and suppressing dissenting scientific views.[13]

The plaintiffs have relied upon two distinct theories of recovery. First, they have demanded compensation under the FTCA for personal injury and property damage caused by government negligence in conducting the nuclear tests. Second, those plaintiffs whose real property was damaged by nuclear testing have brought inverse condemnation actions, arguing that their land was "taken" by the government in violation of the fifth amendment. Numerous barriers to recovery limit the availability of both legal theories.

The two following comments examine the negligence and inverse condemnation theories of recovery. The first comment analyzes the critical problem under the FTCA of overcoming the discretionary function exemption. The second comment analyzes inverse condemnation theories and finds a limited basis for holding the government liable to plaintiffs whose real property is rendered useless due to radiation contamination.

Christine M. Doyle
David B. Durrett

Government Liability for Nuclear Testing Under the Federal Tort Claims Act

INTRODUCTION

The Federal Tort Claims Act (FTCA)[1] is a statutory waiver of

[13] The AEC publicly belittled the work of eminent scientists such as Linus Pauling and issued press releases that attacked the assertions of radiation hazards. H. ROSENBERG, *supra* note 1, at 36, 68 & 80-81. The Commission also frequently disregarded warnings from its own scientists and other government agencies. FORGOTTEN GUINEA PIGS REPORT, *supra* note 11, at 15-17 & 26. The Commission harassed and censored government scientists who attempted to publicize their adverse findings. H. ROSENBERG, *supra* note 1, at 146-50.

[1] 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1976).

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the doctrine of sovereign immunity. This doctrine shields the federal government from tort liability unless Congress statutorily consents to suit.[2] While the FTCA provides this consent, it contains a number of exceptions under which the sovereign immunity doctrine still applies.[3]

One such exception is the discretionary function exemption.[4] This exemption bars government liability for claims based on a federal agency's or federal employee's exercise or lack of exercise of discretion, whether or not the discretion is abused.[5] Thus, if the exemption applies, it prevents a court from deciding the merits of a case involving discretionary governmental acts or omissions.[6]

The discretionary function exemption is a threshold "jurisdictional" issue that nuclear testing plaintiffs must overcome.[7]

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[2] Dalehite v. United States, 346 U.S. 15, 30 (1953) ("the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it"). Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) ("universally received" opinion that no suit may be prosecuted against the United States government). *See also* Note, *The Discretionary Function Exemption to the Federal Tort Claims Act,* 42 ALB. L. REV. 721, 721-22 (1978).

[3] Thirteen exceptions to the Act are codified at 28 U.S.C. § 2680 (1976).

[4] 28 U.S.C. § 2680(a) (1976).

[5] *Id.*

[6] In such cases, courts usually render judgment for the government. *See In re* Texas City Disaster Litig., 197 F.2d 771, 778, 781 (5th Cir. 1952), *aff'd,* 346 U.S. 15 (1953).

[7] Considerable disagreement exists among the courts regarding the exemption's function as a jurisdictional bar or an affirmative defense. *Compare* Smith v. United States, 546 F.2d 872 (10th Cir. 1976) (dismissed for lack of subject matter jurisdiction), *with* Stewart v. United States, 199 F.2d 517 (7th Cir. 1952) (exemption is an affirmative defense that is waived if the government fails to raise it in a timely manner).

There is little practical difference between the two theories. In either case, when the exemption applies the court cannot hold for the plaintiff and discussion of a governmental duty becomes moot. Therefore, whether it is a defense or a jurisdictional bar, the exemption issue must be resolved before the court reaches the negligence issue. Allen v. United States, 527 F. Supp. 476, 486-488 (D. Utah 1981). Treating the exemption as a defense is better for the plaintiff because the exemption is waived unless the government raises it in a timely manner. *Stewart,* 199 F.2d at 519.

Courts that have treated the exemption as a jurisdictional bar have sometimes decided the issue on a motion to dismiss. Thus, they have made the exemption determination on minimal facts and prior to a plenary hearing on the merits. *See* Blessing v. United States, 447 F. Supp. 1160, 1186 (E.D. Pa. 1978). In cases where the parties must elicit complex facts through discovery,

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Once this initial hurdle is crossed, plaintiffs have the equally difficult burden of proving each element of negligence.[8] One theory

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such as nuclear testing cases, the better approach is to decide the exemption issue after developing a full record at trial. Allen v. United States, 527 F. Supp. 476, 486 (D. Utah 1981). As a procedural matter, however, the court would still decide the exemption issue before reaching the plaintiff's substantive claim. *Id.* at 487.

[8] Causation in fact, one of the prima facie elements of negligence, is difficult to prove in nuclear testing cases. A plaintiff must establish that his illness was in fact caused by exposure to radioactive fallout from the nuclear tests. Scientists disagree about which diseases are radiation-related. *Low Level Radiation Effects on Health: Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce,* 96th Cong., 1st Sess. 241 (1979) (testimony of William Schaffer, Deputy Assistant Attorney General) [hereinafter cited as *Low Level Hearings*].

Even if the plaintiff has a disease that is associated with radiation, he must prove that he would not have contracted the disease but for his exposure to radiation. This is a formidable task for plaintiffs with diseases such as leukemia, which may be caused by a number of cancer-producing agents other than radiation. *Id.* at 242-43. Thus, many nuclear testing plaintiffs rely on statistical and epidemiological studies which show that persons who lived in the fallout zone during the atmospheric testing died from leukemia at a higher rate than did individuals outside the fallout zone. *Id. See* Lyon, Klauber, Gardner, & Udall, *Childhood Leukemia Associated With Fallout From Nuclear Testing,* 300 New England J. Med. 397, 399 (1979) (a significant excess of leukemia deaths occurred in children living in Utah between 1951 and 1958).

Some experts suggest that the courts shift the plaintiffs' burden of proving "but for" causation to the government, requiring it to prove that it was not responsible for the plaintiff's illness. *Low Level Hearings, supra* this note, at 239 (testimony of Rex Lee, Dean, Brigham Young University School of Law).

Another suggested alternative is to total the amount of compensation to which each claimant is entitled and subtract an amount that reflects the number of diseases that are statistically proven non-radiation-induced. The balance would be distributed proportionately among the claimants. *Id.* at 239. Thus, all claimants would bear the burden of lack of positive proof.

In addition to proving causation, plaintiffs must overcome the government's statute of limitations defense. The FTCA's statute of limitations is two years. 28 U.S.C. § 2401(b) (1980). The statute is tolled, however, if the plaintiff's "blameless ignorance" of his injury prevented assertion of the claim within two years of the tortious conduct. Allen v. United States, 527 F. Supp. 476, 489 (D. Utah 1981). Nuclear testing plaintiffs are frequently ignorant of their health injuries until many years after the radiation exposure has ceased. *See* Kuhne v. United States, 267 F. Supp. 649 (E.D. Tenn. 1967) (claim not barred where decedent did not learn that exposure to radioactive materials may have caused his disease until 20 years after the fact).

Thus, while the discretionary function exemption poses a formidable problem, nuclear testing plaintiffs face other equally difficult legal obstacles as well. However, further discussion of these obstacles is beyond the scope of this

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of government negligence that nuclear testing plaintiffs have emphasized is the government's failure to warn them of the risks of exposure to radioactive fallout.[9]

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comment.

[9] *See, e.g.*, Allen v. United States, 527 F. Supp. 476, 476, 478 (D. Utah 1981). "[B]reach by the government of an alleged continuing duty . . . to warn persons in affected communities, including the plaintiffs, of the risks and potential consequences of exposure to radioactive fallout generated by the tests. . . ." *Id.*

The duty to warn may arise in a court's application of the discretionary function exemption and in consideration of the plaintiff's substantive claim. *See id.* at 488-89; Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 117 (1967). Thus, in discussing the exemption's applicability, a court sometimes notes a mandatory or discretionary duty to perform some act. Once the court determines that the exemption will not bar judicial review, it discusses the government's duty of care to the plaintiff in the context of proving a basis of liability. Allen v. United States, 527 F. Supp. 476, 488-89 (D. Utah 1981).

