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## Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act

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PROTECTING DISCRETION:  
JUDICIAL INTERPRETATION OF THE  
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TO THE FEDERAL TORT CLAIMS ACT

Donald N. Zillman

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# PROTECTING DISCRETION: JUDICIAL INTERPRETATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

Donald N. Zillman\*

## I. INTRODUCTION

In 1996 the Federal Tort Claims Act turns fifty.<sup>1</sup> Few statutes reach the half-century mark only slightly amended and with their primary purposes still intact. The Federal Tort Claims Act is one such rare statute.

The purpose of the Federal Tort Claims Act (FTCA) was to make the United States liable for the torts of its employees committed in the scope of their employment.<sup>2</sup> Today that sounds commonplace. Half a century ago, however, a considerable legislative effort was needed to overturn the doctrine of sovereign immunity that forbade the recovery of tort damages against the United States.<sup>3</sup>

Congress's rejecting sovereign immunity did not mean making the United States liable for every allegedly tortious act. The crucial determination that remained was what government harms would still be shielded from tort liability. The primary statutory answer to that question was the discretionary function exception, codified at 28 U.S.C. section 2680(a). The pertinent portion of section 2680(a) provides that the United States is not liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

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1. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified at 28 U.S.C. §§ 2671-2680 (Supp. V 1993)). The jurisdictional grant of power to the federal courts to decide Federal Tort Claims Act cases appears at 28 U.S.C. § 1346(b) (Supp. V 1993).

2. FTCA suits are authorized "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 agency 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. § 2672 (Supp. V 1993).

3. See generally Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 690-95 (1989) [hereinafter *Reflections*].

Few other sections of the FTCA aid in the definition of "discretionary functions." The legislative history, spread over several sessions of Congress, gives little additional guidance.<sup>4</sup> In effect Congress invited the federal agencies (who were authorized to settle claims against them administratively) and the federal courts (who were tasked with deciding the claims that could not be settled) to define "discretionary functions."

And so they have. This Article continues a series of this Author's studies of the judicial interpretation of the discretionary function exception.<sup>5</sup> The initial study in 1977 examined lower federal court decisions in search of guidance.<sup>6</sup> At that time only a single United States Supreme Court case, *Dalehite v. United States*,<sup>7</sup> provided guidance. *Dalehite* was a unique case on its facts. The guidance for other cases from the opinion was somewhat muddled. By 1977 *Dalehite* was nearly a quarter-century old.

The two subsequent articles in 1985<sup>8</sup> and 1989<sup>9</sup> drew on new Supreme Court discretionary function cases. Between 1984 and 1991, the Supreme Court issued near-unanimous decisions in three cases that squarely raised the application of the discretionary function exception.<sup>10</sup> A lack of Supreme Court law changed to a relative wealth of it.

This Article assesses discretionary function law at the FTCA's half-century mark. This Article reviews the Supreme Court precedents, and examines all of the over 100 reported federal court of appeals and district court discretionary function cases since the crucial Supreme Court decision in *Berkovitz v. United States*<sup>11</sup> in 1988. An analysis of that jurisprudence gives a good sense of the scope of United States tort liability as of 1995.

## II. THE DISCRETIONARY FUNCTION EXCEPTION—THE SUPREME COURT PRECEDENTS

The student of recent Federal Tort Claims Act cases involving such major issues as liability for radiation injuries from the nuclear

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4. *Id.* at 703-08.

5. *Reflections*, *supra* note 3; Donald N. Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act*, 110 *MIL. L. REV.* 115 (1985) [hereinafter *Regulatory Discretion*]; Donald N. Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 *MIL. L. REV.* 1 (1977) [hereinafter *Changing Meanings*].

6. *Changing Meanings*, *supra* note 5.

7. 346 U.S. 15 (1953).

8. *Regulatory Discretion*, *supra* note 5.

9. *Reflections*, *supra* note 3.

10. *United States v. Gaubert*, 111 S. Ct. 1267 (1991); *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. Varig Airlines*, 467 U.S. 797 (1984).

11. 486 U.S. 531 (1988).

weapons program,<sup>12</sup> failures to inspect aircraft or mines in which mass disasters have occurred,<sup>13</sup> or misregulation of the savings and loan industry<sup>14</sup> might lose sight of the origins of the Federal Tort Claims Act. The statute was a rather small part of the 1946 Legislative Reorganization Act.<sup>15</sup> The FTCA was inspired by equal measures of concern for injured citizens and unhappiness with the private bill system that forced Congress to consider thousands of individual requests for monetary relief for harms in tort. The contemporaneous record of private bills suggests that Congress was inclined primarily to grant relief in only a few recurrent factual situations, most notably automobile accidents.<sup>16</sup> This background hardly suggests novel or expansive liability.

When the United States Supreme Court reviewed its first discretionary function case, *Dalehite v. United States*,<sup>17</sup> in 1953, caution prevailed. *Dalehite* posed the prospect of mass disaster liability in the second year of the Federal Tort Claims Act. Two ships loaded with fertilizer-grade ammonium nitrate exploded in the harbor of Texas City, Texas, with heavy loss of life and property damage. The explosion resulted in 8500 plaintiffs seeking \$200 million in damages. The plaintiffs claimed government negligence in the manufacture, bagging, shipment, and storage of the ammonium nitrate (which was destined for the European recovery program), and negligent firefighting by the Coast Guard.

A majority of the Supreme Court held the discretionary function exception protected the United States against all allegations of fault. The Court held discretion included more than the initiation of programs (here the decision to engage in export for the European recovery program). "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 directions cannot be actionable."<sup>18</sup> In the phrase that became the most quoted portion of *Dalehite* the Court concluded that all government decisions under challenge were "responsibly made at a planning rather than operational level."<sup>19</sup>

*Dalehite* remained the single Supreme Court discretionary function decision for thirty years. Congress did not amend section

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12. See, e.g., *Barnson v. United States*, 816 F.2d 549 (10th Cir. 1987), *cert. denied*, 484 U.S. 896 (1987); *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

13. See, e.g., *United States v. Varig Airlines*, 467 U.S. 797 (1984); *Collins v. United States*, 783 F.2d 1225 (5th Cir. 1986).

14. See, e.g., *United States v. Gaubert*, 111 S. Ct. 1267 (1991).

15. See *Reflections*, *supra* note 3, at 708-15.

16. *Id.* at 713-14 (110 of 162 private bills studied involved automobile accidents).

17. 346 U.S. 15 (1953).

18. *Id.* at 36.

19. *Id.* at 42.

2680(a). Between 1953 and 1984 hundreds of lower federal court decisions set out the contours of discretionary functions. The decisions made clear that discretionary function claims would not bar government liability in such torts as vehicle negligence, building maintenance, medical practice, and airport ground control errors.<sup>20</sup> By contrast, section 2680(a) generally did protect the government from claims arising out of flood control and irrigation, military and foreign policy decisions, law enforcement activity,<sup>21</sup> and regulatory and licensing activity. Other allegedly discretionary actions forced courts to weigh the *Dalehite* language with care.<sup>22</sup>

Two unrelated aircraft accidents provided the occasion for the 1984 Supreme Court decision of *United States v. Varig Airlines*<sup>23</sup> and a second look at discretionary function. Both cases involved aircraft fires. The plaintiffs alleged that government liability should be based on the Federal Aviation Administration's (FAA) failure to perform an inspection that would have detected the fire hazard.

The Supreme Court's formulation of the *Varig* case was that it reviewed<sup>24</sup> a decision by FAA authorities to rely on manufacturer representatives to do the safety inspections rather than doing the inspections themselves. The Court concluded these decisions were entitled to the protection of the discretionary function exception.<sup>25</sup>

The Court began with the obvious: "The discretionary function exception . . . marks the boundary between Congress's willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals."<sup>26</sup>

The Court then reaffirmed *Dalehite* noting that "it is unnecessary—and indeed impossible—to define with precision every contour of the [exception]."<sup>27</sup> However, two factors stood out. First "it is the nature of the conduct, rather than the status of the actor" that governed.<sup>28</sup> The question was whether the challenged acts were "of the nature and quality that Congress intended to shield from tort liability."<sup>29</sup> Second, "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of

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20. *Changing Meanings*, *supra* note 5, at 12.

