

Texas City Disaster - History of the FTCA - Dalehite v. U.S., 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953)

[28] I. The Federal Tort Claims Act was passed by the Seventy-ninth Congress in 1946 as Title IV of the Legislative Reorganization Act, 60 Stat. 842, after nearly thirty years of congressional consideration. It was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. And the private bill device was notoriously clumsy.*fn9 Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope.*fn10 The meaning of the governmental regulatory function exception from suits, 2680 (a), shows most clearly in the history of the Tort Claims Bill in the Seventy-seventh Congress. The Seventy-ninth, which passed the Act, held no relevant hearings. Instead, it integrated the language of the Seventy-seventh Congress, which had first considered the exception, into the Legislative Reorganization Act as Title IV.

[29] Earlier tort claims bills considered by Congress contained reservations from the abdication of sovereign immunity. Prior to 1942 these exceptions were couched in terms of specific spheres of federal activity, such as postal service, the activities of the Securities and Exchange Commission, or the collection of taxes.*fn11 In 1942, however, the Seventy-seventh Congress drafted a twofold elimination of claims based on the execution of a regulation or statute or on the exercise of a discretionary function. The language of the bills then introduced in both the House and Senate, in fact, was identical with that of 2680 (a) as adopted.*fn12 The exception was drafted as a clarifying amendment to the House bill to assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions.*fn13 An Assistant Attorney General, appearing before the Committee especially for that purpose,*fn14 explained it as avoiding "any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity," merely because "the same conduct by a private individual would be tortious." 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. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project and the like."*fn15 Referring to a prior bill which had not contained the "discretionary function" exemption, the House Committee on the Judiciary was advised that "the cases embraced within [the new] subsection would have been exempted from [the prior bill] by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H. R. 6463 makes this specific."*fn16

[30] The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business,*fn17 it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.*fn18 Section 2680 (a) draws this distinction. Uppermost in the collective mind of Congress were the ordinary common-law torts.*fn19 Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is

"negligence in the operation of vehicles."*fn20 On the other hand the Committee's reports explain the boundaries of the sovereign immunity waived, as defined by this 2680 exception, with one paragraph which appears time and again after 1942, and in the House Report of the Congress that adopted in 2680 (a) the limitation in the language proposed for the 77th Congress.*fn21 It was adopted by the Committee in almost the language of the Assistant Attorney General's explanation. This paragraph characterizes the general exemption as "a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion."

[31] II. Turning to the interpretation of the Act, our reasoning as to its applicability to this disaster starts from the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it.*fn22 The language of the Act makes the United States liable "respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. 2674. This statute is another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule. Through such statutes that change the law, organized government expresses the social purposes that motivate its legislation. Of course, these modifications are entitled to a construction that will accomplish their aim,*fn23 that is, one that will carry out the legislative purpose of allowing suits against the Government for negligence with due regard for the statutory exceptions to that policy. In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception.*fn24 They cannot do less since petitioners obtain their "right to sue from Congress [and they] necessarily must take it subject to such restrictions as have been imposed." *Federal Housing Administration v. Burr*, 309 U.S. 242, 251.

[32] So, our decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions.*fn25 Where jurisdiction was clear, though, we have allowed recovery despite arguable procedural objections.*fn26

[33] One only need read 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions. Negligence in administering the Alien Property Act, or in establishing a quarantine, assault, libel, fiscal operations, etc., was barred. An analysis of 2680 (a), the exception with which we are concerned, emphasizes the congressional purpose to except the acts here charged as negligence from the authorization to sue.*fn27 It will be noted from the form of the section, see p. 18, supra, that there are two phrases describing the excepted acts of government employees. The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars tests by tort action of the legality of statutes and regulations. The second is applicable in this case. It excepts acts of discretion in the performance of governmental functions or duty "whether or not the discretion involved be abused." Not only agencies of government are covered but all employees exercising discretion.*fn28 It is clear that the just-quoted clause as to abuse connotes both negligence and

wrongful acts in the exercise of the discretion because the Act itself covers only "negligent or wrongful act or omission of any employee," "within the scope of his office" "where the United States, if a private person, would be liable." 28 U. S. C. 1346 (b). The exercise of discretion could not be abused without negligence or a wrongful act. The Committee reports, note 21, supra, show this. They say 2680 (a) is to preclude action for "abuse of discretionary authority . . . whether or not negligence is alleged to have been involved." They speak of excepting a "remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion."*fn29