Many nuclear testing plaintiffs have based their claims of government liability on breach of a duty to warn. Several cases involving claims for money damages have recognized this basis of liability. *See, e.g.*, Bulloch v. United States, 133 F. Supp. 885, 889 (D. Utah 1955) (potential government liability for failure to warn of an impending detonation).

Additionally, some plaintiffs have received equitable relief as a result of a failure to warn of the health hazards of fallout. *See* Jaffee v. United States, 592 F.2d 712, 719-20 (3d Cir. 1979) (Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1976 & Supp. IV 1980)), waives sovereign immunity for injunction requiring the government to warn soldiers who were present at atomic tests about medical risks of their past exposure); Johnsrud v. Carter, 620 F.2d 29 (3d Cir. 1980) (Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1976 & Supp. IV 1980)), waives sovereign immunity for injunction requiring issuance of health warning during Three Mile Island disaster). *Jaffee* and *Johnsrud* involved prospective relief in the form of a future warning. The plaintiffs in Allen v. United States, 527 F. Supp. 476 (D. Utah 1981) are requesting money damages based on the government's past failure to warn of health hazards.

The government cannot be held strictly liable under the FTCA for conducting an ultra-hazardous activity. Laird v. Nelms, 406 U.S. 797, 803 (1972). *See also* Bartholomae Corp. v. United States, 135 F. Supp. 651, 654 (S.D. Cal. 1955), *aff'd*, 253 F.2d 716, 718 (9th Cir. 1957) (government cannot be strictly liable under the FTCA for operating nuclear testing program).

Misrepresentation is one of the intentional torts specifically indicated in a recent opinion that § 2680(h) does not reach actions for misrepresentation where nuclear testing plaintiffs seek compensation for personal injuries rather than injury to pecuniary or commercial interests. *Allen*, 527 F. Supp. at 491-92.

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I. The Conflict Between the FTCA and the Discretionary Function Exemption

The FTCA and the discretionary function exemption have conflicting purposes. In passing the FTCA, Congress had two primary purposes. First, it sought to eliminate the inefficiency of the former compensation scheme. Prior to the FTCA, the sole remedy for government negligence was private relief legislation that granted monetary compensation despite sovereign immunity.[10] Second, Congress sought to provide a more equitable compensation scheme for the victims of government negligence.[11]

Despite the clarity of its purpose, Congress did not define the proper scope of liability. On the one hand, Congress desired to eliminate legislative consideration of routine negligence matters such as traffic accidents.[12] On the other hand, it wanted to retain immunity for decisions made in the planning and administration of government activities.[13] Congress designed the discretionary function exemption to separate these two types of activities.[14]

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[10] Reynolds, *supra* note 9, at 81. Both legislators and claimants recognized the disadvantages of this exclusive legislative remedy. Legislators deplored the waste of valuable time as each claim advanced through Congress. *Id.* at 81 n.6. Claimants complained of inadequate awards and biased legislative and executive investigators. *Id.* at 81 n.5.

[11] *See* Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955); *Hearings Before the Joint Comm. on the Organization of Congress Pursuant to H. Con. Res. 18,* 79th Cong., 1st Sess. pt. 1, at 67-69 (1945) (testimony of Hon. Estes Kefauver, Representative in Congress from Tennessee).

[12] *Hearings Before the House Judiciary Comm. on H.R. 5373 and H.R. 6463,* 77th Cong., 2nd Sess. 33 (1942) (testimony of Francis M. Shea, Assistant Attorney General).

[13] *Id.* In drafting the discretionary function exemption, Congress intended to preclude:

> [A]ny possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity, such as a flood control or irrigation project . . . . It is also designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, the Federal Trade Commission, the Securities and Exchange Commission . . . or others.

Id.

[14] *Id.*

> It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of

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However, Congress failed to define the term "discretionary function" or specify the extent to which immunity should be retained.[15]

Although the legislative history surrounding the exemption is inconclusive,[16] courts and commentators agree that the major purpose of the exemption is promotion of the separation of powers.[17] Policy decisions of the legislative and executive branches must be insulated from judicial review to preserve the efficient operation of government activities.[18] Otherwise, government business would be disrupted as legislators and administrators obeyed judicial subpoenas to testify about their activities. In addition, judicial scrutiny would discourage policymakers from exercising the independent judgment necessary to formulate and implement innovative policies.[19]

> a damage suit for tort . . . On the other hand, the common-law torts of employees of regulatory agencies, as well as of all other Federal agencies, would be included within the scope of the bill.

Id.

[15] Comment, *Scope of Discretionary Function Exception Under the Federal Tort Claims Act,* 67 GEO. L.J. 879, 884 (1979) [hereinafter cited as *Scope of Discretionary Function Exemption*].

[16] Reynolds, *supra* note 9, at 83-84; Comment, *Federal Tort Claims: A Critique of the Planning Level-Operational Level Test,* 11 U.S.F.L. REV. 170, 173-74 (1976) [hereinafter cited as *Critique of Planning Level-Operational Level Test*].

[17] United States v. Muniz, 374 U.S. 150, 163 (1963); Payton v. United States, 636 F.2d 132, 143 (5th Cir. 1981); Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978); Reynolds, *supra* note 9, at 121.

[18] United States v. Muniz, 374 U.S. 150, 163 (1963); Blessing v. United States, 447 F. Supp. at 1160, 1170 (E.D. Pa. 1978); Reynolds, *supra* note 9, at 121-22.

The essence of the separation of powers rationale is that judicial scrutiny of legislative or executive activities must be limited or policymakers will spend more time defending their decisions in court than conducting government business. Reynolds, *supra* note 9, at 121. A closely related concern is that courts are not structured to second-guess the policymaking of legislators and administrators. *Id.* at 122. The legislative and executive branches must process voluminous empirical data and balance numerous factors in formulating policy. It is neither possible nor appropriate for the judiciary to duplicate their efforts. *Id.*

A lesser rationale for the discretionary function exemption is prevention of huge damage awards against the government. *Id.* at 122-23. However, this rationale is too general to adequately define the scope of the exemption.

[19] Payton v. United States, 636 F.2d 132, 143 (5th Cir. 1981) (conduct of United States Parole Board personnel in releasing a federal prisoner who subsequently murdered plaintiff's decedent was not within the discretionary func-

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Courts may fulfill the policies of both the FTCA and the discretionary function exemption by balancing their competing purposes. In striking this balance, courts must effectuate the waiver of immunity without infringing the separation of powers.

II. The Planning-Operational Test

In the face of Congressional silence on the scope of the discretionary function exemption, the United States Supreme Court developed the planning-operational test to determine when the exemption applies.[20] In *Dalehite v. United States*,[21] the Court reviewed claims of government negligence arising from a shipboard explosion of combustible fertilizer that was to be exported to Europe under a post-war reconstruction program.[22] The plaintiffs alleged that the government was negligent in coating the fertilizer with a flammable compound, packaging it in paper bags at a dangerously high temperature, failing to give notice of the danger, and failing to supervise its loading onto the ship.[23] In a four to three decision, the Court denied government liability because each challenged act and omission was directed by decisions made at a planning rather than an operational level.[24]

As demonstrated by the Court's holding, the planning-operational test focuses on the level at which the negligent decision is

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tion exemption); Reynolds, supra note 9, at 121. *See also* note 18 *supra*.

[20] Reynolds, *supra* note 9, at 103; Comment, *Critique of the Planning Level-Operational Level Test*, *supra* note 16, at 172, 177.

[21] 346 U.S. 15 (1953).

