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INTRODUCTION

Pursuant to the Federal Tort Claims Act (hereinafter FTCA) enacted in 1946, liability is generally imposed on the federal government whenever the government negligently undertakes an activity. One limit to broad government liability is the statutory exception for an act which is discretionary in nature. Historically, court decisions concerning the imposition of liability on the government have been extremely inconsistent, due primarily to the substantial difficulty the courts have encountered interpreting the discretionary function exception to the FTCA. Recently, this inconsistency has evidenced itself in two decisions by the federal courts of appeals.

In the case of Eklof Marine Corp. v. United States, the Court of Appeals for the Second Circuit ruled that the United States Coast Guard was potentially liable to the owners of a vessel which ran aground and was seriously damaged due to the Coast Guard’s negligent placement of a navigational buoy. The United States Court of Appeals for the First Circuit was faced with a similar situation in the case of Brown v. United States. In that case, that court rejected the reasoning of Eklof and held that an instrumentality of the United States, the National Weather Service (hereinafter NWS), was not liable for the death of several fishermen who drowned in a storm at sea. The NWS had failed to predict the storm primarily because of a malfunctioning weather observation buoy.

Despite their apparent inconsistency, both the Eklof and Brown

2. See infra note 17 and accompanying text.
3. See infra notes 18-61 and accompanying text.
5. 762 F.2d 200 (2d Cir. 1985).
6. Id. at 205.
8. Id.
decisions are in accord with precedence. The court in *Eklof* ruled that when the federal government performs a discretionary act such as the placement of a navigational buoy to aid vessels, it has a duty to use reasonable care and will be held liable if this duty is breached.\(^9\) The *Eklof* decision is in agreement with a prior Supreme Court decision that imposed liability on the Coast Guard.\(^{10}\) In contrast, the court in *Brown* ruled that when the federal government performs a discretionary act, such as the preparation of a weather forecast for an area which contains a malfunctioning weather observation buoy, it is protected by immunity for any untoward consequences.\(^{11}\) The *Brown* decision is consistent with prior federal court decisions limiting government liability for weather forecasting.\(^{12}\)

In an attempt to understand and explain these two conflicting interpretations of the discretionary function exception, Part I of this note sets forth the background and substance of the FTCA and the discretionary function exception. In this section the note focuses upon the legislative history and congressional intent behind the Act and includes an analysis of how the Supreme Court has applied the FTCA. Part II describes the *Brown* and *Eklof* decisions including the facts and issues the courts dealt with, the discretionary activities in question, and the reasoning employed to reach their respective conclusions. Part III discusses the similarities and differences between the two cases as well as the express and silent concerns of the courts. It identifies and analyzes the reasons why the courts reached diametrically opposite conclusions. Part IV suggests that the solution to the prospect of future judicial inconsistence in this area is further legislative clarification from Congress.

I. THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION

Congress passed the FTCA after nearly thirty years of debate.\(^{13}\) The Act was the result of a congressional decision to allow private citizens easy access to the federal courts for tort claims arising out of

\(^9\) *Eklof*, 762 F.2d at 200.  
\(^{11}\) *Brown*, 790 F.2d at 199.  
\(^{12}\) See infra note 137 and accompanying text.  
the negligent or wrongful acts or omissions of federal government employees.\textsuperscript{14}

The FTCA, 28 U.S.C. § 1346(b), reads in part:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.\textsuperscript{15}

The Act grants jurisdiction to the federal courts primarily for claims arising out of common law torts committed by government employees. The application of common law standards is evidenced by the language, "if a private person would be liable," and by the requirement that the government must act in the same manner that a private individual would in order to avoid liability. The Act also allows claims against the government to be litigated in federal courts instead of being pursued through private bills, which proved to be notoriously ineffective.\textsuperscript{16}

Congress recognized, however, that strong government depended on the ability of government agencies to act freely, exercising discretion without fear of liability. It was this concern which led to the

\textsuperscript{14} Dalehite, 346 U.S. at 25. Prior to the passage of the FTCA, petitioners had to employ a private bill action against the United States. This system was very ineffective. For example, in the Seventieth Congress, 2268 private claim bills were put before Congress. Out of these only 336 were enacted of which 144 were for tort claims. \textit{Id.} at 25 n.9. The attempt to arrive at legislation to correct this problem can be traced as far back as 1855. In that year, Congress first established the Court of Claims where the government consented to suits based on contract claims and federal law claims brought by private citizens. In 1887, Congress expanded this amenability to suit to include all actions not sounding in tort, while beginning in 1920 the government allowed suits for the first time on admiralty claims and maritime claims involving United States vessels. \textit{Id.} at 25 n.10. In commenting on the origins of the FTCA, the Supreme Court has stated that the FTCA came about as a result of "inaequate\[e\] . . . congressional machinery for [the] determination of facts, the importunities to which [the] claimants subjected members of Congress, and the capricious results . . . [of the private bills]." Feres v. United States, 340 U.S. 135, 140 (1950). These concerns led to a strong demand that claims for tort wrongs be submitted to adjudication. \textit{Id.}

\textsuperscript{15} 28 U.S.C. § 1346(b) (1982).