[34] So we know that the draftsmen did not intend it to relieve the Government from liability for such common-law torts as an automobile collision caused by the negligence of an employee, see p. 28, supra, of the administering agency. We know it was intended to cover more than the administration of a statute or regulation because it appears disjunctively in the second phrase of the section. The "discretion" protected by the section is not that of the judge -- a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.*fn30

Allen v. United States, 816 F.2d 1417 (10th Cir. 1987)

[12] In this action under the Federal Tort Claims Act, see 28 U.S.C. 1346(b), 2401(b), 2671-80, nearly 1200 named plaintiffs have sued the United States, alleging some 500 deaths and injuries as a result of radioactive fallout from open-air atomic bomb tests held in Nevada in the 1950s and 1960s. The district court selected and tried twenty-four "bellwether" claims, in order to find a common framework for the rest.*fn1 See *Allen v. United States*, 588 F. Supp. 247, 258 (D. Utah 1984). The court entered final judgment in favor of the government on fourteen of these claims and against the government on nine, leaving" one claim outstanding. *Id.* at 446-47. It then granted a Fed. R. Civ. P. 54(b) motion permitting the government to appeal those claims resolved against it. On appeal the government contends that (1) the "discretionary function" exception in 28 U.S.C. 2680(a) precludes government liability; (2) the government did not breach any duty owed to the public; (3) the government did not cause plaintiffs' injuries; and (4) the plaintiffs' claims were barred by the two-year statute of limitations in 28 U.S.C. 2401(b). We do not discuss the last three issues, because we agree that the discretionary function exception precludes government liability.

[13] The district court opinion states the facts fully. See *Allen*, 588 F. Supp. at 337-38, 348-50, 358-404. The authority for federal atomic bomb tests came from the Atomic Energy Act of 1946, Pub. L. No. 585, 60 Stat. 755 ("the 1946 Act"). See Atomic Energy Act of 1954, 42 U.S.C. 2011-2296 (present version of atomic energy statutes). Under the 1946 Act, the Atomic Energy Commission (AEC) received broad discretionary power to "conduct experiments . . . in the military application of atomic energy." 1946 Act, 6(a); see 42 U.S.C. 2121(a) (same authority in present statutes).*fn2 The AEC was authorized to carry on such experiments "only to the extent that the express consent and direction of the President of the United States has been obtained, which consent and direction shall be obtained at least once each year." *Id.* Additionally, the AEC was "authorized and directed to make arrangements . . . for . . . the protection of health during research and production activities." 1946 Act, 3(a). These arrangements were to "contain such provisions to protect health, to minimize danger from explosion and other hazards to life or

property . . . as [the AEC] may determine." Id.; see 42 U.S.C. 2012(d)-(e), 2013(d), 2051(d) (similar provisions in present statutes).

[14] In 1950 the AEC chose an area in Nevada as a testing site. The President approved this choice. Thereafter, between 1951 and 1962, eight series of open-air tests were conducted, with the President approving each series of tests. Over one hundred atomic bombs were detonated.

[15] Each test explosion was executed according to detailed plans which the AEC officially reviewed and adopted. Separate plans for protecting the public, and for providing the public with appropriate information, were also adopted by the AEC. To actually execute the plans, however, the AEC delegated some of its authority. The AEC selected a "Test Manager" for each test series, who had some day-to-day discretion. The Test Manager could, for example, postpone a given test because of adverse weather conditions. The Test Manager in turn delegated authority to a Radiological Safety Officer (a "Radsafe Officer") who was in charge of implementing plans to avoid radiation dangers, and a Test Information Officer who was in charge of implementing plans to provide public information on the tests. Both the Radsafe Officer and the Test Information Officer also had some day-to-day discretion in performing their duties.

[16] At trial, as a basis for governmental liability, plaintiffs singled out the alleged failure of the government, especially of the Radsafe Officers and the Test Information Officers, to fully monitor offsite fallout exposure and to fully provide needed public information on radioactive fallout. The district court focused on these two failures in finding government liability. *Allen*, 588 F. Supp. at 372-404.