[22] Dalehite v. United States, 346 U.S. 15, 19-21 (1953). The fertilizer contained ammonium nitrate compounds whose combustible properties were known to the government at the time of the accident. *Id.* at 23. The explosion destroyed over half of Texas City, Texas. Approximately 8,500 plaintiffs brought claims totalling $200 million. *Id.* at 17; *In re* Texas City Disaster Litig., 197 F.2d 771, 772 (5th Cir. 1952).

Dalehite is analogous to the nuclear testing cases. *Dalehite* involved production and shipment of an inherently dangerous product, whereas nuclear testing involves an inherently dangerous activity. In both instances, the government was aware of the dangerous nature of its activity. *See* Comment, *Issues in Nuclear Testing Litigation: An Introduction*, 15 U.C. Davis L. Rev. 997, 1001 n.10 (1982) [hereinafter cited as *Issues in Nuclear Testing Litigation*].

[23] Dalehite v. United States, 346 U.S. 15, 42-43, 46-47 (1953). The dissenters would have held the government liable for negligent shipping of the fertilizer, failure to conduct further experiments, and failure to warn. *Id.* at 56 (Jackson, J., dissenting).

[24] *Id.* at 42.

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made.[25] If negligence occurs at a planning level of government, the discretionary function exemption shields the government from liability. On the other hand, if negligence occurs in implementing government plans, it is operational and the discretionary function exemption does not apply.[26]

While the *Dalehite* court adopted a broad definition of discretionary planning, it gave little guidance for determining the point at which planning ends and operational activities begin.[27] Instead, it identified two types of discretionary planning activities that immunized the entire fertilizer production program from liability. These were the Cabinet-level decision to undertake the program and the development of specific administrative rules and regulations at intermediate government levels to govern its operation.[28] Surprisingly, the Court found that the actions of low level employees who implemented the program according to the administrative specifications were also part of the planning process.[29] This broad interpretation of discretionary planning has furnished a blueprint that many lower federal

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[25] *Critique of the Planning Level-Operational Level Test, supra* note 16, at 179-80.

[26] *Id.* at 180.

[27] Reynolds, *supra* note 9, at 98.

[28] Dalehite v. United States, 346 U.S. 15, 36-42 (1953).

[29] *Id.* at 36, 38-40. Much of the confusion surrounding the *Dalehite* decision stems from the Court's general statement that the exemption covers the acts and failures of subordinates who carry out government plans as directed. *Id.* at 36. The Court failed to designate which acts of implementation are accorded immunity.

Commentators have advanced two interpretations regarding *Dalehite's* extension of immunity to the acts of subordinates. One interpretation holds that immunity applies to *any* act of a subordinate that is executed to further the discretionary decision of a superior. Reynolds, *supra* note 9, at 98. This position is supported by *Dalehite's* statement that the exemption covers the execution of plans by subordinates. Dalehite v. United States, 346 U.S. 15, 36 (1953). *See* Williams v. United States, 115 F. Supp. 386 (N.D. Fla. 1953), *aff'd on other grounds,* 218 F.2d 473 (5th Cir. 1955). Taken to its logical extreme, this interpretation would immunize the entire performance of a government program; operational negligence simply would not exist.

A second interpretation notes that all the acts of subordinates that were granted immunity in *Dalehite* involved an exercise of discretion. Reynolds, *supra* note 9, at 98; Comment, *Federal Tort Liability for Experimental Activity,* 6 STAN. L. REV. 734, 736-37 (1954). *Dalehite's* statements that the allegedly negligent acts were performed pursuant to a delegation of "plan-making authority" and that the acts required an exercise of judgment support this position. *Dalehite,* 346 U.S. at 40.

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courts use in denying government liability.[30]

Two years after *Dalehite,* its dissenters became the majority in *Indian Towing Co. v. United States,*[31] the only other major Supreme Court decision to discuss the discretionary function exemption. In that case, the federal government voluntarily undertook the maintenance of a lighthouse and failed to repair or give warning of its broken light.[32] As a result, a tugboat ran aground, damaging its cargo.[33]

The Court held that, although the initial decision to undertake the activity was discretionary, the government had a duty to operate the lighthouse in a non-negligent manner[34] once it exercised its discretion. Since the government conceded before trial that the acts in question were not discretionary,[35] this holding has limited significance for application of the discretionary function exemption.[36] At most, the decision indicates that once a

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[30] *See, e.g.,* Daniel v. United States, 426 F.2d 281, 282 (5th Cir. 1970) (per curiam) (government not liable for highway injuries resulting from Secretary of Commerce's planning-level approval of certain highway specifications); Mahler v. United States, 306 F.2d 713, 722-24 (3d Cir. 1962) (government not liable for injuries caused by fallen boulder because Secretary of Agriculture's approval of defective highway plans was a planning-level decision); *In re* Silver Bridge Disaster Litig., 381 F. Supp. 931, 969-70 (S.D.W. Va. 1974) (government not liable for collapse of bridge construction because approval of the construction was a planning-level decision).

[31] 350 U.S. 61 (1955).

[32] Indian Towing Co. v. United States, 350 U.S. 61, 62 (1955).

[33] *Id.*

[34] *Id.* at 69. The court applied the "good samaritan" tort law principle to the government. This principle required the government to exercise due care once it undertook an activity that induced the plaintiff to rely on its performance. *Id.* at 64-65. Thus, although the government had no obligation to act, it assumed the duty of using reasonable care once it did act.

The Court also rejected the government's argument that the FTCA did not impose liability for "uniquely governmental" activities such as operation of a lighthouse. *Id.* at 68. The government argued that the FTCA did not waive immunity for functions that private persons do not perform. *Id.* at 64. In addition, the Court refused to apply the "governmental-proprietary function" distinction from the law of municipal liability. *Id.* at 65. *See also* Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957) (plaintiffs cannot be denied recovery on the theory that the government was negligent while acting in a "uniquely governmental capacity").

[35] Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955).

[36] *See* Reynolds, *supra* note 9, at 100. The proper application of the good samaritan rule used in *Indian Towing* is as a basis of government liability, not as a test for applying the discretionary function exemption. Once a court deter-

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negligent act is identified as operational rather than discretionary, a court will enforce a governmental duty to exercise due care.[37]

Many courts and commentators have read *Indian Towing* as a general rejection of *Dalehite's* broad application of the discretionary function exemption.[38] In addition, in identifying government activity as operational, some courts have ignored the fact that *Indian Towing's* discussion of the exemption was dicta. These courts have relied on a statement in *Indian Towing* which implies that discretionary immunity ends with the initial decision to undertake a project.[39] They have used this statement as authority for identifying many acts of implementation as operational.[40]

Decisions of the lower federal courts reflect the disharmony between *Dalehite's* extension of discretion to the execution of government plans and *Indian Towing's* imposition of a duty of care after an initial discretionary undertaking.[41] Although courts

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mines that the challenged governmental act or omission is operational, it may scrutinize the governmental conduct to determine whether the government exercised due care in acting. The negligence law in the state where the acts occurred determines liability under the FTCA. Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957).

[37] *See* notes 34-36 and accompanying text *supra.*

[38] Smith v. United States, 375 F.2d 243, 246 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967); Reynolds, *supra* note 9, at 101-02; *The Supreme Court 1955 Term,* 70 HARV. L. REV. 83, 136-37 (1956).

[39] Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955). *See Scope of Discretionary Function Exception, supra* note 15, at 891.

[40] *See* Seaboard Coast Line R.R. v. United States. 473 F.2d 714, 716 (5th Cir. 1973) (although decision to build drainage ditch was discretionary, government held liable for negligent design and construction of the ditch); United Air Lines v. Wiener, 335 F.2d 379, 396-97 (9th Cir.) (although government exercised discretion in establishing air traffic control regulations, failure to warn commercial pilots of Air Force training flights constituted operational negligence), *cert. dismissed,* 379 U.S. 951 (1964); Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955) (although decisions regarding the time and manner of nuclear tests were discretionary, failure to warn of an impending detonation was operational).