21. *Id.* at 13.

22. *Id.* at 13-14 (two factual situations reaching differing results were claims for sonic boom damage and suits for failure to care for psychiatric patients).

23. 467 U.S. 797 (1984).

24. *See Regulatory Discretion*, *supra* note 5, at 131-32.

25. *United States v. Varig Airlines*, 467 U.S. at 815-16.

26. *Id.* at 808.

27. *Id.* at 813.

28. *Id.*

29. *Id.*

the conduct of private individuals."<sup>30</sup> Congress's objective in section 2680(a) was to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."<sup>31</sup>

While *Varig* was not a model of clarity,<sup>32</sup> it did advance discretionary function analysis beyond *Dalehite's* simplistic "planning v. operational" guidance. *Varig's* most certain effect was virtually to bar recovery for alleged failure of government regulatory activity.<sup>33</sup> The post-*Varig* cases also began paying closer attention to the statutes and regulations that purported to direct the conduct of the allegedly negligent government officials.<sup>34</sup> That factor became of central importance in *Berkovitz v. United States*<sup>35</sup> decided by the Supreme Court in 1988.

The infant plaintiff in *Berkovitz* contracted a disabling case of polio after ingesting an oral polio vaccine. His parents alleged negligence on the part of the Division of Biologic Standards of the National Institutes of Health and the Food and Drug Administration in licensing and releasing the Orimune vaccine manufactured by Lederle Laboratories.

Because *Berkovitz* involved government regulation of private business, an expansive reading of *Varig* might have barred the claim with little investigation. The Supreme Court, however, pursued a different route. It began by reiterating *Varig's* "nature of the conduct, rather than the status of the actor" language.<sup>36</sup> This prompted the Court to examine two factors. The first was "whether the action is a matter of choice for the acting employee."<sup>37</sup> The protection of the discretionary function would not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."<sup>38</sup> The second, assuming that the employee was allowed to exercise judgment, was "whether that judgment is of the kind that the discretionary function exception was designed to shield."<sup>39</sup> The only judgments protected by section 2680(a) are those based "on considerations of public policy."<sup>40</sup> This conclusion

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30. *Id.* at 813-14.

31. *Id.* at 814.

32. *Regulatory Discretion*, *supra* note 5, at 131-42.

33. *Reflections*, *supra* note 3, at 720-21 (of 23 post-*Varig* cases only two were not decided in favor of the United States under § 2680(a)).

34. *Id.* at 726-28.

35. 486 U.S. 531 (1988).

36. *Id.* at 536 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 537.

was tied into the *Varig* discussion of the desire to prevent judicial second guessing of social, economic, and political policy decisions.<sup>41</sup>

The Supreme Court's review of the licensing and release of the Oritume vaccine concentrated on the first part of the test, namely, whether the statutes, regulations, and policies allowed discretion. The Court engaged in a considerable review of the licensing process. It remanded the case for further proceedings in language that suggested that certain of the actions appeared to be protected by section 2680(a) and others did not.<sup>42</sup>

*United States v. Gaubert*,<sup>43</sup> decided in 1991, is the Supreme Court's most recent review of the discretionary function exception. The case was one of many arising out of the savings and loan scandals of the 1980s. Federal intervention in purportedly unstable savings and loan institutions gave rise to two categories of complaints. In the first category customers complained that the federal regulators did too little to warn them or to correct the instabilities of certain institutions. In the second category savings and loan management complained that the federal authorities had made a satisfactory situation worse, thus costing the investors and owners money. The *Gaubert* complaint was of the second variety. The government intervention at issue involved a combination of general advice on running the savings and loan institution and some closer involvement in the day-to-day business decisions of the enterprise.

In *Gaubert* the Supreme Court restated the two-part *Berkovitz* test: 1) Has judgment been controlled by a statute, regulation, or policy?<sup>44</sup> 2) Even if discretion remains with the federal official, is the judgment of the kind section 2680(a) was meant to protect? The Court identified three situations involving the presence of statutes, regulations, or policies. In the first situation the law mandates particular conduct and the government officer or employee obeys the law. Here section 2680(a) applies "because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."<sup>45</sup> In the second situation the law mandates particular conduct and the officer or employee violates the law. Here "there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."<sup>46</sup> In the third scenario the law allows the officer or employee to exercise discretion. Here "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves

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41. *United States v. Varig Airlines*, 467 U.S. at 814. This also draws from language in *Dalehite v. United States*, 346 U.S. 15 (1952): "Where there is room for policy judgment and decision there is discretion." *Id.* at 36.

42. *Berkovitz v. United States*, 486 U.S. at 543-48.

43. 111 S. Ct. 1267 (1991).

44. *Id.* at 1273-74.

45. *Id.* at 1274.

46. *Id.*



consideration of the same policies which led to the promulgation of the regulations."<sup>47</sup> That strong presumption also most likely resolves the second *Berkovitz* issue—whether the policy is the type protected by section 2680(a). To avoid dismissal a plaintiff "must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."<sup>48</sup> That is determined not by the officer's "subjective intent . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis."<sup>49</sup>

The reformulated *Berkovitz* test then was applied to the *Gaubert* allegations. The Court found no statutes or regulations that mandated a particular form of regulation. The overall legal structure allowed, if not encouraged, case by case regulation and informal means of supervision.<sup>50</sup>

The Court also ruled for the government on the second part of the *Berkovitz* test. The plaintiff argued that even if the government actions were permissible under law "they involved the mere application of technical skills and business expertise," not the social, economic, and political judgements protected by section 2680(a).<sup>51</sup> The Court disagreed. Such actions by the federal regulators as changes in management, hiring of consultants, advising on litigation, mediating salary disputes, and negotiating with Texas officials were policy activities. These were actions "within the purview of the policies behind the statutes."<sup>52</sup> The "routine or frequent nature of a decision,"<sup>53</sup> essentially the operational side of the *Dalehite* planning-operational distinction,<sup>54</sup> did not disqualify it from section 2680(a) protection. If that were so, the Court observed, "countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable."<sup>55</sup>

### III. *VARIG*, *BERKOVITZ*, AND *GAUBERT* IN THE LOWER COURTS

What has been the impact of the *Varig* and *Berkovitz* precedents, later enhanced by *Gaubert*, on discretionary function decisions in the lower federal courts?<sup>56</sup> In the considerable majority of cases the discretionary function exception won the case for the United States,

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47. *Id.*

48. *Id.* at 1275.

49. *Id.*

50. *Id.* at 1277-78.

51. *Id.* at 1278.

52. *Id.* at 1279.

53. *Id.*

54. *See Dalehite v. United States*, 346 U.S. at 42.

55. *United States v. Gaubert*, 111 S. Ct. at 1279.

56. The Author examined all relevant court of appeals and federal district court cases decided in 1990 and after. The date was chosen in order to allow a reasonable time for courts and advocates to digest the 1988 *Berkovitz* opinion. Fifty-eight fed-

ending the plaintiff's chance of recovery. Of fifty-eight court of appeals cases, forty were ended by application of section 2680(a). Of eighty district court cases, discretionary function barred recovery in sixty-one. Success on the discretionary function issue removes only one government challenge to recovery. Other statutory defenses or failure on the underlying negligence action also can leave plaintiff without relief.

