelines to be used in deciding if an activity is discretionary. A discretionary duty or act upon which a person may sue the government is more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official direction cannot be actionable.

Having given a fairly broad and sweeping definition of discretion the Court then offered a test to be applied when dealing with section 2680. Their test involves defining the activity as either falling into the category of, "operational activities" of the government, which would not be barred by § 2680 and "planning" level activities which would be barred from suit under § 2680. In applying this test to the case before them, the Court found that the actions

74. Id. at 23. The specific charge of negligence was that the United States had shipped or allowed shipment of Fertilizer Grade Ammonium Nitrate, ("FGAN"), into a congested area without first investigating the properties of FGAN, and without warning of a possible explosion under certain circumstances. Id.
75. Id. at 47.
76. Id. at 24.
77. Id. at 30.
78. The court said "it is unnecessary to define, apart from this case, precisely where discretion ends." Id. at 35.
79. Id. at 34-35 The court said that if the exception was not seen this way its objective would fail when it was most needed. " . . . [W]hen a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing discretion." Id. at 36.
80. Id. at 37-42.
of manufacturing, packaging, and transporting the fertilizer as well as the actual program itself were all “planning” activities immune from suit under the FTCA.\textsuperscript{81}

The next case to challenge the government’s immunity under the discretionary function exception was, \textit{Indian Towing v. United States}.\textsuperscript{82} A ship, which relied on a lighthouse set up by the government, ran aground due to the lighthouse being improperly lit.\textsuperscript{83} The owner of the ship and the insurance company alleged that Coast Guard personnel were negligent in their responsibility to properly maintain the lighthouse and thus the government should be held liable for damages under the FTCA.\textsuperscript{84} A 5-4 decision found that the government would be liable if the negligent acts of the Coast Guard caused the damage to the ship and its cargo.\textsuperscript{85} The Court focused its reasoning on the language of § 2674 (and that implied in § 2680), which places liability on the government “in the same manner and to the same extent as a private individual under like circumstances. . . .”\textsuperscript{86} The government focused its argument on it’s reading of the FTCA and determined that it meant that the government could not be liable in this case because the maintenance and upkeep of a lighthouse is a “uniquely governmental function” and since a private person could not perform this duty, the government should not be liable.\textsuperscript{87} The Supreme Court did not agree with the government’s interpretation of the FTCA and said that once the government made a decision to provide a service, even though that decision itself may be discretionary, it must provide the service with due care.\textsuperscript{88}

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\textsuperscript{81} Id. All the acts were made at the “planning” level and not an “operational” level. These activities included: selecting the coating for the fertilizer which made the probability of explosion high; putting the fertilizer in paper bags which were subject to tearing and flammable; putting the fertilizer in the bags at a high temperature; packing the fertilizer in a way which did not encourage cooling; and not labeling the bags as a fire hazard and as a dangerous explosive. \textit{Id}.  \\
\textsuperscript{82} 350 U.S. 61 (1955).  \\
\textsuperscript{83} \textit{Id}. at 62.  \\
\textsuperscript{84} \textit{Id}. at 61-2. “[F]ailure of the responsible Coast Guard personnel to check the battery and sun relay system which operated the light; the failure . . . to make a proper examination of the connections which were ‘out in the weather’; the failure to check the light between September 7 and October 1, 1951; and the failure to repair the light or give warning that the light was not operating.” \textit{Id}. at 62.  \\
\textsuperscript{85} \textit{Id}. at 69.  \\
\textsuperscript{86} \textit{Id}. at 64-64.  \\
\textsuperscript{87} \textit{Id}.  \\
\textsuperscript{88} \textit{Id}. 68-69. The court pointed out that “it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his ‘good Samaritan’ task in a careful manner. “ \textit{Id}. 64-65. The court also noted that the purpose of
The government was held liable under the theory that the activity involved was one which took place at the "operational" level, thus subjecting the government to liability. The Court did not overrule Dalehite but distinguished this case from it, stating that "[t]he differences between this case and Dalehite need not be labored. The governing factors in Dalehite sufficiently emerge from the opinion in that case." Two years later, in Rayonier, Inc., v. United States, another case was brought before the Supreme Court under the discretionary function exception of the FTCA. Two cases were brought by individuals seeking damages which they alleged were caused by the negligence of Forest Service employees in letting a fire start on government land and in failing to use due care to put that fire out. Faced with determining if the government would be immune from liability for the negligence of these employees, the Court reaffirmed its finding in Indian Towing that the government is not shielded from liability simply because the acts in question are "uniquely governmental." Using the same reasoning and test set forth in Indian Towing, Justice Black stated that a person cannot be deprived of his or her rights under the FTCA "... by resort to any alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity." The Court made it clear that when the FTCA was established the government knew that the treasury would be affected by meritorious claims, but that it is more equitable for the loss to be spread amongst all who benefit from government services than to impose a burden on the person who as been harmed. The Supreme Court should not put in any other exemptions to the FTCA than those already established by