[41] *See generally Scope of Discretionary Function Exception, supra* note 15, at 886-87. *Compare* Ashley v. United States, 215 F. Supp. 39 (D. Neb. 1963) (ranger's handling of troublesome bear in national park held within discretionary function exemption), *aff'd per curiam,* 326 F.2d 499 (8th Cir. 1964) *and* Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955) (decisions as to the size of a cannon, amount and character of explosive used, and locations of firing positions fell within the discretionary function exemption) *and* Williams

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following *Indian Towing* have scrutinized government conduct that would have been totally immune under *Dalehite,* the *Indian Towing* approach is nothing more than a restatement of the planning-operational test.[42] *Dalehite* advocates a broad construction of discretionary planning; *Indian Towing* emphasizes a broad construction of operational conduct. Both approaches utilize the "planning-operational level" language and focus on the level of decision-making rather than the challenged conduct itself.[43] Currently, the planning-operational test is unrepudiated by the Supreme Court.

A. *The Planning-Operational Test and Nuclear Testing*

Since the planning-operational test looks to the level of government conduct, its application to nuclear testing requires identification of five levels of government decision-making.[44] They are: (1) the initial decision to undertake the nuclear weapons testing program made by the Cabinet and ratified by Congress in the Atomic Energy Act of 1946;[45] (2) promulgation of

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v. United States, 115 F. Supp. 386 (N.D. Fla. 1953) (explosion of Air Force jet on an experimental flight held discretionary where government refused to reveal the cause of the accident for national security reasons), *aff'd on other grounds,* 218 F.2d 473 (5th Cir. 1955) *with* Moyer v. Martin Marietta Corp., 481 F.2d 585, 598 (5th Cir. 1973) (although Department of Defense's selection of aircraft was discretionary, exemption did not immunize government from liability for negligent design or construction of ejection seat) *and* Pigott v. United States, 451 F.2d 574 (5th Cir. 1971) (decisions as to day and hour of firing and amount of thrust of Saturn rocket were outside discretionary function exemption) *and* Everitt v. United States, 204 F. Supp. 20, 21 (S.D. Tex. 1962) (submerging pilings in canal was a discretionary act but failure to place them so as not to cause a collision was operational).

[42] *Scope of the Discretionary Function Exception, supra* note 15, at 887.

[43] *See generally* Reynolds, *supra* note 9, at 128, 130-31; *Scope of the Discretionary Function Exception, supra* note 15, at 890, 892-93; *Critique of Planning Level-Operational Level Test, supra* note 1, at 172, 181, 188-89.

[44] For a similar identification of governmental levels of decision-making in a non-nuclear context, *see generally* Harris and Schnepper, *Federal Tort Claims Act: Discretionary Function Exception Revisited,* 31 U. MIAMI L. REV. 161 (1976).

[45] In 1946, President Truman called for establishment of a commission to oversee the nation's atomic weapons development program. H. ROSENBERG, ATOMIC SOLDIERS 23 (1980). Congress complied by passing the Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755 (codified as amended at 42 U.S.C. § 2011 and scattered sections of 42 U.S.C. (1976)). In that statute, Congress created the AEC. Atomic Energy Act of 1946, Pub. L. No. 79-585 § 2(a)(1), 60

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formal and informal administrative rules and regulations by the AEC and other federal agencies;[46] (3) implementation of these

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Stat 755, 756, *repealed by* Energy Reorganization Act of 1974, Pub. L. No. 93-438, Tit. 1, § 104(a), 88 Stat. 1237, which abolished the AEC and transferred its functions relating to military uses of atomic energy to the Energy Research and Development Administration (ERDA). Congress later transferred ERDA's functions to the Department of Energy. Energy Reorganization Act of 1977, Pub. L. No. 95-91, § 301(a), 91 Stat 565 (codified at 42 U.S.C. § 7151 (Supp. III 1979)).

The 1946 Act authorized the AEC to research and develop atomic energy for both military and peaceful purposes. Atomic Energy Act of 1946, Pub. L. No. 79-585 § 3(a)(3), 60 Stat. 755, 758 (current version at 42 U.S.C. § 2051(a)(3) (1976)). The statute defined "research and development" to include "experimental production and testing of models." Atomic Energy Act of 1946, Pub. L. No. 79-585, § 18(e), 60 Stat. 755, 774 (current version at 42 U.S.C. § 2014(x) (1976)).

The statute required the AEC to obtain the President's general approval of the nuclear testing at least once a year. Atomic Energy Act of 1946, Pub. L. No. 93-438, § 6(a)(2), 60 Stat 755, 763 (current version at 42 U.S.C. § 2121(a) (2) (1976)). The President merely reviewed and approved the laboratory program. The AEC prepared this general document which set out the purpose of the test series and the devices to be tested. *Health Effects of Low-Level Radiation: Joint Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce and the Health and Scientific Research Subcommittee of the Senate Labor and Human Resources Committee on the Judiciary,* 96th Cong., 1st Sess. 749-50 [hereinafter cited as *Health Effects Hearings*] (testimony of Dr. Alan Graves, Division Leader of Los Alamos Scientific Laboratory). Once the President approved the lab program, the Chairman of the AEC directed subordinate employees to draft a more detailed plan that included tentative time schedules and specific procedures for individual tests. *Id.* at 750-51. *See* note 46 *infra.* In 1954, in the middle of the atmospheric testing program, Congress amended the 1946 Act. Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919. However, the provisions for military applications of atomic energy remained relatively unchanged. Atomic Energy Act of 1954, Pub. L. No. 83-703 § 91, 68 Stat. 919, 936 (current version at 42 U.S.C. § 2121 (1976)).

Thus, the decision to undertake the nuclear testing program included the 1946 and 1954 statutes and Presidental approval of each test series. The undertaking also included President Truman's approval of the Nevada Test Site for continental tests. *Health Effects Hearings, supra* this note, at 746 (testimony of Dr. Alan Graves, Division Leader of Los Alamos Scientific Laboratory); STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 2D SESS., "THE FORGOTTEN GUINEA PIGS," A REPORT ON HEALTH EFFECTS OF LOW LEVEL RADIATION SUSTAINED AS A RESULT OF THE NUCLEAR WEAPONS TESTING PROGRAM CONDUCTED BY THE UNITED STATES GOVERNMENT 3 (Comm. Print 1980) [hereinafter cited as FORGOTTEN GUINEA PIGS REPORT].

[46] The manager of the AEC's Santa Fe Operations Office was responsible for

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rules and regulations by lower level federal employees;[47] (4) decisions within the inherent discretionary authority of an agency or federal employee;[48] and (5) technical and scientific evaluations by experts.[49]

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drafting a detailed plan for each test. *Health Effects Hearings, supra* note 45, at 750-51 (testimony of Dr. Alan Graves, Division Leader of Los Alamos Scientific Laboratory). This task is equivalent to the promulgation of informal administrative rules at intermediate government levels. An example of the promulgation of administrative regulations is the establishment of maximum radiation exposure levels for the public. *See generally* H. ROSENBERG, *supra* note 45, at 34.

[47] Implementation of administrative regulations involves applying *articulated* standards or policies by subordinate employees during the operational phase of the nuclear testing program. An example of decision-making at the level of implementation would be the adherence to radiation exposure standards. If a plaintiff could establish that individuals on or off the test site were exposed to radiation dosages exceeding the AEC's permissible levels, he could claim that an error was made in implementing the radiation standards. The maximum permissible dosage for AEC workers was 2-3 roentgens while the maximum permissible dosage for the general public was 25 roentgens. H. ROSENBERG, *supra* note 45, at 34.

This third level of decision-making is very similar to decisions made under the inherent discretionary authority of the AEC or one of its employees. *See* note 48 and accompanying text *infra*. The inherent discretionary authority level differs only in the fact that subordinate employees exercising inherent discretion do not have articulated guidelines to follow.