#### A. Recurrent Fact Patterns

Prior studies of the discretionary function exception have identified recurrent fact situations in which section 2680(a) immunity is likely to be granted or denied.<sup>57</sup> The Supreme Court's refinement of discretionary functions in *Varig*, *Berkovitz*, and *Gaubert* has had an impact on these recurrent fact situations. Four types of cases traditionally have been treated as not involving protected discretionary functions.<sup>58</sup> They are vehicle accidents, premises liability in or around structures (as contrasted to liability for parks and other open spaces), medical malpractice, and negligent aircraft ground control. There are no recent cases in which the government asserted that section 2680(a) would bar federal liability for vehicle operation, medical malpractice, or controller error. These long-recognized areas of FTCA liability remain unchanged by *Varig*, *Berkovitz*, and *Gaubert*.

The area of premises liability in or around structures, however, has become less predictable. As in vehicle operation or medical malpractice, the courts may draw upon the ample private sector precedents to assess the care of the reasonable premises owner to persons on the property. Many of the cases seem like garden variety torts with few policy implications. Nevertheless government counsel have tried to extend the protection of section 2680(a) to certain premises liability claims.

The results have been mixed. In *Schneider v. United States*<sup>59</sup> and *Soni v. United States*<sup>60</sup> the inadequate placement of a railing was found to be a policy matter and protected by section 2680(a). *Coats v. Luedtke Engineering Co.*<sup>61</sup> and *Greene v. United States*<sup>62</sup> recognized that section 2680(a) would protect the decision whether to install a railing. Once an installation decision was reached, however, ordinary care was required to govern the installation.

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eral court of appeals cases and 80 district court cases not involving a subsequent court of appeals decision were found.

57. See, e.g., *Changing Meanings*, *supra* note 5, at 12-14; *Reflections*, *supra* note 3, at 719-20.

58. *Id.*

59. 734 F. Supp. 239 (E.D. La. 1990).

60. 739 F. Supp. 485 (E.D. Mo. 1990).

61. 744 F. Supp. 884 (E.D. Wis. 1990).

62. 745 F. Supp. 1486 (E.D. Mo. 1990), *rev'd*, 872 F.2d 236 (8th Cir. 1989).

The most interesting premises liability case is the 1990 First Circuit decision in *Ayer v. United States*.<sup>63</sup> A visitor to Vandenberg Air Force missile launch base was injured allegedly due to a lack of railings around the launch pad. The government responded with a showing that Air Force officials had weighed with considerable care the decision not to install the railings. "First, [the Air Force] wanted Vandenberg to maintain the same configuration as other launch sites nationwide to assure realistic and transferrable training there. Second, the Air Force wanted to retain maximum floor mobility so as not to affect the survivability of the [launch control chamber] in the event of an attack."<sup>64</sup> The court was properly impressed and granted the government's discretionary function motion.

Pre-*Berkovitz* cases also identified several factual situations in which courts were likely to recognize that a discretionary function was involved.<sup>65</sup> These included flood control activities, military activities, and matters of foreign relations. Many cases since 1990 have explored these matters. The majority have followed past practice and applied section 2680(a) to protect the United States from liability.<sup>66</sup> A significant minority of cases, however, rejects the application of section 2680(a) to bar recovery for any activity that im-

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63. 902 F.2d 1038 (1st Cir. 1990).

64. *Id.* at 1043-44.

65. See, e.g., *Changing Meanings*, *supra* note 5, at 13-14; *Regulatory Discretion*, *supra* note 3, at 118-20.

66. See *Black Hills Aviation v. United States*, 34 F.3d 968 (10th Cir. 1994) (accident investigation on missile range); *D.B.S. ex rel. C.R.S. v. United States*, 11 F.3d 791 (8th Cir. 1993) (military program for screening donated blood); *Kirchmann v. United States*, 8 F.3d 1273 (8th Cir. 1993) (environmental contamination at missile site); *Powers v. United States*, 996 F.2d 1121 (11th Cir. 1993) (failure to advise of flood insurance); *Blakey v. U.S.S. Iowa*, 991 F.2d 148 (4th Cir. 1993) (conduct of Navy investigation into gun explosion on battleship); *Daigle v. Shell Oil Company*, 972 F.2d 1527 (10th Cir. 1992) (pollutant clean-up at Rocky Mountain Arsenal); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 411 (1992) (Panamanian riot damage); *Industria Panificadora v. United States*, 957 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 304 (1992) (property losses in connection with Panamanian invasion); *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990) (control of Haitian detainees); *Buchanan v. United States*, 915 F.2d 969 (5th Cir. 1990) (control of Cuban detainees); *Creek Nation Indian Housing Authority v. United States*, 905 F.2d 312 (10th Cir. 1990) (government choice of bomb design); *Ayer v. United States*, 902 F.2d 1038 (1st Cir. 1990) (missile launch site design); *Hart v. United States*, 894 F.2d 1539 (11th Cir. 1990), *cert. denied*, 498 U.S. 908 (1990) (military MIA designation); *Prescott v. United States*, 858 F. Supp. 1461 (D. Nev. 1994) (nuclear tests); *Sauders v. S.C. Pub. Serv. Author.*, 856 F. Supp. 1066 (D.S.C. 1994) (waterflow in canal); *Bowman v. United States*, 848 F. Supp. 979 (M.D. Fla. 1994) (Navy toxics storage); *Crompton v. United States*, 843 F. Supp. 751 (D.D.C. 1994) (release of military information); *Balmaceda v. United States*, 815 F. Supp. 823 (E.D. Pa. 1992), *aff'd sub nom. Fisher Bros. Sales v. United States*, 1995 U.S. App. LEXIS 1384 (3rd Cir. Jan. 25, 1995) (exclusion of Chilean grapes from U.S. market); *Breland v. United States*, 791 F. Supp. 1128 (S.D. Miss. 1990) (operation of Army firing range); *Hobdy v. United States*, 762 F. Supp. 1459 (D. Kan. 1991), *aff'd*, 968 F.2d 20 (10th Cir. 1992) (military criminal fraud investigation); *Sim-*

plicates military or foreign policy.<sup>67</sup> These cases often turn on a government officer's violation of a statute or regulation.<sup>68</sup>

Six other categories of cases have provided much work for the lower federal courts since 1990. Here the results have been less predictable than they might have been in the years prior to *Varig* and *Berkovitz*.

Fourteen cases involve alleged government error in the regulation of financial institutions or the administration of government loan or grant programs.<sup>69</sup> In twelve cases the courts ruled for the United States on section 2680(a).<sup>70</sup> Typically defendants in these cases counterclaimed against the United States, alleging improper government regulation<sup>71</sup> or a failure of the government to act quickly enough in placing troubled financial institutions into receivership.<sup>72</sup> Both before and particularly after the Supreme Court decision in

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*mons v. United States*, 754 F. Supp. 274 (N.D.N.Y. 1991) (military procedure for reclassification of personnel missing in action).

67. See *Prescott v. United States*, 973 F.2d 696 (9th Cir. 1992) (protection of Nevada Nuclear Test Site workers; Government claim that all aspects of nuclear testing program are protected by § 2680(a) is rejected); *Redlands Soccer Club v. Department of the Army*, 835 F. Supp. 803 (M.D. Pa. 1993) (Army waste disposal); *Sumner v. United States*, 794 F. Supp. 1358 (M.D. Tenn. 1992) (exploding dud ordnance on military base); *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427 (D.D.C. 1991), *rev'd*, 904 F.2d 719 (D.C. Cir. 1990), *rev'd*, 28 F.3d 120 (D.C. Cir. 1990) (AID overseas medical practices); *Musick v. United States*, 768 F. Supp. 183 (W.D. Va. 1991) (Air Force overflight).

68. See, e.g., *Sumner v. United States*, 794 F. Supp. 1358 (M.D. Tenn. 1992); *Musick v. United States*, 768 F. Supp. 183 (W.D. Va. 1991).