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the FTCA was to give compensation to victims of negligent acts under the same circumstances a private person would be liable,"and not to leave just treatment to the caprice and legislative burden of individual private bill laws." Id. at 68-69.
89. Id. at 64-65, (citing Dalehite v. United States, 346 U.S.15, 42 (1953)).
90. Id. at 69. (footnote omitted) Justice Reed, who wrote the opinion in Dalehite, was joined by three other Justices in a dissent. Id. at 70-76.
92. Id. at 315.
93. Id. at 318-19.
94. Id. at 315-16. "...the test established by the Tort Claims Act for determining the United States liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. Id. at 319.
95. Id. at 319.
96. Id. at 320.
Congress. Again Justice Reed dissented, along with Justice Clark feeling that the issue of liability for fighting fires was well settled in *Dalehite*.  

The last time the Supreme Court addressed this issue prior to *Berkovitz* was in *Varig*. In a unanimous opinion, written by Chief Justice Burger, the Court was faced with the question of whether or not the United States could be held liable for the negligence of the Federal Aviation Administration, ("FAA"), in their failure to properly inspect two aircraft for safety and fire hazards before certifying the planes which were to be used in commercial aviation. In answering the question in the negative, the Court held that the discretionary function exception applied to all negligent acts of the FAA in inspecting and certifying aircraft.  

*Varig* was the consolidation of two cases from the Ninth Circuit in which the government was held liable under the California "Good Samaritan" rule and the defense of the discretionary function exception of the FTCA was rejected. The alleged negligence in the two cases involved the inspection and certification of aircraft by the FAA.  

In *Varig*, the negligence complained of was that the plane, which crashed, was inspected and issued a certificate even though the towel disposal area, where the fire started, was not in compliance with the fire safety standard. In the companion case, *United States v. Scottish Insurance Company*, the plane was issued a supplemental type certificate, which certified that the plane met all airworthiness standards, after the installation of a gasoline
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burning cabin heater.\textsuperscript{106} The cause of the crash was found to have resulted from certain defects in the installation of gas lines in the cabin heater and that the installation of this heater did not comply with FAA regulations.\textsuperscript{107}

In analyzing the claims of negligence and the possible application of the discretionary function exception, the Court first made a detailed examination of the FAA and the regulations under its authority.\textsuperscript{108} The regulations make "the applicant itself responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements."\textsuperscript{109}

The next step in their analysis was the same step taken in previous cases dealing with the discretionary function exception: an examination of the legislative history and phrasing of the FTCA and specifically § 2680(a).\textsuperscript{110} In examining the legislative history, the Court noted with interest the testimony of a government spokesman who appeared before the House Committee on the Judiciary describing § 2680(a) as a "highly important exception."

[It is] designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency . . . it is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. . . .\textsuperscript{111}

The Court next discussed cases which have previously dealt with the discretionary function exception and noted that the "[c]ourt's reading of the Act admittedly has not followed a straight line, we do not accept the supposition that Dalehite no longer represents a valid interpretation of the discretionary function exception."\textsuperscript{112} Indian Towing should not be taken as a repudiation of the views set forth in Dalehite regarding § 2680(a).\textsuperscript{113}

\textsuperscript{106} Varig v. United States, 467 U.S. 797, 802 (1984). Any person who alters an aircraft by introducing a major change in the type design must obtain from the FAA a supplemental type certificate. 14 C.F.R. § 21.113 (1983). In order to obtain such a certificate, the applicant must supply the FAA with drawings, plans, and other data sufficient to establish that the altered aircraft meets all applicable airworthiness requirements 14 C.F.R. § 21.115 (1983).

