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Discretionary Functions—The Planning-Operational Dichotomy Revisited

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RECENT DEVELOPMENTS

DISCRETIONARY FUNCTIONS—THE PLANNING-OPERATIONAL DICHOTOMY REVISITED

Federal officials, supervising a high-priority contract to dredge and improve a navigable river, approved a decision to deposit dredged spoil on a vacant lot situated near plaintiff's building. An exhaustive search by a naval officer revealed no other feasible land site immediately available. Wind carried gases emanating from the spoil to plaintiff's buildings, allegedly reacting upon the exterior surfaces to cause severe damage. Plaintiff brought an action under the Federal Tort Claims Act[1] against the United States and its contractor, alleging negligence in the decision to place the spoil on the land, rather than dump it at sea, and in failing to take precautions against the escaping gas. The United States moved for summary judgment, claiming immunity under the "discretionary functions" exception[2] within the act. The court granted the motion.[3] *Held:* A determination to dump spoil on land, rather than carry it out to sea, and not to take precautions against escaping fumes, was a "planning level" decision which falls within the discretionary function immunity of the Federal Tort Claims Act, and prevents recovery for damage to a nearby building resulting from the escaping fumes. *Dolphin Gardens, Inc. v. United States,* 243 F. Supp. 824 (D. Conn. 1965).

Recognizing that nearly all human activity requires some type of "discretion," the United States Supreme Court has interpreted the discretionary functions immunity of the Federal Tort Claims Act as exculpating only government decisions made at the "planning level" of government.[4] Negligent decisions at the "operational level" do not

[1] 28 U.S.C. §§ 1346, 2671-78, 2680 (1964).

[2] 28 U.S.C. § 2680(a) (1964):

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, 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.

[3] The contractor's motion for summary judgment was also granted. Since the government plans did not provide for a safeguard against the escape of fumes, the contractor could not be held liable for this omission. Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965).

[4] Dalehite v. United States, 346 U.S. 15 (1953). In a 4-3 decision the Court held the Government not liable for the multi-million dollar claims arising out of the

fall within the exception.[5] The principal case is an example of the problems and pitfalls[6] in determining where the "planning level" ends and the "operational level" begins.

The court in the principal case, noting that the planning-operational distinction "has not been clearly drawn," stated that the initial decision to dredge the channel was clearly within the discretionary function immunity. Attempting to draw a line between the planning and operational levels, the court stated that "affirmative decisions to act or not to act rather than the negligent performance of a course of action already decided upon,"[7] are decisions at the planning level, falling within the discretionary function exception. Without discussing recent cases holding that planning-level discretion ends with the initial governmental decision to act,[8] the court in *Dolphin Gardens* concluded that the decision to dump the spoil on land without taking precautions against escaping fumes, although subsequent to the initial decision to dredge the river, was "far removed from the operational level and ... well within the scope of 'discretionary functions'."[9]

Texas City disaster. The claims resulted from an explosion of ammonium nitrate fertilizer which was being loaded on ships in the Texas City harbor for shipment to Europe as part of the Government re-development program after World War II. The lower court found negligence in the manufacturing process. The Supreme Court disposed of this finding by saying:

> The acts found to have been negligent were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department.... The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program. *Id.* at 39-42.

[5] Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955). The Court of Appeals affirmed a lower court judgment against the United States for the wrongful death of passengers on an Eastern Air Lines plane which collided with another plane while both were attempting to land at an airport owned and controlled by the Government. Negligence was attributed to a Civil Aeronautics Administration employee in the control tower for failure to keep the planes advised of their respective positions. This was characterized as an "operational level" activity. The Supreme Court granted certiorari, and affirmed per curiam.

[6] See Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). In discussing the planning-operational level distinction shortly after the Supreme Court indicated in Dalehite v. United States 346 U.S. 15 (1953), that it might adopt such a test, Professor Peck states:

> Not only would acceptance of such a classification involve all the difficulties inherent in a formula for determining liability stated in terms only vaguely definable, but it would also present a scheme for disposition of cases which would have none of the appearance of justice. ... To phrase the test of liability in terms which leave out its essential component would result in both confusion and dissatisfaction. *Id.* at 219-20.

[7] 243 F. Supp. at 827.

[8] American Exchange Bank v. United States, 257 F.2d 938 (7th Cir. 1958); Jemison v. The Duplex, 163 F. Supp. 947 (S.D. Ala. 1958); Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956).