69. *ALX El Dorado, Inc. v. Southwest Savings & Loan*, 36 F.3d 409 (5th Cir. 1994) (negligent supervision); *McNeily v. United States*, 6 F.3d 343 (5th Cir. 1993) (failed S&L); *Cooper v. American Automobile Insurance Co.*, 978 F.2d 602 (10th Cir. 1992) (wrongful termination of bonds destroys plaintiff's business); *Lundstrum v. Lyng*, 954 F.2d 1142 (6th Cir. 1991) (farmer claims improper handling of his loan); *FDIC v. Irwin*, 916 F.2d 1051 (5th Cir. 1990) (bank sues for improper determination of insolvency); *Love v. United States*, 915 F.2d 1242 (9th Cir. 1989) (government liquidation of property in connection with unpaid loan; application of the discretionary function exception denied); *Brackin v. United States*, 913 F.2d 858 (11th Cir. 1990) (improper division of farm property for benefits program); *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991) (FDIC delay in placing S&L into receivership); *Biase v. Kaplan*, 852 F. Supp. 268 (D.N.J. 1994) (shareholder of S&L sues government regulators); *FDIC v. FSSS*, 829 F. Supp. 317 (D. Alaska 1993) (FDIC decisions on settlement of note); *Wohlford v. United States*, 823 F. Supp. 386 (W.D. Va. 1992) (Farmers Home Administration handling of farmers' loans); *Hale House Center, Inc. v. FDIC*, 788 F. Supp. 1309 (S.D.N.Y. 1992) (FDIC failure to warn about unstable bank); *FDIC v. Cheng*, 787 F. Supp. 625 (N.D. Tex. 1991) (attempts to recoup bond trading losses by failed S&L); *Ackerley v. United States*, 741 F. Supp. 1519 (D. Wyo. 1990) (FDIC negligent failure to make payments to plaintiff) (2680(a) rejected for lack of showing of policy considerations).

70. The two cases where the Government's assertion of § 2680(a) was rejected were both decided prior to *Gaubert*. See *Love v. United States*, 915 F.2d 1242 (9th Cir. 1990); *Ackerley v. United States*, 741 F. Supp. 1519 (D. Wyo. 1990).

71. See, e.g., *FDIC v. Irwin*, 916 F.2d at 1052.

72. See, e.g., *FDIC v. Mmahat*, 907 F.2d at 551.

*Gaubert* the courts have treated the government action as reflecting protected discretion.

Courts have not chosen to bar claims because they do not involve wrongful death, personal injury, or property damage—the categories of claims recognized by the jurisdictional grant of the Federal Tort Claims Act.<sup>73</sup> Instead the courts have looked to the *Berkovitz* standards. They have generally found that the federal statutes and regulations offer wide discretion to the federal financial officials.<sup>74</sup> As a result *Gaubert* has undercut plaintiffs' hopes that such decisions would not be seen as involving the kind of discretion Congress meant to protect.<sup>75</sup> Courts have uniformly held that federal financial regulators were making policy decisions involving social, political, and economic choices.<sup>76</sup>

The second factual category in which the courts have fairly consistently sustained government action encompasses law enforcement torts beyond assault, battery, and false imprisonment, which are clearly covered by the FTCA.<sup>77</sup> Seventeen of the twenty cases identified resulted in a section 2680(a) decision favorable to the government.<sup>78</sup> The decisions challenged are made by police,<sup>79</sup>

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73. 28 U.S.C. § 2672 (Supp. V 1993).

74. See, e.g., *Cooper v. American Auto. Ins. Co.*, 978 F.2d 602, 611 (10th Cir. 1992); *Lundstrum v. Lyng*, 954 F.2d 1142, 1147 (6th Cir. 1991); *FDIC v. Irwin*, 916 F.2d at 1054; *Brackin v. United States*, 913 F.2d 858, 860 (11th Cir. 1990).

75. *United States v. Gaubert*, 111 S. Ct. 1267, 1275-76 (1991).

76. See, e.g., *McNeily v. United States*, 6 F.3d 343 (5th Cir. 1993); *Lundstrum v. Lyng*, 954 F.2d 1142 (6th Cir. 1993).

77. See 28 U.S.C. § 2680(h) (Supp. V 1993). See also *Beran v. United States*, 759 F. Supp. 886 (D.D.C. 1991) (discussing interplay between sections 2680(a) and 2680(h)).

78. *Weissich v. United States*, 4 F.3d 810 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2705 (1994) (failure of probation officers to warn federal prosecutor of threat against him); *Blakey v. U.S.S. Iowa*, 991 F.2d 148 (4th Cir. 1993) (Navy investigation of shipboard explosion, resulting in death of sailor); *Johnson v. Sawyer*, 980 F.2d 1490 (5th Cir. 1992), *modified*, 4 F.3d 369 (5th Cir. 1993) (IRS agent disclosure of private information not protected under § 2680(a)); *Industria Panificadora v. United States*, 957 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 304 (1992) (U.S. authorities' failure to provide police protection during Panamanian invasion, resulting in damage to property); *Attallah v. United States*, 955 F.2d 776 (1st Cir. 1992) (Customs authorities' failure to supervise agents); *Kelly v. United States*, 924 F.2d 355 (1st Cir. 1991) (DEA failure to investigate allegations against an agent); *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990) (Attorney General's decisions on parole of Haitian refugees); *McElroy v. United States*, 861 F. Supp. 585 (W.D. Tex. 1994) (conduct of drug investigation); *Merced v. City of New York*, 856 F. Supp. 826 (S.D.N.Y. 1994) (denial of police protection); *Bailor v. Salvation Army*, 854 F. Supp. 1341 (N.D. Ind. 1994) (release of inmate); *Mesa v. United States*, 837 F. Supp. 1210 (S.D. Fla. 1993) (service of arrest warrant on wrong individual); *Marin v. United States*, 814 F. Supp. 1468 (E.D. Wash. 1992) (failure to warn victims not protected by § 2680(a) due to absence of policy based decision); *Reeves v. United States*, 809 F. Supp. 92 (N.D. Ga. 1992) (Bureau of Alcohol, Tobacco and Firearms' failure to protect victim in manufacture of explosives); *Patel v. United States*, 806 F. Supp. 873 (N.D. Cal. 1992) (§ 2680(a) rejected due to lack of policy judgment in conduct in

prosecutors,<sup>80</sup> and corrections officers.<sup>81</sup> What statutes and regulations exist generally leave matters to the discretion of the officers.<sup>82</sup> The courts then are willing to view the matters as policy decisions that Congress intended to leave to the executive and judicial branch officers.<sup>83</sup>

The third set of recurrent cases (and one that occurs more frequently now than in past decades) involves alleged government failure to provide safety protection in situations involving a private contractor. In such cases the victim has been injured and seeks not only workers' compensation recovery against the contractor-employer but also recovery against the government. The post-*Berkovitz* courts generally have sided with the government under section 2680(a). Of the seventeen cases identified, only four did not rule for the government.<sup>84</sup> The four, however, are all court of ap-

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drug raid); *Flax v. United States*, 791 F. Supp. 1035 (D.N.J. 1992), *vacated*, 983 F.2d 1050 (3rd Cir. 1992), *remanded to* 847 F. Supp. 1183 (D.N.J. 1994) (FBI handling of kidnapping); *Wilson v. United States*, 767 F. Supp. 551 (S.D.N.Y. 1991) (parole revocation); *Hobdy v. United States*, 762 F. Supp. 1459 (D. Kan. 1991), *aff'd*, 968 F.2d 20 (10th Cir. 1992) (claim of negligent criminal investigation banned); *Beran v. United States*, 759 F. Supp. 886 (D.D.C. 1991) (claim of malicious prosecution against Secret Service agent barred); *Ward v. United States*, 738 F. Supp. 129 (D. Del. 1990) (Postal Service conduct during investigation of disability claim, allegedly resulting in psychological and physical injury).