[17] The Federal Tort Claims Act (FTCA) authorizes suits for damages against the United States

[18] "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. 1346(b). In such suits, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Suit is not allowed, however, for any claim

[19] "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

[20] 28 U.S.C. 2680(a) (emphasis added). The key term, "discretionary function," is not defined. For over thirty-five years the federal courts have been attempting to define it.

[21] Plaintiffs in the present case attempted to distinguish between the discretionary initiation of government programs, at the highest levels of administration, and the decisions involved in carrying out programs, at lower levels. Plaintiffs argued that while low-level decisions may involve some "judgment," they do not fall within the discretionary function exception of 2680(a).

See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 100 L. Ed. 48, 76 S. Ct. 122 (1955) (reference to "operational level" of activity; no immunity found for government failure to operate lighthouse). The district court agreed, basing its finding of government liability squarely on a distinction between high-level and low-level government activity. *Allen*, 588 F. Supp. at 335-40.

[22] After the district court judgment in the present case, the Supreme Court decided *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984), in which it explicitly rejected distinctions based on the administrative level at which the challenged activity occurred. In *Varig*, various plaintiffs brought an FTCA suit against the United States, claiming that the Federal Aviation Administration (FAA) had negligently implemented plane inspection and design certification programs, allowing improper flammable materials and a defective heater system to be used to construct a specific Boeing 707 and a specific DeHavilland Dove. The planes in question caught fire and burned, killing most of those on board. The Supreme Court held, however, that the United States was immune from suit. The Court found that the contested FAA actions constituted the performance of a "discretionary function," exempt under 28 U.S.C. 2680(a) from potential FTCA liability. 467 U.S. at 819-21.

[23] The plaintiffs in *Varig* focused on "low-level" decisions in their suit. They challenged the actual issuance by the FAA of design approval certificates for two plane types, the decision to enforce FAA standards with a particular "spot-check" system, and the actual plane inspections that were and were not carried out under that system. 467 U.S. at 799-803, 816-20. The Supreme Court found that each of these actions constituted a discretionary function, immune from suit under 2680(a):

[24] "The "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and 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."

[25] *Id.* at 811 (quoting *Dalehite v. United States*, 346 U.S. 15, 35-36, 97 L. Ed. 1427, 73 S. Ct. 956 (1953)). The Court emphasized that it is "the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig*, 467 U.S. at 813.

[26] On appeal, plaintiffs contend that the AEC, in planning and conducting its monitoring and information programs, was not making the kind of policy judgments protected by 2680(a). They point to the general statutory provisions instructing the AEC to consider public health and safety, and claim that these broad congressional directives leave no further room for discretion. We disagree.

[27] In the case before us, as in *Varig*, the government actors had a general statutory duty to promote safety; this duty was broad and discretionary. In the case before us it was left to the AEC, as in *Varig* it was left to the Secretary of Transportation and the FAA, to decide exactly

how to protect public safety. If anything, the obligation imposed on the FAA to protect public safety was greater and the discretion granted to the FAA by Congress was less, in the circumstances reviewed by *Varig*, than the comparable obligation imposed and discretion available to the AEC in the present case. Compare 49 U.S.C. 1421 (FAA safety duty) with 42 U.S.C. 2051(d) (AEC safety duty). We cannot say that what was protected by the Supreme Court in *Varig* is now subject to liability.

[28] Plaintiffs further contend that, even if the initial discretion granted the AEC by statute was broad, test site personnel violated the AEC's own policy directives by failing to implement adequate protective measures. We cannot accept this argument either. Neither the plaintiffs nor the district court have been able to point to a single instance in which test site personnel ignored or failed to implement specific procedures mandated by the AEC for monitoring and informing the public. Indeed, the district court's conclusions appear to be based, at least in part, on perceived inadequacies in the AEC's radiological safety and information plans themselves.*fn3 The court relied heavily on a 1954 report to the AEC by the Committee "to Study Nevada Proving Grounds which was moderately critical of the measures taken up to that point to inform and warn the public. See *Allen*, 588 F. Supp. at 386-90, 392-93. The stated objective of this report, however, was "[t]o be a basis for Commission decisions on future policy." Pl. Ex. at 4. The operational plans the district court considered deficient embody those AEC policy decisions. As such, these plans clearly fall within the discretionary function exception.*fn4

[29] Government liability cannot logically be predicated on the failure of test-site personnel to go beyond what the operational plans specifically required them to do. If, as the plaintiffs maintain, the AEC delegated "unfettered authority" to a Test Manager and his subordinates to implement public safety programs, this simply compels the conclusion that those officers exercised considerable discretion. Their actions, accordingly, also fall within the discretionary function exception.