[48] A decision may be within an agency's or employee's discretionary authority if a statute or regulation specifically authorizes discretion or contains nonmandatory language from which authorization of discretion may be inferred. In addition, inherent discretion may exist when a government official faces a unique problem that is not anticipated in a statute or regulation. *See* United States v. Faneca, 332 F.2d 872 (5th Cir. 1964) (United States Marshalls ordered to supervise admission of Negro student to segregated school had complete discretion in dealing with racial violence).

Immunity does not attach to every exercise of inherent discretion. Thus, the issue of whether an employee exercised inherent discretion is separate from the issue of whether immunity shields his conduct from judicial scrutiny.

There are two examples of decisions within the AEC's inherent discretionary authority. One is the distorted public relations campaign that was designed to allay public fears about fallout. *See* Comment, *Issues in Nuclear Testing, supra* note 22, at 1002 n.12. Another is the AEC decision to deviate from safety policies that established the optimal weather conditions for an atomic blast. These policies were designed to minimize fallout on already endangered population centers. *See id.* at 997 n.2; note 56 *infra*. For examples of an AEC employee's inherent discretionary authority, *see* notes 55-63 and accompanying text *infra*.

[49] Decisions based on readings from scientific instruments and interpreta-

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While the first two levels of decision-making always receive immunity, application of the planning-operational test to the last three categories has produced conflicting results.[50] Thus, a court has held immune the presidential decision to conduct a nuclear weapons testing program at the Nevada Test Site because it was made at a high planning level.[51] In addition, a court has found that the AEC's promulgation of administrative regulations and approval of operation schedules for each test series were also discretionary planning activities.[52]

Courts have not directly addressed the issue of whether implementation of nuclear testing regulations by subordinate employees is discretionary. In other contexts, however, courts have distinguished strict adherence to and deviation from regulations.[53]

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tions of scientific data fall within this level. The AEC relied on the evaluations of many scientific experts in operating the nuclear testing program. For example, the AEC employed individuals to monitor radiation levels in communities around the test site. H. ROSENBERG, *supra* note 45, at 35. Commission members also consulted the Division of Biology and Medicine, a team of scientists that studied safety problems related to the program and recommended permissible radiation exposure levels. *Id.* at 38, 42-43, 53.

[50] *See* notes 55-63 and accompanying text *infra*.

[51] Bartholomae Corp. v. United States, 135 F. Supp. 651, 654 (D. Utah 1955). The court also indicated that presidential approval of a particular test series would be immune. *Id.* at 653, 654.

Similarly, the discretionary function exemption immunizes the 1946 and 1954 statutes from judicial challenge. The FTCA does not apply to a claim based on ". . . the execution of a statute or regulation whether or not such statute or regulation be valid. . . ." 28 U.S.C. § 2680(a) (1976). *See also* Dalehite v. United States, 346 U.S. 15, 33 (1953) (the exemption "bars tests by tort action of the legality of statutes and regulations").

[52] Bartholomae Corp. v. United States, 135 F. Supp. 651, 653-54 (S.D. Cal. 1953). *See also* Dalehite v. United States, 346 U.S. 15, 35-36 (1952) (discretionary function includes "determinations made by executives or administrators in establishing plans, specifications or schedules of operations"); H. R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945) (stating that the drafters did not intend the Federal Tort Claims bill to permit suits testing the legality or constitutionality of administrative regulations).

[53] A subordinate's conduct is only immune when he strictly adheres to administrative orders and regulations. Courts have held the discretionary function exemption inapplicable when low level employees disregard or deviate from articulated administrative policy. *See* Downs v. United States, 382 F. Supp. 713 (M.D. Tenn. 1974) (exemption not applicable where FBI agent violated FBI policy), *aff'd*, 522 F.2d 990 (6th Cir. 1975). The result is less clear when there are no specific administrative guidelines to govern the subordinate's behavior because either the plan is too general or the particular crisis could not be anticipated. *Compare* United States v. Faneca, 332 F.2d 872

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When subordinate employees actually rely on well-articulated regulations, their actions are immune.[54]

The planning-operational analysis becomes murky at the inherent authority level. A Test Manager presided over each test series in the nuclear testing program, overseeing the operation of each test, including adherence to certain safety precautions.[55] These safety precautions consisted of two general types. First, the Test Manager consulted with various experts to determine the safest time for a particular detonation.[56] Second, the Test Manager instructed the radiation monitors to warn people found in specified areas of an impending detonation.[57] Thus, the Test

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(5th Cir. 1964) (exemption applicable where law enforcement officers were forced to formulate policy in handling racial violence on university campus), *cert. denied,* 380 U.S. 971 (1965), *with* United States v. Hunsucker, 314 F.2d 98, 105 (9th Cir. 1962) (exemption not applicable where plan was general in nature and subordinate employees had to fill in operational details).

[54] Dalehite v. United States, 346 U.S. 15, 38-40 (1953) (exemption applicable because there was no showing that subordinates deviated from plan). *See* note 29 and accompanying text *supra.*

[55] The Test Manager operated under a shot schedule prepared by the Santa Fe Operations Office. *See* note 46 *supra.* However, he had discretion to deviate from the schedule if safety required. *See Health Effects Hearings, supra* note 45, at 757 (testimony of Dr. Alan Graves, Division Leader at the Los Alamos Scientific Laboratory).

[56] The AEC established guidelines to determine the safest time for a detonation. Criteria such as weather conditions and fallout patterns were to control the timing of the blast. H. ROSENBERG, *supra* note 45, at 70. The guidelines sought to avoid additional fallout exposure to populations that had been exposed under earlier tests. *Id.*

The Test Manager effectuated this policy by consulting scientists to determine whether prevailing weather conditions permitted the blast to proceed as scheduled. The scientists performed various experiments to determine the blast pressure and yield on a given day. They then advised the Test Manager who then decided when to detonate. *Health Effects Hearings, supra* note 45, at 756-57 (testimony of Dr. Alan Graves, Division Leader at the Los Alamos Scientific Laboratory).

The safety policy did not always prevail, however. Sometimes, the Test Manager's decision to detonate was based on meteorological reports that proved to be inaccurate by the time of detonation. *Id.* at 172. In addition, non-safety considerations, such as the desire to adhere to the shot schedule sometimes controlled the decision to detonate. *Id.*

[57] *Health Effects Hearings, supra* note 45, at 752-53, 754-55 (testimony of Dr. Alan Graves, Division Leader of the Los Alamos Scientific Laboratory). The AEC usually gave two types of warnings of atomic detonations. Radio stations and newspapers announced an impending detonation. *Id.* at 753. This type of announcement was inadequate because many people did not have ac-

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Manager had the inherent authority to set the time for a particular blast according to expert safety evaluations and to direct that warnings be given to individuals found wandering in vicinities identified as dangerous.

Courts examined the extent to which they should grant immunity to the Test Manager's decisions in *Bartholomae Corp. v. United States*[58] and *Bulloch v. United States.*[59] In *Bartholomae,* the court held immune the Test Manager's decision regarding the timing of a blast.[60] Statements in *Bulloch* regarding the discretionary nature of decisions as to the time and manner of a nuclear test echo the *Bartholomae* holding.[61]

However, citing *Indian Towing* as authority, *Bulloch* held that potential liability exists for the Test Manager's failure to warn the plaintiffs of an impending detonation.[62] Thus, while *Bartholomae* held the Test Manager's scheduling of a blast discretionary, *Bulloch* found the Test Manager's failure to warn operational. Since both the act and the omission are attributable to the same decision-maker, the different results demonstrate the

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cess to these media. In addition, unfavorable weather conditions frequently delayed the announced blasts. *Id.* at 757.