79. *Attallah v. United States*, 955 F.2d 776 (1st Cir. 1992) (customs agents).

80. *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990) (Attorney General's decisions on parole of Haitian refugees).

81. *Weissich v. United States*, 4 F.3d 810 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2705 (1994) (probation officers).

82. *Id.* See also *Blakey v. U.S.S. Iowa*, 991 F.2d 148 (4th Cir. 1993); *Attallah v. United States*, 955 F.2d 776 (1st Cir. 1992); *Kelly v. United States*, 924 F.2d 355 (1st Cir. 1991).

83. See, e.g., *Weissich v. United States*, 4 F.3d 810, 813 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2705 (1994) (warnings to potential victims involve policy choices including "how much of the agency's resources it should commit to identifying victims, what standards it should adopt to determine which potential victims to notify, and how it should go about notifying them"); *Kelly v. United States*, 924 F.2d 355, 362 (1st Cir. 1991) ("The [Drug Enforcement Administration's] mission can be effectively served only if the agency is free to balance its need for internal security against its need to prevent the squandering of scarce resources in the endless chasing of wild geese"); *Adras v. Nelson*, 917 F.2d 1552 (11th Cir. 1990).

84. *Kirchmann v. United States*, 8 F.3d 1273 (8th Cir. 1993); *Duff v. United States*, 999 F.2d 1280 (8th Cir. 1993); *Layton v. United States*, 984 F.2d 1496 (8th Cir. 1993), *reh'g denied*, 1993 U.S. App. LEXIS 4857 (9th Cir. Mar. 12, 1993), *cert. denied*, 114 S. Ct. 213 (1993); *Phillips v. United States*, 956 F.2d 1071, 1077 (11th Cir. 1992) (§ 2680(a) protection denied for failure to obey Army Corps of Engineers safety manual); *Routh v. United States*, 941 F.2d 853, 856-57 (9th Cir. 1991) (§ 2680(a) protection denied for lack of public policy content to decision); *Tracor/MBA Inc. v. United States*, 933 F.2d 663 (8th Cir. 1991); *Murdock v. Employers Insurance*, 917 F.2d 1065, 1073 (8th Cir. 1990), *reh'g denied*, 951 F.2d 907 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 2996 (1992) (§ 2680(a) protection denied); *McCall v. United States Dep't of Energy*, 914 F.2d 191, 196 (9th Cir. 1990) (§ 2680(a) protection denied in face of Montana nondelegable duty to provide safe workplace); *Fort-*

peals cases and involve instances where the court has found both a violation of law<sup>85</sup> and an absence of a policy based judgment.<sup>86</sup>

A fourth category involves claims arising out of failures to protect citizens from pollutants.<sup>87</sup> Some involve the government as the polluter.<sup>88</sup> In other cases the government is sued for its lack of care in cleaning up a private party's pollution.<sup>89</sup> Regardless of the identity of the polluter, section 2680(a) provides ample protection for the United States. Only three of fifteen cases have not ruled for the government under section 2680(a).<sup>90</sup>

Two other categories of cases show less decisive results for the government. The first involves an injury on government owned land (as contrasted to buildings). The prototypical case is the national park visitor injured by some element of the wilderness park experience. The government then is forced to defend itself against charges

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ney v. United States, 912 F.2d 722, 726 (4th Cir. 1990) (dicta on probable application of § 2680(a)); *Kandarge v. United States Navy*, 849 F. Supp. 304 (D.N.J. 1994); *Hall v. United States General Services Admin.*, 825 F. Supp. 427 (D.N.H. 1993); *Webster v. United States*, 823 F. Supp. 1544 (D. Mont. 1992), *aff'd*, 22 F.3d 221 (9th Cir. 1994); *Clark v. United States*, 805 F. Supp. 84 (D.N.H. 1992); *Doud v. United States*, 797 F. Supp. 138 (N.D.N.Y. 1992); *Zocco v. United States*, 791 F. Supp. 595 (E.D.N.C. 1992); *Moody v. United States*, 753 F. Supp. 1042 (N.D.N.Y. 1990); *Pershing v. United States*, 736 F. Supp. 132 (W.D. Tex. 1990).

85. *Phillips v. United States*, 956 F.2d 1071 (11th Cir. 1992).

86. *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991); *McCall v. United States Dep't of Energy*, 914 F.2d 191 (9th Cir. 1990).

87. *Employers Ins. of Warsaw v. United States*, 27 F.3d 245 (7th Cir. 1994); *Kirchmann v. United States*, 8 F.3d 1273 (8th Cir. 1993) (government disposal of trichloroethalenes (TCE) at missile site); *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992) (cleanup of Rocky Mountain arsenal); *Lockett v. United States*, 938 F.2d 630 (6th Cir. 1991) (EPA failure to warn of contaminated scrapyard); *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.* 854 F. Supp. 400 (D.S.C. 1994) (location and cleanup of pollutants); *Salter v. United States*, 853 F. Supp. 389 (M.D. Ala. 1994); *Laurence v. United States*, 851 F. Supp. 1445 (N.D. Cal. 1994); *Bowman v. United States*, 848 F. Supp. 979 (M.D. Fla. 1994); *Redland Soccer Club, Inc. v. Dep't of Army*, 835 F. Supp. 803 (M.D. Pa. 1993), *judgment entered sub nom. O'Neal v. Dep't of Army*, 852 F. Supp. 327 (M.D. Pa. 1994); *United States v. Martech USA, Inc.*, 800 F. Supp. 865 (D. Alaska 1992); *United States v. Amtreco, Inc.*, 790 F. Supp. 1576 (M.D. Ga. 1992); *Stewman v. Mid-South Wood Products of Mena, Inc.*, 784 F. Supp. 611 (W.D. Ark. 1992), *aff'd*, 993 F.2d 646 (8th Cir. 1993); *United States v. Skipper*, 781 F. Supp. 1106 (E.D.N.C. 1991); *Santa Fe Pacific Realty Corp. v. United States*, 780 F. Supp. 687 (E.D. Cal. 1991).

88. *See, e.g., Kirchmann v. United States*, 8 F.3d 1273 (8th Cir. 1993); *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992).

89. *See, e.g., Lockett v. United States*, 938 F.2d 630 (6th Cir. 1991).

90. *Salter v. United States*, 853 F. Supp. 389 (M.D. Ala. 1994) (violation of manufacturer safety standard which was made mandatory by government regulation); *Redland Soccer Club, Inc. v. Dep't of Army*, 835 F. Supp. 803, 808 (M.D. Pa. 1993) (waste disposal decisions were not policy "in more direct furtherance of the agency or department's congressionally delegated mission"), *judgment entered sub nom. O'Neal v. Department of Army*, 852 F. Supp. 327 (M.D. Pa. 1994); *Santa Fe Pacific Realty Corp. v. United States*, 780 F. Supp. 687 (E.D. Cal. 1991) (government violates its own regulations; sale in damaged containers is not a policy-based judgment).

that it should have provided better protection or warning. Prior to *Berkovitz* courts had reached differing results in these cases.<sup>91</sup> The *Berkovitz* tests sharpen the analytical framework. They provide more consistent results in the government's favor. Of fifteen cases in this category only two reject the discretionary function claim.<sup>92</sup> Plaintiffs generally win cases when there is a clear regulatory provision that compels government safety action<sup>93</sup> or when the court concludes that no matters of political, economic, or social policy were involved in the government decision.<sup>94</sup> By contrast the government ordinarily wins when the court adopts their argument that a central philosophy of the federal parks program is to keep wild areas wild and impliedly dangerous.<sup>95</sup>

The final area involves government licensing and regulation other than financial regulation. These cases are the direct *Varig* and *Berkovitz* descendants, as they involve government officers making potentially harmful decisions as they act pursuant to statutory authority to inspect and to license. The ten cases that fit this model<sup>96</sup>

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91. See *Regulatory Discretion*, *supra* note 5, at 119 and *Reflections*, *supra* note 3, at 724.