[30] It is irrelevant to the discretion issue whether the AEC or its employees were negligent in failing to adequately protect the public. See *Cisco v. United States*, 768 F.2d 788, 789 (7th Cir. 1985); *General Public Utilities Corp.*, 745 F.2d 239, 243, 245 (3d Cir. 1984), cert. denied, 469 U.S. 1228, 84 L. Ed. 2d 365, 105 S. Ct. 1227 (1985).*fn5 When the conduct at issue involves the exercise of discretion by a government agency or employee, 2680(a) preserves governmental immunity "whether or not the discretion involved be abused." For better or worse, plaintiffs here "obtain their 'right to sue from Congress [and] necessarily must take it subject to such restrictions as have been imposed.'" *Dalehite v. United States*, 346 U.S. 15, 31, 97 L. Ed. 1427, 73 S. Ct. 956 (1953) (quoting *Federal Housing Administration v. Burr*, 309 U.S. 242, 251, 84 L. Ed. 724, 60 S. Ct. 488 (1940)).*fn6

[31] *Id.* at 97-98. Accord *In re Consolidated United States Atmospheric Testing Litigation*, 616 F. Supp. 759, 776-77 (N.D. Cal.), appeal docketed, No. 85-2842 (9th Cir. 1985).

[32] To be sure, the circumstances in *Varig* are not identical to those now before us. Most notably, *Varig* involved the actions of a regulatory agency supervising private individuals. The Court observed in *Varig* that the discretionary actions of government regulators were at the core of what 2680(a) was intended to protect. But *Varig* expressly reaffirmed the earlier Supreme Court decision of *Dalehite v. United States*, 346 U.S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953),

which found very broad governmental immunity outside a regulatory setting. See *Varig*, 467 U.S. at 810-14.

[33] In *Dalehite*, private plaintiffs sued the government over deaths, injuries, and property damage resulting from a disastrous explosion of two shiploads of ammonium nitrate fertilizer. 346 U.S. at 22-23. As with the AEC bomb-testing program before us here, Congress and the President, in response to international tensions following World War II, had decided on a crash government program--in *Dalehite*, a program to feed the populations of Korea, Japan, and Germany. *Id.* at 19-20. Broad general authority was given to the War Department, and the War Department created a plan for massive fertilizer shipments. The Army's Chief of Ordnance was delegated discretionary responsibilities for carrying out the War Department plan, and he in turn appointed a "Field Director of Ammunition Plants" to administer the program. *Id.* Other lower-level plant managers and supply officers were also appointed.

[34] As with the AEC bomb tests, the production of fertilizer in *Dalehite* involved a mix of private and public facilities and employees. *Id.* at 20-21. As with the AEC bomb tests, all plans for manufacture, packing, and shipping of the fertilizer in *Dalehite* were officially approved. *Id.* at 38-40. The *Dalehite* plaintiffs, like the present plaintiffs, were unable to point to any instances in which government employees acted negligently in performing specific, mandatory duties. The *Dalehite* plaintiffs instead argued primarily, just as the present plaintiffs argue here, that at various points the government could have made better plans, and that the government failed to fully investigate the hazards of the dangerous material involved and to fully inform and warn the nearby populace. *Id.* at 23.