[9] 243 F. Supp. at 826.

Other cases, which the court in the principal case failed to adequately consider, have held that an "affirmative decision to act or not to act" takes place with the Government's initial determination to undertake the project,[10] *i.e.*, the decision to dredge the channel. The Government will be liable for any negligent decision in *carrying out* an initial determination to act, because these subsequent decisions are on the operational level. In *Jemison v. The Duplex*,[11] the United States contracted to dredge a ship canal. Because the government plans ignored the dredging line of the canal, the water level fell below plaintiffs' wharves and caused them to subside. Holding the Government liable, against its contention that planning the dredging project was a discretionary function, the court said:

> Discretion within the meaning of the Tort Claims Act was exercised when it was decided that the ship channel in the Mobile River should be deepened. But in drawing the plans and specifications pursuant to achieving this improvement, the United States Engineers were not given *carte blanche* to draft plans and specifications for the dredging operations in negligent disregard for the rights of property owners along the shore. When acts of negligence are committed at the *operational level,* the government is no longer immune from suit.[12]

The court in the principal case held that, even *after* the initial decision was made to dredge the canal, there was planning-level discretion in how this was to be done. Although stating that "negligent performance of a course of action already decided upon"[13] will be actionable negligence, the court failed to explain why the decision to dump uncovered spoil in a particular spot was not a negligent performance of the decision to dredge the river.

The difficulty inherent in the planning-operational level dichotomy lies in finding a point within the governmental decision-making hierarchy at which liability for negligent decisions will attach. The opinion in the principal case illustrates the general confusion which exists because of a failure to analyze the many levels of decision-making that occur once the legislative or executive branch has made a high-level policy decision.[14] Implementation of a broad policy requires many

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[10] See cases cited *supra* note 8.
[11] 163 F. Supp. 947 (S.D. Ala. 1958).
[12] *Id.* at 951.
[13] 243 F. Supp. at 827.
[14] *Compare* Bartholomae Corp. v. United States, 135 F. Supp. 651 (S.D. Calif. 1955) (Government not liable for decision not to take preventive measures to protect plaintiff's house from tests of atomic weapons), *and* Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955) (selection of weapon proving grounds at "planning level,"

further decisions at lower levels of Government. Courts have generally been satisfied to conclude that an allegedly negligent decision is either on the "planning" or "operational" level,[15] rather than to look beyond this question to a consideration of the role of the discretionary function immunity within the general framework of the Federal Tort Claims Act.

The purpose of the act has been concisely stated by the United States Supreme Court:

> Congress was aware that when losses caused by such [government] negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on the taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.[16]

On the other hand, the specific purpose of the discretionary function immunity is unclear. The legislative history is of little assistance.[17] Initially, the Supreme Court referred to the discretionary function immunity as the distinction between "governmental" and "non-governmental" functions.[18] This analysis was later rejected as an "inherently unsound" distinction,[19] but the Court failed to offer a new explanation. As previously mentioned, subsequent decisions—without an adequate guideline—have been content to classify activity by the Government as either "planning" or "operational,"[20] without offering an explanation for the classification.

Shortly after the planning-operational level dichotomy was conceived, it was predicted that the distinction was no more precise than

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and Government not liable for damage to plaintiff's house), *with* Bulloch v. United States, 145 F. Supp. 824 (D. Utah 1956) (alternative holding) (Government liable for injury to plaintiff's sheep from atomic fallout, as there is no justification for negligent endangering of lives or property in the course of atomic tests). See generally, Annot., 99 A.L.R.2d 1016 (1965).

[15] See, *e.g.*, United States v. Gregory, 300 F.2d 11 (10th Cir. 1962); Friday v. United States, 239 F.2d 701 (9th Cir. 1957); Colorado Ins. Group, Inc. v. United States, 216 F. Supp. 787 (D. Colo. 1963). For discussion of the possible factors underlying the scant analysis by the courts, see Note, 66 HARV. L. REV. 488 (1953).

[16] Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957).

[17] Most of the examples given deal with the negligent operation of government motor vehicles. See, *e.g.*, S. REP. No. 1400, 79th Cong., 2d Sess. 29 (1946). The reports on earlier bills contain examples of activities clearly within the immunity, such as the regulatory functions of the SEC and FTC. See, *e.g.*, H.R. REP. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. REP. No. 1196, 77th Cong., 2d Sess. 7 (1942).