92. See, e.g., *LeSueur v. United States*, 21 F.3d 965 (9th Cir. 1994) (discretion protected); *Autery v. United States*, 992 F.2d 1523 (11th Cir. 1993) (discretion protected), *cert. denied*, 114 S. Ct. 1829 (1994); *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993) (discretion protected); *Kiehn v. United States*, 984 F.2d 1100 (10th Cir. 1993) (discretion protected); *Johnson v. United States Dep't of Interior*, 949 F.2d 332 (10th Cir. 1992) (discretion protected); *Zumwalt v. United States*, 928 F.2d 951 (10th Cir. 1991) (discretion protected); *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990) (no discretion); *Childers v. United States*, 841 F. Supp. 1001 (D. Mont. 1993), *aff'd*, 40 F.3d 973 (9th Cir. 1994) (discretion protected); *Valdez v. United States*, 837 F. Supp. 1065 (E.D. Cal. 1993) (discretion protected); *Alderman v. United States*, 825 F. Supp. 742 (W.D. Va. 1993) (discretion protected); *Schmitz v. United States*, 796 F. Supp. 263 (W.D. Mich. 1992) (discretion protected); *Fahl v. United States*, 792 F. Supp. 80 (D. Ariz. 1992) (discretion protected); *Pope & Talbot, Inc. v. Department of Agriculture*, 782 F. Supp. 1460 (D. Ore. 1991) (discretion protected); *Mattice v. United States*, 752 F. Supp. 905 (N.D. Cal. 1990), *aff'd*, 969 F.2d 818 (9th Cir. 1991) (discretion protected); *Soto v. United States*, 748 F. Supp. 727 (C.D. Cal. 1990) (no discretion).

93. See *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990); *Soto v. United States*, 748 F. Supp. 727 (C.D. Cal. 1990).

94. See *Summers v. United States*, 905 F.2d at 1215 (no evidence suggests the failure to post warning signs was the "result of a decision reflecting the competing considerations of the Service's sign policy"). This portion of the holding is probably invalid after *United States v. Gaubert*, 111 S. Ct. 1267, 1275 (1991) ("The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.").

95. See, e.g., *Kiehn v. United States*, 984 F.2d 1100 (10th Cir. 1993); *Johnson v. United States*, 949 F.2d 332 (10th Cir. 1991); *Zumwalt v. United States*, 928 F.2d 951, 955 (10th Cir. 1991) (absence of warning signs "was part of the overall policy decision to maintain the Trail in its wilderness state").

96. *Apple Bros. v. United States*, 7 F.3d 720 (8th Cir. 1993) (inspection of grain warehouse; remand); *In re Sabin Oral Polio Vaccine Products Liability Litigation*,



reflect that *Berkovitz* has dampened the notion that *Varig* meant to forbid all government liability for inspection and licensing error.<sup>97</sup> The crucial factor in deciding licensing liability appears to be the discretion granted by statute or regulation.<sup>98</sup>

### B. Application of the Berkovitz Tests

Most courts have read *Berkovitz*,<sup>99</sup> as amplified by *Gaubert*,<sup>100</sup> as setting out a two-step analysis for any discretionary function claim regardless of subject matter. The government must satisfy both tests in order to claim the protection of section 2680(a). As indicated, the United States has managed to do so within certain areas.

#### 1. Does the act involve an element of judgment or choice?

The "judgment or choice" requirement turns on whether a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."<sup>101</sup> *Gaubert* sets out the possible patterns.<sup>102</sup> If performance is mandated and the government officer complies, the action is protected discretion "because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."<sup>103</sup> If performance is mandated and the actor violates the directive "there will be no shelter from liability because there is no room for choice and the action will be contrary to pol-

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984 F.2d 124 (4th Cir. 1993) (polio vaccine licensing; no discretion); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992) (MSHA mine inspection failure; no discretion); *Daniels v. United States*, 967 F.2d 1463 (10th Cir. 1992) (OSHA inspection; discretion protected); *Redmon v. United States*, 934 F.2d 1151 (10th Cir. 1991) (pilot certification; discretion protected); *Foster v. United States*, 923 F.2d 765 (9th Cir. 1991) (FAA pilot certification; discretion protected); *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990) (failure of OSHA inspectors to observe dangerous condition at factory; remanded for further findings); *Hayes v. United States*, 899 F.2d 438 (5th Cir. 1990) (no discretion in pilot licensing decision); *Koppie v. Busey*, 832 F. Supp. 1245 (N.D. Ind. 1992), *aff'd sub nom.* *Koppie v. United States*, 1 F.3d 651 (7th Cir. 1993) (FAA plane certification; discretion protected); *Cooley v. United States*, 791 F. Supp. 1294 (E.D. Tenn. 1992), *aff'd on other grounds sub nom.* *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994) (MSHA mine inspection; discretion protected by the trial court but not by the appellate court).

97. See *United States v. Varig Airlines*, 467 U.S. 797, 813-14 (1984) ("[W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.").

98. See *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994); *In re Sabin Oral Polio Vaccine Products Liability Litigation*, 984 F.2d 124 (4th Cir. 1993); *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990); but see *Hayes v. United States*, 899 F.2d 438 (5th Cir. 1990) (decisions not policy related).

99. *Berkovitz v. United States*, 486 U.S. 531 (1988).

100. *United States v. Gaubert*, 111 S. Ct. 1267 (1991).

101. *Berkovitz v. United States*, 486 U.S. at 536.

102. *United States v. Gaubert*, 111 S. Ct. at 1274.

103. *Id.*

icy.”<sup>104</sup> Lastly if the directive allows the actor discretion “the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.”<sup>105</sup>

*Gaubert* further notes that not all agencies operate under comprehensive regulations.<sup>106</sup> In fact the reported cases often review decisions made at a sub-regulatory level. Courts have probed into guidelines,<sup>107</sup> project statements,<sup>108</sup> manuals,<sup>109</sup> and checklists.<sup>110</sup> These cases all have involved written documents, but oral understandings could serve the same purpose.

At the other extreme, one plaintiff tried unsuccessfully to mandate agency action on the basis of an international treaty, the Hague Convention on the Laws of Warfare. The court noted that the Treaty was not self-executing. It found no United States law that mandated the action desired by the plaintiff and upheld the government’s section 2680(a) claim.<sup>111</sup>

*Johnson v. Sawyer*<sup>112</sup> addresses the conflicting directives. The plaintiff alleged that an IRS agent improperly disclosed the plaintiff’s tax information. The agent pointed to an IRS policy that encourages publicizing actions against certain tax violators. A federal statute, however, protects the taxpayer’s privacy and forbids disclosure. Congressional supremacy carried the day, and the taxpayer prevailed.

Relatively few cases at the appellate level are successful in showing that a clear mandatory guideline has been violated by a government officer. The Eighth Circuit made the point well in 1993<sup>113</sup> stating: “Thus, to remove discretion from government employees, a

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104. *Id.*

105. *Id.*

106. *Id.* (“Not all agencies issue comprehensive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations.”).

107. *C.R.S. ex rel. D.B.S. v. United States*, 11 F.3d 791 (8th Cir. 1993); *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990); *Flynn v. United States*, 902 F.2d 1524 (10th Cir. 1990).

108. *Zumwalt v. United States*, 928 F.2d 951 (10th Cir. 1991).

109. *Phillips v. United States*, 956 F.2d 1071 (11th Cir. 1992); *Fazi v. United States*, 935 F.2d 535 (2d Cir. 1991); *Kelly v. United States*, 924 F.2d 355 (1st Cir. 1991).

110. *Tracor/MBA, Inc. v. United States*, 933 F.2d 663 (8th Cir. 1991).