\textsuperscript{107} 467 U.S. at 803.
\textsuperscript{108} Id. at 804-07.
\textsuperscript{109} Id. at 805, (citing 14 C.F.R. §§ 21.33, 21.35 (1983)).
\textsuperscript{110} 467 U.S. at 807-10.
\textsuperscript{111} Id. at 809-10.
\textsuperscript{112} Id. at 811-12.
\textsuperscript{113} Id. at 812-13.
The Supreme Court, recognizing the impossibility of outlining the fine lines and boundaries of the discretionary function exception, set forth guidelines to be used when applying § 2680(a). The first step is to assess "the nature of the conduct, rather than the status of the actor." Second, the Court must look to see if the acts of the government employees are of the nature and quality that Congress intended to shield from liability. The discretionary function exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."

Using the guidelines set forth by the Court, they then examined the FAA certification process used in the two cases on review. The Secretary of Transportation had a duty to "promote safety in air transportation by promulgating reasonable rules and regulations governing the inspection, servicing and overhaul of civil aircraft." The statute authorizing this allowed the Secretary to use her discretion in achieving a goal of promoting air safety. The Secretary formulated a system which placed the responsibility for compliance with the FAA regulations on the manufacturer and the operator. The FAA retained the duty of policing the compliance with regulations. This policing was done by a "spot check" system set up by the Secretary.

The Court held that this "spot check" system was discretionary and of "the 'nature and quality' protected by § 2680(a)." It also stressed that "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind."

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114. Id. at 813.
115. Id. (Emphasis added).
116. Id. 813-14.
118. Id. at 816-17. The Secretary may also prescribe "the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons. . . ." 49 U.S.C. 1421(a)(3)(C)(1983).
119. 467 U.S. 797, 816-17.
120. Id.
121. Id. A manufacturer is required to develop plans and specifications as well as perform the necessary test to make sure that the plane is in compliance with the regulations. Upon completing these steps, the FAA's method of review is through "spot checks" on the manufacturer's work. Id. at 816-17.
122. Id. at 819.
123. Id. at 819-20.
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In stating their holding, the Court again stressed the legislative intent of § 2680(a) and made it clear that the duty on the part of the FAA was to "promote safety in air transportation, not to insure it."\(^{124}\)

The three leading cases in which the Supreme Court reviewed the discretionary function exception,\(^{125}\) prior to Berkovitz, set the framework for the boundaries of the discretionary function exception. These decisions have been consistent in relying on both the language of the statute and the intent of Congress as discovered through the legislative history of the FTCA. The Supreme Court, through the years, has not made a significant departure from the views first expressed in 1953 when they were first confronted with applying the discretionary function exception in Dalehite.\(^{126}\) Although the route from Dalehite\(^{127}\) to Berkovitz\(^{128}\) has not been straight and concise in setting down clear criteria for what is discretionary, the general understanding of what will be actionable under the FTCA has remained the same throughout the years and there has been no increase in the scope of liability under the discretionary function exception of the FTCA.

Since the Court did not have to specifically address the liability of the government in this case, they were able to set up guidelines to be used in cases arising under the discretionary function exception of the FTCA. In setting these guidelines, the Court seized an opportunity to make clear any discrepancies that may have arisen from previous cases, as well as ambiguities which arose due to the lack of a specific definition of the term "discretionary."\(^{129}\) Not only has the Court clarified its interpretation of the statutes in question, it has also used this case to give possible interpretations of what in the future will and will not be considered discretionary, especially in the petitioners' present case.\(^{130}\)