[35] The Supreme Court in *Dalehite* found every contested government decision, action, and omission to be the performance of a discretionary function, exempt from suit under 2680(a): the cabinet-level decision to export the fertilizer, the lower-level failure to fully test for explosive properties, the Field Director's fertilizer production plan, the actual production of the fertilizer in accordance with the government specifications and the specific decisions to bag the fertilizer at a certain temperature and to label the fertilizer in a certain way. *Id.* at 24, 36-42. The various actions and omissions of the Coast Guard, supervising the actual loading of the ships, were also exempted, as was the general failure to warn the nearby populace of potential dangers. *Id.* at 23-24, 43.*fn7

[36] In *Varig*, the Supreme Court approved the view of 2680(a) expressed in *Dalehite*, strongly rejecting any suggestion that later cases had narrowed the broad immunity found there. *Varig*, 467 U.S. at 810-14. Given the Court's holding in *Dalehite*, reaffirmed in *Varig*, we must conclude that the government is immune from liability for the failure of the AEC administrators and employees to monitor radioactivity more extensively or to warn the public more fully than they did.*fn8

[37] In the instant case, no evidence was presented of any act or omission of the AEC or its employees that clearly contravened a specific statutory or regulatory duty, or that exceeded statutory or regulatory authority. There was no evidence, for example, that the Test Information Officer failed to release information he was required to give out, or that the Radsafe Officer failed to take a specific radiation measurement that had been decided upon. Plaintiffs' entire case

rests on the fact that the government could have made better plans. This is probably correct, but it is insufficient for FTCA liability.

[38] Our decision here adheres to the principle enunciated by the Supreme Court of broad sovereign immunity. An inevitable consequence of that sovereign immunity is that the United States may escape legal responsibility for injuries that would be compensable if caused by a private party. There remain administrative and legislative remedies; we note the express authorization under 42 U.S.C. 2012(i) for the government to make funds available for damages suffered by the public from nuclear incidents. Nonetheless, judicial reluctance to recognize the sometimes harsh principle of sovereign immunity explains much of the tangle of the prior FTCA cases.

[39] The Court stated in *Varig* that the purpose of 2680(a) was to avoid any judicial intervention that "would require the courts to 'second-guess' the political, social, and economic judgments of an agency." 467 U.S. at 814. The bomb-testing decisions made by the President, the AEC, and all those to whom they were authorized to delegate authority in the 1950s and 1960s, were among the most significant and controversial choices made during that period. The government deliberations prior to these decisions expressly balanced public safety against what was felt to be a national necessity, in light of national and international security. However erroneous or misguided these deliberations may seem today, it is not the place of the judicial branch to now question them.

[40] For the above reasons, we find all challenged actions surrounding the government atomic bomb tests in the 1950s and 1960s to be immune from suit, as the performance by a federal agency of a "discretionary function," protected by 2680(a).

[41] We REVERSE the district court's decision with regard to those nine claims in which the government was found to have liability and REMAND for further proceedings consistent with this opinion.

Standards for Federal Tort Claims Act Immunity - The Polio Case - Berkovitz by Berkovitz v. U.S., 486 U.S. 531 (1988)

[31] The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles. This Court stated in *Varig* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id.*, at 813. In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. See *Dalehite v. United States*, 346 U.S. 15, 34 (1953) (stating that the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course"). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Cf. *Westfall v. Erwin*, 484 U.S. 292, 296-297 (1988)

(recognizing that conduct that is not the product of independent judgment will be unaffected by threat of liability).

[32] Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire 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." *United States v. Varig Airlines*, *supra*, at 814. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See *Dalehite v. United States*, *supra*, at 36 ("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.

[33] This Court's decision in *Varig Airlines* illustrates these propositions. The two cases resolved in that decision were tort suits by the victims of airplane accidents who alleged that the Federal Aviation Administration (FAA) had acted negligently in certifying certain airplanes for operation. The Court characterized the suits as challenging the FAA's decision to certify the airplanes without first inspecting them and held that this decision was a discretionary act for which the Government was immune from liability. In reaching this result, the Court carefully reviewed the statutory and regulatory scheme governing the inspection and certification of airplanes. Congress had given the Secretary of Transportation broad authority to establish and implement a program for enforcing compliance with airplane safety standards. In the exercise of that authority, the FAA, as the Secretary's designee, had devised a system of "spot-checking" airplanes for compliance. This Court first held that the establishment of that system was a discretionary function within the meaning of the FTCA because it represented a policy determination as to how best to "accommodat[e] the goal of air transportation safety and the reality of finite agency resources." 467 U.S., at 820. The Court then stated that the discretionary function exception also protected "the acts of FAA employees in executing the 'spot-check' program" because under this program the employees "were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Ibid.* Thus, the Court held the challenged acts protected from liability because they were within the range of choice accorded by federal policy and law and were the results of policy determinations. *fn3