111. *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir.), *cert. denied*, 113 S. Ct. 411 (1992).

112. 980 F.2d 1490 (5th Cir.), *modified*, 4 F.3d 369 (5th Cir. 1992).

113. *C.R.S. ex rel. D.B.S. v. United States*, 11 F.3d 791 (8th Cir. 1993).

regulation must be mandatory and it must clearly and specifically define what the employees are supposed to do."<sup>114</sup>

The cases finding a violation of mandated discretion give some guidance. *Summers v. United States*<sup>115</sup> involved an injury allegedly due to a violation of National Park Service safety guidelines. The Ninth Circuit held the guidelines mandated corrective action as soon as a hazard posing risk of serious injury had been identified. In *Love v. United States*<sup>116</sup> the government failed to give a mandatory statutory notice. *Phillips v. United States*<sup>117</sup> involved a violation of mandatory directives in an Army Corps of Engineers safety manual. *Johnson v. Sawyer*,<sup>118</sup> mentioned above, involved a statutory prohibition against disclosure of taxpayer information. *Tinkler v. United States*<sup>119</sup> involved a mandate in Federal Aviation Administration regulations to provide weather information to a pilot. *In re Sabin Oral Polio Vaccine Litigation*<sup>120</sup> virtually repeated the *Berkovitz* fact situation. Lastly *Myers v. United States*<sup>121</sup> found violations of Mine Health and Safety Act provisions. The court concluded: "The [Mine Safety and Health Administration] inspectors whose conduct is at issue in the present case are *not authorized* to reweigh these interests on a case-by-case basis. Rather, they are to determine compliance and, in the event of non-compliance, issue the mandatory citations and orders."<sup>122</sup> Judge Guy of the Sixth Circuit differed with his colleagues on the section 2680(a) issue and impliedly on the possibility of denying the government protection in regulatory cases. Judge Guy wrote: "I do not think Congress ever intended the FTCA to be an invitation to parse the rules and regulations of regulatory agencies looking for those functions the agencies arguably were required to perform, and then attempting to have liability follow those functions."<sup>123</sup>

What parsing of rules and regulations has been done, however, typically has favored the government. Commonly the plaintiff finds a supposedly mandatory provision that the government officer has violated. The plaintiff asserts there is no judgment or choice allowed to the government officer. The government attorneys, however, have been quite skilled in taking the sting out of "shalls" and "musts." A few cases are illustrative.

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114. *Id.* at 799.

115. 905 F.2d 1212 (9th Cir. 1990).

116. 915 F.2d 1242 (9th Cir. 1989).

117. 956 F.2d 1071 (11th Cir. 1992).

118. 980 F.2d 1490 (5th Cir.), *modified*, 4 F.3d 369 (5th Cir. 1992).

119. 982 F.2d 1456 (10th Cir. 1992).

120. 984 F.2d 124 (4th Cir. 1993).

121. 17 F.3d 890 (6th Cir. 1994).

122. *Id.* at 898.

123. *Id.* at 905.

In *Kelly v. United States*<sup>124</sup> the plaintiff alleged that regulations mandated an investigation of charges of misconduct against a Drug Enforcement Agency (DEA) agent. The First Circuit noted that “will” and “must” can have multiple meanings and took a common sense reading of the regulation. “If the Manual were read to mandate that every bit of idle gossip intimating employee misconduct had to be reported, it would constitute an open invitation to drug traffickers to make baseless claims against DEA agents.”<sup>125</sup> In *Powers v. United States*<sup>126</sup> a statutory requirement that the federal officer “shall” make flood insurance information available was qualified by “from time to time” and “as may be necessary.” Those words were sufficient to give protected discretion to the director.

Courts also have given the government the benefit of the doubt in defining the terms under which mandatory duties are imposed. In *Fazi v. United States*<sup>127</sup> the victim of an armed robbery alleged that the United States Postal Service had violated its regulations in not providing him with an armed escort. The case turned on whether blank traveler’s checks should be included within the term “negotiable instruments” for which the armed escort was required. The Second Circuit observed that “a decision to treat blank traveler’s checks like negotiable or bearer instruments was not required by the Manual, and any such decision would be based on a balancing of economic and policy factors.”<sup>128</sup>

Just because a result is mandated does not require that it be reached in a particular way. In *Zumwalt v. United States*<sup>129</sup> National Park Service policies appeared to mandate the repair of dangerous park trails. The court observed that the project statement did not spell out how hazardousness determinations were to be made. Further, “[o]nce a hazardous section is identified, Park Service personnel must determine what type of improvements to make and where the improvements should be located based on wilderness policy and the need for public safety.”<sup>130</sup> This left sufficient discretion to the government officer to allow the section 2680(a) immunity. Similarly in *Daniels v. United States*<sup>131</sup> an Occupational Safety and Health Administration (OSHA) regulation required that “end saws on the trimmer shall be guarded.”<sup>132</sup> However, the kind of guard employed was a matter of discretion.<sup>133</sup>

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124. 924 F.2d 355 (1st Cir. 1991).

125. *Id.* at 361.

126. 996 F.2d 1121 (11th Cir. 1993).

127. 935 F.2d 535 (2d Cir. 1991).

128. *Id.* at 539.

129. 928 F.2d 951 (10th Cir. 1991).

130. *Id.* at 954.

131. 967 F.2d 1463 (10th Cir. 1992).

132. *Id.* at 1465.

133. *Id.*

2. *Is the judgment of the kind section 2680(a) was intended to protect?*

If a government officer violates an established statute, regulation, or policy, the discretionary function is lost and the government must defend its conduct on other grounds. The government's success on the question whether the conduct violates an established policy, however, leaves the government only halfway to a successful discretionary function defense. *Varig*, *Berkovitz*, and *Gaubert* make clear that the government also must show "whether that judgment is of the kind that the discretionary function exception was designed to shield."<sup>134</sup> This test arises from *Varig's* reading of congressional intent. Congress in enacting section 2680(a) desired "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."<sup>135</sup> As *Berkovitz* elaborates: "The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy."<sup>136</sup> The Second Circuit in *Andrulon v. United States* sharpened the focus by asking whether the alleged policy actions were "based on the purposes the regulatory regime seeks to accomplish."<sup>137</sup> If so the matter is protected under section 2680(a). If not the discretionary function does not apply even if the government has not violated any legal standard.

Courts have given considerable deference to government assertions of policy discretion. Economic factors often are cited with little evidence to back up the claim. This claim is made easier by *Gaubert's* removal of any requirement that an actual decision has been made by the government officer in question.<sup>138</sup> After *Gaubert* it seems sufficient to claim that budgetary consideration could have been a factor.

Non-economic policy considerations may outweigh safety concerns. Considerable deference to national defense judgments is reflected in *Ayer v. United States*<sup>139</sup> and *Creek Nation Indian Housing Authority v. United States*.<sup>140</sup> *Ayer* endorsed the policy factors behind the Air Force's favoring military readiness over safety in the design of a missile launch control chamber. *Creek Nation* allowed the military great latitude in bomb design decisions. Quoting from the United States Supreme Court decision in *Boyle v. United Tech-*

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134. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

135. *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

136. *Berkovitz v. United States*, 486 U.S. at 537.

137. *Andrulon v. United States*, 952 F.2d 652, 655 (2d Cir. 1991) (quoting *United States v. Gaubert*, 111 S. Ct. at 1275 n.7).

138. *United States v. Gaubert*, 111 S. Ct. at 1275.

139. 902 F.2d 1038 (1st Cir. 1990).

140. 905 F.2d 312 (10th Cir. 1990).