The other type of warning involved attempts to locate and warn people in the predicted fallout zone both immediately before and after a blast. The Test Manager instructed AEC radiological monitors about which areas the fallout would affect. *Id.* at 752, 754-55. The monitors went to those areas to measure radiation levels and warn people wandering in the fallout zone. *Id.* at 752. However, the monitors usually only covered areas within twenty-five miles of the test site whereas the fallout cloud frequently traveled thousands of miles. *Id.* The Test Manager was responsible for the welfare of persons and property within the fallout zone. *Id.* at 702, 704. He was therefore responsible for a failure to warn of an impending detonation. The radiation monitors had no discretion to deviate from his instructions. *Id.* at 755.

[58] 135 F. Supp. 651 (S.D. Cal. 1955), *aff'd,* 253 F.2d 715 (9th Cir. 1957).

[59] 133 F. Supp. 855 (D. Utah 1955).

[60] Bartholomae Corp. v. United States, 135 F. Supp. 651, 653-54 (S.D. Cal. 1955), *aff'd,* 253 F.2d 716 (9th Cir. 1957).

[61] Bulloch v. United States, 133 F. Supp. 885, 888 (D. Utah 1955). *See also* Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955) (court held that the size of cannon, amount of explosive, location of firing positions, and conditions of the test were all discretionary functions). *But see* Pigott v. United States, 451 F.2d 574 (5th Cir. 1971) (decisions as to day and hour of rocket firing and amount of thrust in the engines are not immune under the discretionary function exemption).

[62] Bulloch v. United States, 145 F. Supp. 824, 826 (D. Utah 1956), *citing* Indian Towing Co. v. United States, 350 U.S. 61 (1955), discussed at notes 31-43 and accompanying text *supra.*

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conflict between the *Dalehite* and *Indian Towing* views of the proper scope of discretionary planning activities.[63]

Bartholomae also illustrates the application of the planning-operational test to evaluations by scientific experts. In that case, a government scientist failed to measure and predict the effect of an atomic explosion on the plaintiff's property.[64] Citing *Dalehite*, the court identified the scientific evaluation as discretionary because the Test Manager relied on it in scheduling a particular atomic blast.[65] Thus, as in *Dalehite*, the discretionary authority of one decision-maker barred review of the operational acts of a subordinate.[66]

B. *Criticism of the Planning-Operational Test*

As the cases illustrate, the planning-operational test has proven unsatisfactory for the nuclear testing plaintiff. Application of the test has been inconsistent[67] and inequitable.

However, the test's main failure is its disregard for the essential purposes of the FTCA and the discretionary function exemption.[68] The test ignores the FTCA's general waiver of sovereign immunity and denies recovery where separation of powers concerns are absent. The test fails to satisfy the discretionary function exemption's separation of powers purpose because it focuses exclusively on the level of decision-making, rather than on the policies inherent in the decision.[69] The test is overinclusive because it immunizes high level decision-making whether or not political, social, or economic factors are present. Theoretically, the test is also underinclusive because it permits judicial review

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[63] *See* notes 38-43 and accompanying text *supra*.

[64] Bartholomae Corp. v. United States, 135 F. Supp. 651, 653-54 (S.D. Cal. 1955), *aff'd*, 253 F.2d 715 (9th Cir. 1957).

[65] Bartholomae Corp. v. United States, 135 F. Supp. 651, 653-54 (S.D. Cal. 1955), *citing* Dalehite v. United States, 346 U.S. 15 (1953), *aff'd*, 253 F.2d 716 (9th Cir. 1957).

[66] *See* note 29 and accompanying text *supra*.

[67] Reynolds, *supra* note 9, at 110; *Critique of the Planning Level-Operational Level Test*, *supra* note 16, at 184.

[68] *Scope of Discretionary Function Exception*, *supra* note 15, at 893; *Critique of the Planning Level-Operational Level Test*, *supra* note 16, at 181. *See* notes 10-19 *supra*.

[69] Reynolds, *supra* note 9, at 82, 97; *Critique of the Planning Level-Operational Level Test*, *supra* note 16, at 181, 191-92. *See* notes 16-19 and accompanying text *supra*.

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of low level decisions that could involve substantive policy considerations.[70] Thus, the test has barred judicial review of seeming operational conduct, such as implementation of administrative regulations by low level subordinates, despite an absence of undue burden on the legislative and executive decision-making process.[71]

As yet, no court has granted money damages under the FTCA to nuclear testing victims, a result which is partially attributable to the planning-operational test. Congress is now considering legislation which would amend the discretionary function exemption to permit nuclear testing victims to recover money damages for personal injuries.[72] While this proposed legislation indicates an implicit acknowledgment of government responsibility and a desire to compensate the victims, it is an inadequate substitute for judicial reform.[73]

III. A New Judicial Approach

The obvious deficiencies of the planning-operational test have led some lower courts to adopt a more substantive test for applying the discretionary functon exemption.[74] This test, some-

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[70] *See generally Scope of Discretionary Function Exception, supra* note 15, at 890-91.

[71] *See* Daniel v. United States, 426 F.2d 281, 282 (5th Cir. 1970) (government not liable for "discretionary planning" of faulty highway divider); Ashley v. United States, 215 F. Supp. 39 (D. Neb. 1963) (rangers' handling of troublesome bear held a discretionary function).

[72] S. 1483, 97th Cong., 1st Sess. (1981). Entitled the Radiation Exposure Compensation Act of 1981, this bill would create an Advisory Panel on the Health Effects of Exposure to Radiation and Uranium. The Advisory Panel would identify the types of cancer related to low-level radiation exposure and the geographical areas that received significant radiation from nuclear detonations in Nevada. If a person who lived within a designated area at the time of a nuclear weapons test contracts a radiation-related disease, the bill creates a rebuttable presumption that radiation exposure caused the disease. As drafted, the bill would place a yet unspecified ceiling on recovery.

[73] S. 1483 has its shortcomings. It places a ceiling on recovery and provides a rebuttable rather than an irrebuttable presumption of causation. *Compare* S. 1483, 97th Cong., 1st Sess. (1981) *with* S. 1865, 96th Cong., 1st Sess. (1979). S. 1483 also makes no provision for genetic disorders or birth defects. Finally, the bill's scope is limited to atmospheric tests. It thus fails to cover damages that might result from the venting of radiation from an underground test. *See Issues in Nuclear Testing, supra* note 22, 999 n.4.

[74] Payton v. United States, 636 F.2d 132, 143-45 (5th Cir. 1981) (release of dangerous prisoner); Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975)

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times referred to as the quality-of-discretion test,[75] examines the nature and quality of the discretion exercised in each government decision.[76]

Unlike the planning-operational test, this new test requires a court to examine each challenged decision, whether made at high or low levels of government, to determine if the decision involved a weighing of substantive policy factors.[77] If a decision involves political, social, or economic policy judgments, judicial scrutiny yields to the exemption's basic purpose of preventing interference with policymaking by the executive and legislative branches.[78] Conversely, when the decision involves merely routine matters, there is potential government liability.[79]

A. *The Quality-of-Discretion Test and Nuclear Testing*

The quality-of-discretion test treats the level of the decisionmaker as just one of several possible indicators of substantive policymaking.[80] In comparing the old and new test, however, it is

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(FBI agent's handling of hijacking situation); Griffin v. United States, 500 F.2d 1059, 1066 (3d Cir. 1974) (ingestion of toxic vaccine); Smith v. United States, 375 F.2d 243 (5th Cir. 1967) (law enforcement); Allen v. United States, 527 F. Supp. 476, 485-86 (D. Utah 1981) (nuclear testing); Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978) (OSHA inspections of private employer's premises).

[75] *See Scope of Discretionary Function Exception, supra* note 15, at 891 (identifying the new test as the "quality-of-decision" test).

[76] Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975); Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967); Allen v. United States, 527 F. Supp. 476, 485-86 (D. Utah 1981).

[77] This does not mean that the exemption frequently will not immunize presidential or Cabinet level decisions. Most decisions at these levels involve weighty policy considerations and courts will hold them immune under the quality-of-discretion test. *See* note 80 *infra*. *See generally Critique of Planning Level-Operational Level Test, supra* note 16, at 192-93. One court that favors the new test has flatly stated that the decision to undertake the nuclear testing program "is obviously insulated from judicial interference." Allen v. United States, 527 F. Supp. 476, 485 (D. Utah 1981).