[34] In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument, pressed both in this Court and the Court of Appeals, that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies. That argument is rebutted first by the language of the exception, which protects "discretionary" functions, rather than "regulatory" functions. The significance of Congress' choice of language is supported by the legislative history. As this Court previously has indicated, the relevant legislative materials demonstrate that the exception was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature. *fn4 See *Dalehite v. United States*, *supra*, at 33-34. This coverage accords with Congress' purpose in enacting the exception: to prevent "udicial intervention in . . . the political, social, and economic judgments" of governmental -- including regulatory -- agencies. *United*

States v. Varig Airlines, 467 U.S., at 820. Moreover, this Court twice before has rejected a variant of the Government's position. See *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955) (disapproving argument that FTCA precludes liability for the performance of "uniquely governmental functions"); *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-319 (1957) (same). *fn5 And in *Varig*, we ignored the precise argument the Government makes in this case, focusing instead on the particular nature of the regulatory conduct at issue. To the extent we have not already put the Government's argument to rest, we do so now. The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment. The question in this case is whether the governmental activities challenged by petitioners are of this discretionary nature.

...

[47] The regulatory scheme governing release of vaccine lots is distinct from that governing the issuance of licenses. The former set of regulations places an obligation on manufacturers to examine all vaccine lots prior to distribution to ensure that they comply with regulatory standards. See 21 CFR § 610.1 (1978). *fn12 These regulations, however, do not impose a corresponding duty on the Bureau of Biologics. Although the regulations empower the Bureau to examine any vaccine lot and prevent the distribution of a non-complying lot, see 21 CFR § 610.2(a) (1978), they do not require the Bureau to take such action in all cases. The regulations generally allow the Bureau to determine the appropriate manner in which to regulate the release of vaccine lots, rather than mandating certain kinds of agency action. The regulatory scheme governing the release of vaccine lots is substantially similar in this respect to the scheme discussed in *United States v. Varig Airlines*, 467 U.S. 797 (1984).

[48] Given this regulatory context, the discretionary function exception bars any claims that challenge the Bureau's formulation of policy as to the appropriate way in which to regulate the release of vaccine lots. Cf. *id.*, at 819-820 (holding that discretionary function exception barred claim challenging FAA's decision to establish a spot-checking program). In addition, if the policies and programs formulated by the Bureau allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion. Cf. *id.*, at 820 (holding that discretionary function exception barred claim that employees charged with executing the FAA's spot-checking program made negligent policy judgments respecting the proper inspection of airplanes). The discretionary function exception, however, does not apply if the acts complained of do not involve the permissible exercise of policy discretion. Thus, if the Bureau's policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful. Cf. *Indian Towing Co. v. United States*, 350 U.S., at 69 (holding that a negligent failure to maintain a lighthouse in good working order subjected the Government to suit under the FTCA even though the initial decision to undertake and maintain lighthouse service was a discretionary policy judgment).

[49] Viewed in light of these principles, petitioners' claim regarding the release of the vaccine lot from which Kevan Berkovitz received his dose survives the Government's motion to dismiss. Petitioners allege that, under the authority granted by the regulations, the Bureau of Biologics has adopted a policy of testing all vaccine lots for compliance with safety standards and

preventing the distribution to the public of any lots that fail to comply. Petitioners further allege that notwithstanding this policy, which allegedly leaves no room for implementing officials to exercise independent policy judgment, employees of the Bureau knowingly approved the release of a lot that did not comply with safety standards. See App. 13; Brief for Petitioners 20-21; Reply Brief for Petitioners 15-17. Thus, petitioners' complaint is directed at a governmental action that allegedly involved no policy discretion. Petitioners, of course, have not proved their factual allegations, but they are not required to do so on a motion to dismiss. If those allegations are correct -- that is, if the Bureau's policy did not allow the official who took the challenged action to release a non-complying lot on the basis of policy considerations -- the discretionary function exception does not bar the claim. *fn13 Because petitioners may yet show, on the basis of materials obtained in discovery or otherwise, that the conduct challenged here did not involve the permissible exercise of policy discretion, the invocation of the discretionary function exception to dismiss petitioners' lot release claim was improper.