[18] Dalehite v. United States, 346 U.S. 15, 32 (1952).

[19] Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

[20] See cases cited *supra* note 15.

was recognized between "governmental" and "proprietary"[21]—a distinction rejected by the United States Supreme Court.[22] Although an examination of the cases applying the planning-operational level distinction supports the assertion that the test is far from precise,[23] Congress intended in the Federal Tort Claims Act that the United States be liable for negligent acts "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."[24] A literal reading of this provision would allow the judicial branch to impose its judgment on another branch of Government whenever negligence could be found. If the discretionary functions immunity is viewed as a vehicle for the exercise of judicial restraint in "planning level" decisions, courts will refuse to impose liability on the Government when its conduct involves too many policy-level considerations for the court to find fault.

In determining whether a particular governmental decision is subject to judicial scrutiny, a court should determine if it is capable of judging the utility and reasonableness of the Government's conduct. As the application of any standard of negligence is a judicial weighing of the wisdom of the actor's conduct against a risk of harm to others,[25] it is apparent that, under the Federal Tort Claims Act, the judiciary is placed in a position of "second guessing" the wisdom of the Government's conduct.[26] The problem is further complicated by attempting to apply tort principles of reasonableness to a unique organization—the United States Government. There are many areas in which private parties may not generally act, *e.g.*, dredging navigable rivers. Although most *details* of a given project are similar to acts performed by private

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[21] Peck, *supra* note 6, at 219.

[22] Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955). A recent case, Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964), provides an excellent discussion of the differences between the "discretionary-ministerial" and "governmental-proprietary" tests at the municipal government level, the court adopting the former.

[23] See, *e.g.*, cases cited *supra* note 14.

[24] 28 U.S.C. § 1346(b) (1964).

[25] PROSSER, TORTS §§ 31-34 (3d ed. 1964).

[26] See Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 235-39 (1963). Professor Jaffe argues, contrary to Professor Peck, that no precise standards may be placed on the discretionary function immunity. "We must ... leave it to the courts to decide case by case whether they are competent to make a more valid judgment than did the government." *Id.* at 238. See also 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 25.13, at 491 (1958); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 256-60 (1965). *But see*, Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167, 172 (1952): "The decision as to what [is] a discretionary function... can never be reached with any degree of precision. The inevitably ensuing result will be uncertainty and arbitrariness of the law."

parties, an attempt by a court to apply a "reasonable and prudent *government*" standard to any actions above the performance level is not possible in terms of traditional tort law, as no standards of comparison are available. Faced with these problems, the planning-operational level distinction may be valid and useful, as it allows federal courts to determine their own ability to "second guess" the reasonableness and utility of a decision by a government official.

In the principal case, for example, the court may have concluded that the decision to place uncovered spoil on the land involved too many policy-level considerations for the court to declare the Government's conduct unreasonable. But, as the court chose only to label this as "planning" rather than "operational," the reasons underlying its conclusion remain unclear. By the same token, the holding in *Jemison*[27] that the Government will be liable for any negligent decisions beyond the initial decision to act, is too inflexible to merit approval.[28] The hierarchical character of governmental decision-making requires that a broad planning-level decision will inevitably set in motion many other decisions, some of which may involve weighing alternatives which courts are incapable of properly judging as reasonable or unreasonable. Other decisions may be only at the operational level, involving few variables of reasonableness and utility. Over the latter decisions, Congress intended the courts to be the judge.

The planning-operational level distinction, if used as a device to determine a court's own capability of judging negligence, will allow the parties to argue on the basis of whether a certain decision is *capable* of being found negligent by the court, rather than whether that decision should be labelled "planning" or "operational." All parties concerned benefit from a reasoned conclusion, rather than a conclusion alone.

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[27] 163 F. Supp. 947 (S.D. Ala. 1958).

[28] *But see* Comment, 36 MARQ. L. REV. 88 (1952). After stating that the language in 28 U.S.C. § 2680 (1964) "seems to be clear and unequivocal," the writer suggests that a distinction be drawn between a primary decision to undertake certain action and subsequent decisions involved in the execution of the primary determination. This would seem to ignore the governmental decision-making process, in which Congress or the Executive makes a general decision to give a government official the discretion to act, that official in turn delegating part of his discretion to a lower official, and so-on down the line. Who makes the "primary decision"?