[78] Allen v. United States, 527 F. Supp. 476 (D. Utah 1981).

[79] *Id.* at 482, *quoting with approval* Smith v. United States, 375 F.2d 243, 248 (5th Cir. 1967) ("The United States is immune from liability in the present case not because of the mere fact that government officials made choices, but because *the choices made affected the political* (not merely the monetary) *interests of the nation*").

[80] *See* Payton v. United States, 636 F.2d 132, 144 (5th Cir. 1981) (court identifies the level of decision-making as one of the governmental interests

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helpful to refer back to the five levels of government decision-making analyzed under the planning-operational test.[81]

Under the quality-of-discretion test, the Cabinet and congressional decisions to undertake the nuclear testing program are immune from judicial scrutiny because they are laden with political and national security policy judgments.[82] The decision-making processes of these two branches would be completely ineffective if judicial review were permitted.[83] Similarly, the AEC's promulgation of radiation exposure standards and operation schedules for each test series are also immune. This type of decision-making involves weighing the program's overall goals against budgetary and statutory constraints.[84] Judicial review would disrupt the nuclear testing program since administrators would be unable to plan future tests during the litigation. Thus, separation of powers concerns permeate much of the decision-making at these two levels. The conduct is immune whether the planning-operational or quality-of-discretion test is applied.

At the other end of the spectrum is clearly routine conduct. This includes scientific and technical evaluations and the discretionary decisions of the Test Manager concerning the operation of particular tests. These decisions do not involve substantive policy-making. Scientific evaluations involve examination of objective data rather than policy goals.[85] Determinations of the saf-

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which must be balanced against the claimant's interests). On the other hand, the planning-operational test emphasizes the level of decision-making to the exclusion of other factors. *See* text accompanying notes 68-69 *supra*. It is necessary to consider the decision-making level because a decision's nature and quality vary at each level.

Although in Bulloch v. United States, 133 F. Supp. 885, 899 (D. Utah 1955), the court held that the government's failure to warn of an impending detonation was operational, it stated that it would extend immunity if the government offered some reason for the lack of warning. *Id.* at 889. The court noted that an acceptable reason might include a decision that notice would be impractical or would delay the project. Thus, the court appeared willing to grant immunity for almost *any* reason the government offered, without examining the quality of discretion inherent in the decision.

[81] *See* notes 45-49 and accompanying text *supra*.

[82] Allen v. United States, 527 F. Supp. 476, 485 (D. Utah 1981).

[83] *See* notes 18-19 and accompanying text *supra*.

[84] *See* Griffin v. United States, 500 F.2d 1059, 1064 (3d Cir. 1974) (regulation involved balancing of policy considerations in advancing the public interest).

[85] *See id.* at 1066 (where government employees only perform scientific evaluations and do not formulate policy, the exemption does not immunize con-

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est time for a detonation also depend upon scientific data, such as meteorological reports.[86] Therefore, they too should fall outside the exemption. Similarly, a decision to warn of an impending detonation merely involves determining the endangered areas and identifying the people who need to be warned.[87] Thus, under both the old and the new tests, these ministerial decisions should not be immune from judicial review.

Applying the exemption to the implementation of AEC regulations and decisions within the AEC's inherent discretionary authority poses significant problems, which the planning-operational test does not resolve. Some decisions at these levels are *essential* to the feasibility of a program or policy, while others merely involve choosing the most *expedient* method of proceeding.[88] The former decisions are immune because by definition they involve policymaking. The latter decisions may sometimes

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duct resulting from their evaluations). The scientist who merely advises the agency to adopt a particular safety standard is not engaged in policy-making. His duty is to advise the agency of the health and safety consequences of various exposure levels, not to decide whether a reduction in safety is necessary to achieve some higher goal. Thus, a scientist's failure to consider all relevant literature and studies in formulating his advice would lack the weighing of policy factors necessary for applying the discretionary function exemption. This reasoning also applies when a scientist reads scientific instruments and then advises a higher official. If the scientist reads the instrument incorrectly, potential liability should exist for any resulting damage because his mistake lacks policy considerations.

Negligent scientific evaluations should not be confused with an agency's failure to conduct further experiments. This failure may be immune if the agency balanced policy considerations such as time and budgetary constraints against the need to render a particular service.

[86] *See* note 56 *supra*.

[87] *See* note 57 *supra*.

[88] *See generally* Reynolds, *supra* note 9, at 115. For example, if an AEC official balanced national security interests against some calculated risk to the public, his decision would be essential to the feasibility of the nuclear testing program. Since Congress designed the program to promote the nation's security, the official must be free to balance a security threat against the risk of public harm to effectuate the program's goals. However, if an AEC official has alternatives, his choice of the most expedient alternative should not automatically be granted immunity. When expediency is not a government program's major goal, there is no barrier to judicial review because the program itself does not suffer by imposing a reasonable care requirement. *See generally Critique of Planning Level-Operational Level Test*, *supra* note 16, at 195-196 ("The exception becomes meaningless if it protects every balancing of care against the cost of that care.").

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involve separation of powers concerns, but frequently they will not.[89] Thus, to determine whether the exemption applies to decisions made at these levels, a court must distinguish an essential decision from one that is merely expedient. Additionally, a court must analyze an expedient decision to determine if separation of powers concerns are present. If such concerns exist, the decision may still be immune from judicial review.

The planning-operational test fails to separate essential decisions from expedient decisions. It also fails to determine when borderline decisions involving factors of expediency should be immune. Because the test allows the decision-maker's status to trigger immunity, it cannot make distinctions based on the presence of policymaking elements in the decision.

B. *The Balancing Approach Under the Quality-of-Discretion Test*

In applying the quality-of-discretion test, one court has adopted a balancing approach to resolve the most difficult problems under the exemption. In *Payton v. United States,*[90] the Fifth Circuit considered whether a parole board's release of a dangerous prisoner fell within the discretionary function exemption.[91] The court balanced the plaintiff's interests against the government's interests to determine whether the parole board's application of administrative guidelines was discretionary.[92]

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[89] Many decisions that involve choosing an expedient means rest on a balancing of safety and economic cost. If courts labeled all such decisions as policy decisions and granted immunity, they would undermine the FTCA's purpose. Several courts have identified the FTCA's purpose as spreading the monetary losses of the victims of government negligence among the taxpayers. *See, e.g.,* Rayonier v. United States, 352 U.S. 315, 319-20 (1957); Payton v. United States, 636 F.2d 132, 144 (5th Cir. 1981); Smith v. United States, 375 F.2d 243, 248 (5th Cir. 1967). These courts have reasoned that it would be unfair for the public to benefit from government services that burden a few without compensating them. Thus, unless it would seriously affect separation of powers concerns, the FTCA authorizes judicial review of decisions motivated solely by expediency. Given the impracticality of a litmus test such as the planning-operational test, the most feasible method for determining whether the exemption applies to such decisions is a test that balances the plaintiff's interest in recovery against the government's interest in immunity.

[90] 636 F.2d 132 (5th Cir. 1981), *reh'g granted* 649 F.2d 385 (5th Cir. 1981).

[91] Payton v. United States, 636 F.2d 132, 134 (5th Cir. 1981).