*nologies Corp.*,<sup>141</sup> the court observed "that the selection of the appropriate design for military equipment . . . involves . . . the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."<sup>142</sup>

The cases involving the United States Park Service also show a willingness to accept government assertions about policy decisions. The desire for wilderness preservation sustained the lack of warning signs in *Zumwalt v. United States*.<sup>143</sup> The court found the decision "was part of the overall policy decision to maintain the Trail in its wilderness state."<sup>144</sup> The matter was phrased more colorfully by the Tenth Circuit when it observed that "many Park visitors value backcountry climbing as one of the few experiences free from government regulation or interference."<sup>145</sup>

One of the most thorough evaluations of policy judgment occurs in *D.B.S. ex rel. C.R.S. v. United States*.<sup>146</sup> The plaintiff and his family were infected with the AIDS virus from blood transfusions received in the military. The plaintiff faulted the government for inadequate blood screening procedures and for failure to warn that contamination might have occurred. The plaintiff sought to portray the case as one of simple professional medical negligence. The Eighth Circuit disagreed. The court concluded:

[The decision to warn] implicates competing concerns of safety and cost. The government could have balanced the fact that identifying all those in [plaintiff's] position might have lowered the risks of transmission against the possibility that public awareness of AIDS and warnings from other sources might have obviated the need for notification from the Army, the fact that the risk of infection was statistically slight, the risk that military morale could be affected, and the judgment that scarce resources could be better allocated elsewhere.<sup>147</sup>

Other courts have sided with plaintiffs, holding that certain government decisions did not involve issues of public policy. The following have been held not to constitute public policy decisions: whether a situation created a job safety hazard;<sup>148</sup> whether research laboratory conditions were safe for rabies research;<sup>149</sup> and whether

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141. 487 U.S. 500 (1988).

142. *Creek Nation Indian Hous. Auth. v. United States*, 905 F.2d at 313 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. at 510-13).

143. 928 F.2d 951 (10th Cir. 1991).

144. *Id.* at 955.

145. *Johnson v. United States Dep't of Interior*, 949 F.2d 332, 337 (10th Cir. 1991).

146. 11 F.3d 791 (8th Cir. 1993).

147. *Id.* at 801.

148. *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991).

149. *Andrulonis v. United States*, 952 F.2d 652 (2d Cir. 1991).

a mine safety inspector made proper recommendations regarding electrical connections for lights to a continuous mining machine.<sup>150</sup>

As mentioned earlier it is not essential that the decision maker actually weigh policy objectives in reaching his or her decision.<sup>151</sup> The Fourth Circuit in *Baum v. United States* made the point well:

Rather than requiring a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function, we are of opinion that a reviewing court in the usual case is to look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in considerations of policy.<sup>152</sup>

#### IV. SUMMARY AND ANALYSIS

United States Supreme Court decisions provide benchmarks for assessing the workings of section 2680(a) in the lower federal courts and in the administrative agencies. As such decisions accrue two questions are appropriate. First, with what clarity has the Supreme Court defined the amorphous legislative term "discretionary function"? That is, are standards clear, allowing legitimate claims to be paid promptly and illegitimate claims to be rejected before expensive litigation is pursued? Second, does the Court's interpretation of section 2680(a) generally expand or limit government liability?

In 1977, after a quarter century in which the only Supreme Court guidance came from *Dalehite*, clarity was lacking and lower court decisions expanded plaintiffs' abilities to assert novel theories of liability against the United States.<sup>153</sup> The latter factor may have been a product of the times. Vietnam and Watergate had put unchecked executive discretion in a bad light, with increased judicial willingness to reject claims of protected discretion. Yet judicial decisions handed down at the time in section 2680(a) actions offered little more than the conclusion that courts would undertake a reasoned case-by-case analysis to distinguish protected from unprotected discretion.

A decade later in *Varig Airlines* the Supreme Court appeared to shift the policy balance toward the government. *Varig* insisted that courts examine the nature of the conduct rather than the status of the actor in weighing application of section 2680(a). This reaffirmation of *Dalehite* revalidated the Court's position that discretion could be exercised at mid-level and low-level government. More importantly, a second *Varig* holding, that regulatory acts are discre-

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150. *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

151. See *supra* note 132 and accompanying text.

152. 986 F.2d 716, 720-21 (4th Cir. 1993).

153. *Changing Meanings*, *supra* note 5, at 40-42.

tionary, promised to remove a considerable chunk of the recent business of the federal courts in section 2680(a) actions.

The last decade has added two more Supreme Court precedents. *Berkovitz* restored hope to plaintiffs by resurrecting the possibility of liability for regulatory acts. *Gaubert*, however, appears to preclude government liability for most financial institution regulatory claims. *Gaubert*'s most lasting value may be in its implicit rejection of any need for examination of whether government officers actually engaged in reasoned policy making.

The *Berkovitz* formulation of section 2680(a) analysis, enhanced by *Gaubert*, has proved to be the most useful analytic tool offered by the Supreme Court in discretionary function jurisprudence. Most current lower federal court decisions track *Berkovitz*'s two-stage analysis: 1) determining first whether existing law gives government officers the legal authority to make the questioned decision and 2) determining then whether the decision made involves the social, economic, and political factors that Congress meant to protect under section 2680(a). This dual analysis does not answer every discretionary function question. It does allow, however, a more structured analysis than did previous Supreme Court tests.

The first part of the *Berkovitz* test encourages a plaintiff's attorney to search for a provision of statute, regulation, or informal policy violated by a government official. As the cases from the lower courts indicate, this is not as easy as it sounds. Courts have struggled to find in lengthy and poorly written directives evidence that government officers exercised a discretion they were not granted. The impression arises that for one judge "shall" can only mean "must" and that for another judge "shall" means "may, if the government wants."

The clear rule, however, may not be the right rule. The emphasis on finding a violation of a regulation, directive, or office manual may ignore congressional objectives. As has been observed in many bureaucracies, the certain way to cripple operations is to insist on literal compliance with every regulatory provision. Even if the law-making authority's policy is that rules are to be enforced, it is not clear that tort sanctions are an appropriate means of enforcement. Quite possibly discretionary function law should borrow common law rules for using a statute or regulation to set a standard of care.

*Gaubert* recognized that a government official need not have made an actual policy-based decision in order to enjoy discretionary protection. Even an official who has engaged in an unreasoned exercise of discretion is protected if the court finds he made the kind of decision that *might have had* policy implications.

This rule is troubling. If part of the justification for section 2680(a) is to avoid paralyzing federal decision making for fear of liability, the *Gaubert* rule reaches too broadly. Why protect the offi-



cial who never may have thought about the policy impacts of her discretion? *Gaubert* does, however, offer considerable saving.

If under an alternative to *Berkovitz* the law were to demand that an official actually engage in reasoned decisionmaking, plaintiffs would scour records or construct testimony to show a lack of reasoned discretion. Defendants, by contrast, in support of their argument for a reasoned policy decision, would bring forward after-the-fact testimony that at best might involve selective memory and at worst undetectable perjury. We also would expect an increase in paperwork as a tort-averse agency made sure to document any actions that might lead to subsequent tort liability. The *Gaubert* rule eliminates or lessens the need for all that.

A full review of the lower court cases since *Berkovitz* leaves the impression that plaintiffs' lawyers are playing some decided long shots. In certain subject areas the assertion of protected government discretion is highly likely to be successful. When cases involve violations of law, however, the courts generally resolve ambiguity in favor of the government. The courts are quite ready to find policy implicated in a wide variety of situations, especially in application of federal regulatory power.

#### V. CONCLUSION

In short, a fiscally cautious Congress has reason to be pleased with the evolution of discretionary function law. The Supreme Court well may be cautious in accepting further discretionary function cases. Government attorneys can feel vindicated that their interpretations of the exception, both in the administrative agencies and the courts, largely have been approved. Plaintiffs and their attorneys must recognize that the demise of sovereign immunity has not opened the United States to any claim of responsibility. Creative lawyering may be rewarded, of course, but both lawyers and plaintiffs should know they are playing in a game where the rules favor the house.