\(^{124}\) Id. at 821. (Emphasis in original).
\(^{126}\) 346 U.S. 15, (1953).
\(^{127}\) Id.
\(^{129}\) The term "discretionary" was not defined when the FTCA was enacted. See supra, note 67 and accompanying text discussing terms which were defined.
\(^{130}\) This is evidenced by the way in which the court takes the petitioners' claim regarding the licensing of Orimune, and tries to clarify exactly what the petitioners are trying to assert. In doing this, the court gives examples of what will and will not be considered discretionary acts in the licensing process. Berkovitz v. United States, 108 S. Ct. 1954, 1959-64 (1988).
The Court in Berkovitz does not create any new areas of liability for the government; rather it further defines what is a discretionary act for purposes of the discretionary function exception of the FTCA. This Court’s definition of discretionary does not depart from the previous doctrine set down by it, rather this Court attempts to define the boundaries of the discretionary function exception. The Court firmly rejects setting down any blanket rule which would preclude recovery by an individual because the action which has caused the injury arises out of a regulatory program sponsored by a federal agency. This is on point with both Varig and Dalehite, which have been consistently cited as the leading cases concerning the discretionary function exception. Both of these cases agree that an action by a regulatory agency can be considered non-discretionary when the conduct does not involve any judgment or choice on the part of an individual. This is consistent with what an average person would see as a non-discretionary activity. If an employee is told, either verbally or by a regulation/statute, to perform a specific task, there is no individual choice or judgment involved. The assigned task must be done in accordance with the instructions. If it is proven that DBS ignored specific regulations in the licensing process of Orimune, a reasonable person would understand this to indicate nonconformance with regulations and non-discretionary. If an employee ignores specific regulations, laws, statutes or policies, it is perfectly understandable that the government should be held liable. If no liability is attached, agencies will be able to hide behind these regulations, statutes and policies and possibly cut corners because they believe that they have an absolute defense for their actions simply because their conduct is furthering a governmental regulatory scheme.

It is evident that the Supreme Court does not want to open the government up to an avalanche of suits for actions which clearly involve a matter of choice or judgment and which are based on considerations of public policy. To open up these avenues would clearly not only overload the courts with tort actions, but may also cause agencies, such as the Federal Drug Administration, to be overly cautious in their activities for fear of a law suit. Putting this

131. Id.
132. Id. at 1960-61. The Court states that this type of argument is rebutted not only by the actual language of the FTCA but also by the legislative history which shows that only “discretionary" acts are shielded from liability. Id.
type of fear into the minds of people who are working on new vac-
cines and possible medical cures could bring a dramatic halt to ad-
vances in the area of health care. At the same time, agencies
charged with specific duties and obligations to the public at large
cannot be shielded from liability when they clearly act in a manner
which is opposite to what they have been mandated to do. The
FTCA set the initial parameters of liability for the federal govern-
ment, if those parameters are to be expanded, it is the duty of the
legislative branch to amend the FTCA.\textsuperscript{135}

Kevan Berkovitz was severely injured by a vaccine and if he is
able to prove that his injury was caused by a person or an agency
not following a specific regulation he will be able to recover for his
injury. This will fall squarely in line with the intent of the
FTCA.\textsuperscript{136}

Rather than opening up any new avenues of liability for the gov-
ernment, the court is content to streamline and clarify the bounda-
ries of the FTCA which can only help both regulatory agencies and
potential plaintiffs.

\textit{Elizabeth L. Foster-Nolan}

\textsuperscript{135} Although Congress has not amended the FTCA they did, in 1986, enact the Na-
tional Childhood Vaccine Injury Act which limits the liability of manufactures. The extent
of the liability is unclear, but the Act sets up a public insurance program which will benefit
the victims of either fatal or debilitating vaccine reactions. In addition to the compensation
for the victims, the Act also seeks to improve and strengthen the regulation of vaccines by
the Department of Health and Human Services. National Childhood Vaccine Injury Act of

\textsuperscript{136} On remand from the Supreme Court, the United States Court of Appeals for the
Third Circuit remanded this case to the district court for further proceedings. Berkovitz v.
United States, 858 F.2d 122 (3d Cir. 1988).