[92] *Id.* at 144-47. Other courts and commentators have proposed adoption of

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The court identified three interests of the individual plaintiff: (1) the nature of the loss incurred; (2) the extent of the plaintiff's reliance on the government; and (3) the availability of alternate remedies.[93] The court identified four governmental interests: (1) the nature and quality of the challenged decision; (2) the administrative level at which it occurred and the duties imposed on the decision-maker by statute or regulation; (3) the burden on governmental activities from judicial scrutiny and possible tort liability; and (4) the availability of alternate government procedures.[94] The court also noted that it was proper to consider judicial capacity to evaluate and offer a remedy for the government's behavior.[95]

This balancing approach is well-suited to the AEC's failure to warn civilian plaintiffs of the health risks posed by their exposure to radiation.[96] On the plaintiff's side of the balance, there have been extreme losses. The plaintiffs have contracted cancer or have lost loved ones to cancer.[97] They relied heavily on the government for warning of the testing's health consequences since the government created the risk and had a virtual monopoly on research in the area.[98] Plaintiffs are presently without a legislative or administrative remedy for their injuries.[99]

The government's failure to warn can be characterized as a decision made for purposes of expediency. Giving a warning

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a balancing approach for applying the exemption. *See* Downs v. United States, 522 F.2d 990, 998 (6th Cir. 1975) ("need for compensation to citizens injured by torts of government employees outweighs whatever slight effect vicarious government liability might have on law enforcement efforts"). *See also Critique of Planning Level-Operatonal Level Test, supra* note 16, at 192.

Although both *Payton* and *Downs* involved law enforcement, the balancing approach is also applicable to the nuclear testing area. The balancing approach resolves problems of applying the exemption to decision-making levels of inherent discretionary authority and implementation of regulations. *Payton, Downs,* and the nuclear testing cases all involve government conduct at these levels. *See* notes 55-63 and accompanying text *supra* (discussing inherent authority in nuclear testing cases).

[93] Payton v. United States, 636 F.2d 132, 144 (5th Cir. 1981), *reh'g granted* 649 F.2d 385 (5th Cir. 1981).

[94] Payton v. United States, 636 F.2d 132, 144-45 (5th Cir. 1981).

[95] *Id.* at 145.

[96] *See Issues in Nuclear Testing, supra* note 22, at nn.11-13.

[97] *See Issues in Nuclear Testing, supra* note 22, at nn.2-3.

[98] *See id.* at nn.11-13.

[99] *See* note 72-93 and accompanying text *supra*. Neither house of Congress has yet voted on the proposed legislation described in note 72 *supra*.

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posed no risk to national security interests.[100] In fact, the real risk arising from a warning was the possibility of a judicial or legislative challenge of the program with the accompanying risks of delay or inconvenience. Even if the warning had prompted the plaintiffs to seek legislative or injunctive relief, the most onerous result would have been a public evaluation of the program's benefits and burdens. This result would not harm the separation of powers because, at some point, that doctrine must give way to constitutionally protected freedoms, such as freedom of speech.[101]

The AEC Commissioners' decision not to inform the the public of the risks was made at a high government level.[102] However, the Commissioners had a statutory duty to minimize the danger to life and property which they surely violated in failing to warn.[103]

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[100] The media publicly announced the schedules for detonations. *See* note 57 *supra*. If no national security interest required suppressing these announcements, it is difficult to conceive of a justification for suppressing health warnings. Further, radiation hazards were the subject of much scientific debate. H. ROSENBERG, *supra* note 45, at 79-81, 137-49. Public concern about fallout dangers also prompted congressional hearings on the subject in 1957, 1959, and 1962. *Id.* at 76-77, 137-38, 141-46.

[101] In a related context, Justice Thurgood Marshall indicated that the separation of powers doctrine did not authorize the Court to enjoin publication of the Pentagon Papers. New York Times Co. v. United States, 403 U.S. 713, 742 (1971). President Nixon argued that the Court should grant the injunction to prevent a grave risk to national security. *Id.* at 741. Justice Marshall maintained that the Executive Branch could not use the Court's equity powers to overrule the congressional refusal to outlaw the press' conduct. *Id.* at 745-46.

[102] Faced with mounting public fears about fallout, the AEC Commissioners chose to launch an inaccurate, misleading public relations campaign rather than reveal the known dangers of fallout. H. ROSENBERG, *supra* note 45, at 76-81. *See Issues in Nuclear Testing, supra* note 22, at 1002 n.12.

[103] The 1946 Act authorized the AEC to establish regulations or standards regarding possession and use of radioactive material in order "to minimize dangers from explosions and other hazards to life or property." Pub. L. No. 79-585, § 12(a)(2), 60 Stat. 755, 770 (current version at 42 U.S.C. § 2201(b) (1976)). The 1954 Act added a provision imposing a duty on the AEC to direct the development and utilization of atomic energy in order "to minimize danger to life or property." Pub. L. No. 83-703, § 31(c), 68 Stat. 919, 927 (current version at 42 U.S.C. § 2051(d) (1976). Thus, throughout the atmospheric testing program the AEC had a duty to minimize the dangers of fallout. The duty to warn appears to be a corollary of the duty to minimize dangers. *See* Crowther v. Seaborg, 312 F. Supp. 1205, 1220 (D. Colo. 1970) (sovereign immunity does not bar judicial review of AEC's duty to conduct nuclear testing in a

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The burden on the government from judicial scrutiny is not very great. The atmospheric testing program no longer exists and probably few of the major policymakers are still alive to testify. The litigation would mainly involve examination of government documents, which would not significantly impair government efficiency. The possibility that government liability would discourage independent official action is also irrelevant in nuclear testing cases. Failure to warn of radiation hazards *should* be discouraged since government officials had no explicit authority to withhold that information.[104]

If the plaintiffs succeed, there could be a substantial burden of tort liability placed on the government. Yet, there is a concomitant benefit in holding the government accountable for its negligence. Tort liability will discourage the government from undertaking future ultra-hazardous activities without disclosing the risks to those affected.

Finally, the government could have utilized alternative procedures. It could have curtailed the program and further studied the health risks, withholding a warning until it obtained conclusive results. It also could have given a public warning and evacuated civilians living in the fallout zone for the duration of the tests. These and other alternatives were available, although the government never attempted to implement them.

On balance, the magnitude of the harm to the plaintiffs and the government's position as the only feasible source of a warning outweighs the limited burden on government decision-making such a warning would have imposed. Thus, evaluating the failure to warn for the presence of separation of powers concerns results in a denial of governmental immunity.

CONCLUSION

The essential drawback of the planning-operational test is its failure to qualitatively distinguish between governmental acts that involve separation of powers concerns and those that do not. While the planning-operational test might characterize a

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fashion that protects the public health and safety).

[104] Whether the AEC possessed implicit discretionary authority to fail to warn is a matter of judicial interpretation of the agency's statutory duties.

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failure to warn of an impending detonation as operational, and thus outside the exemption, it could also hold a failure to warn of health hazards discretionary if *any* governmental reason for the omission is advanced. Unlike a warning of a detonation, however, a warning of health risks involves some policy considerations. The question is whether the policy factors involved in the decision implicate separation of powers concerns.

The quality-of-discretion test avoids a conclusory application of labels by evaluating the nature of the policymaking in the decision not to warn. This new test adopts a balancing approach which assesses the impact of the decision on separation of powers concerns. Under this approach, a court must balance the harm to the plaintiff from the governmental decision not to warn of health risks against the interests of the decision-maker. The result is potential liability for the government's failure to warn nuclear testing plaintiffs of the health risks posed by nuclear fallout.

Christine M. Doyle

Nuclear Testing and Inverse Condemnation

Introduction

The fifth amendment[1] prohibits the government from "tak-

[1] U.S. Const. amend. V provides that "private property [shall not] be taken for public use, without just compensation." To enforce this proscription, plaintiffs may bring an inverse condemnation action "against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." Thornburg v. Port of Portland, 233 Or. 178, 179 n.1, 376 P.2d 100, 101 n.1 (1962). *Accord* Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980); United States v. Clark, 445 U.S. 253, 257 (1980).

Federal district courts, concurrent with the Court of Claims, have original jurisdiction to hear taking claims for property with value not exceeding $10,000. 28 U.S.C. § 1346(a)(2) (Supp. III 1979). For claims involving property worth larger sums, the Court of Claims has sole original jurisdiction. *Id.* § 1491.

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