\textsuperscript{16} See \textit{supra} note 14. A further indication that Congress intended the government to be treated as a private person would be in a tort claim is evidenced in 28 U.S.C. § 2674 (1982). That statute reads: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." \textit{Id.}
enactment of the discretionary function exception, which reads as follows:

[S]ection 1346(b) of this title shall not apply to— . . . (a) 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 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.\(^{17}\)

By fashioning an exception for discretionary functions, Congress took steps to protect the government from liability that would seriously handicap efficient government operations.\(^{18}\) The impact of the discretionary function exception is that the government cannot be held liable for damages arising out of ministerial or administrative decisions.\(^{19}\) For example, the decision by the government to purchase a certain type of vehicle would be unreviewable, but negligence by a government employee in the operation of that vehicle would subject the government to liability just as a private individual would be liable in this circumstance. The problem, though, is that Congress did not define or otherwise explain what is meant by the phrase “discretionary function,” thereby leaving it for the courts to construe.

A. **The Scope of the Federal Tort Claims Act**

Over the years, the courts have attempted to interpret the Act and formulate standards which may be applicable for imposing liabil-

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\(^{17}\) 28 U.S.C. § 2680(a) (1982). The other exceptions contained in § 2680 include: b) claims based on transmission of letters or postal matters; c) claims with respect to custom taxes or retention of goods by customs officers; d) claims based on admiralty jurisdiction; e) claims arising out of the administration of title 50; f) damages incurred or caused by the imposition of a quarantine by the United States; g) repealed; h) claims based on assault, abuse of process, libel, slander, misrepresentation, deceit or interference with contract relations; i) damages caused by the Treasury’s fiscal regulations; j) claims based on combatant activity during wartime; k) claims arising in a foreign country; l) claims arising from the activities of the Tennessee Valley Authority; m) claims arising from the Panama Canal Company; and n) activities and claims due to the activities of the federal land bank, intermediate credit bank, or bank for cooperatives. *Id.*

\(^{18}\) United States v. Muniz, 374 U.S. 150, 163 (1963) (federal prisoner can sue under FTCA to recover for personal injuries sustained in a federal prison due to the negligence of a federal employee). *See also* United States v. Varig Airlines, 467 U.S. 797, 808 (1984). In *Varig*, the Supreme Court said that the discretionary function exception marks the boundary between Congress’ willingness to impose tort liability upon the United States and a desire to protect certain government actions from exposure to suit by private individuals. For further discussion of *Varig*, see *infra* note 47 and accompanying text.

\(^{19}\) Dalehite v. United States, 345 U.S. 15, 26 (1953); *see also* note 17.
ity on the government. In *Feres v. United States*, the Supreme Court developed a doctrine which prohibited military personnel from asserting claims against the government when those claims are incident to service. In *Feres*, a member of the armed forces was killed in a fire resulting from government negligence and his estate was denied recovery. The primary concern in *Feres* was that subjecting the federal government to liability under the FTCA would produce inconsistent results because the laws of the states vary and the Act requires that the law of the state where the tort occurred controls. According to the doctrine set forth in *Feres*, because of the distinctly federal relationship between a member of the service and the government, the only time a member of the armed forces can recover is when the resulting injury is not incident to the service of the member. For example, if a service member were on leave he or she would be entitled to recover from the government for negligent harm because the relationship between the parties at this point would not be distinctly federal in nature.

21. *Id.* The case was actually a combination of three separate claims brought against the government by federal employees claiming negligence on the part of the government. The Supreme Court affirmed the district court's dismissal of an action brought under the FTCA. The decedent perished in a fire in the barracks where he was living. The complaint alleged that the government had reason to believe the barrack was a fire hazard. *Id.* at 137. In affirming the decision to disallow the claim, Justice Jackson stated: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." *Id.* at 141 (footnote omitted). The court reasoned that to permit recovery would subvert military discipline by varying the rights of armed forces personnel according to the varied laws of the states as is required under the FTCA. *Id.* at 149. See *supra* notes 13-18 and accompanying text.
22. For the relevant text of the FTCA, see *supra* note 15 and accompanying text.
23. *Feres v. United States*, 340 U.S. 135, 143 (1950). See *Shearer v. United States*, 723 F.2d 1102 (3d Cir. 1983) (holding that the *Feres* doctrine does not apply where the service member was on active leave and thus the injury was not incident to service), rev'd, 473 U.S. 52 (1985) (recovery under the Act is barred under *Feres* doctrine). See also *United States v. Varig Airlines*, 467 U.S. 797 (1984). In *Varig*, Chief Justice Burger wrote for the majority and stated:

From . . . legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected . . . . First, it is the nature of the conduct, rather than the status of the actor [that is, controlling rank is irrelevant] . . . . Second, [it was intended that the] exception . . . encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.

*Id.* at 813-14 (footnote omitted).

Similarly, in *Anderson v. United States*, 575 F. Supp. 470 (E.D. Mo. 1983), the court upheld the doctrine where a member of the United States Navy brought a claim under the FTCA when he was injured because of a fire on a Navy ship. The court stated that "*Feres* requires . . . that there be some proximate relationship between the service member's activities and the Armed Forces." *Id.* at 472. In *Anderson*, that relationship existed and the court denied recovery. See Comment, *Federal Tort Claims Act-Liability of the Government*
Jackson, writing for the majority in *Feres*, provided a synopsis of the congressional intent behind the FTCA: "The primary purpose of the Act was to extend a remedy to those who had been without. . . . [The] effect [of the Act] is to waive immunity from recognized causes of action . . . [but] not to visit the Government with novel and unprecedented liabilities." 24 *Feres* acted as a strict ban on recovery for military personnel which, until recently, courts have applied rigidly with few exceptions.

In the case of *West v. United States*, 25 the Court of Appeals for the Seventh Circuit allowed recovery to a third party whose claim was based upon a separate but related action of the service member’s. 26 In *West*, the parents of a daughter who suffered birth defects and ultimate death brought an action in her right because of the negligent mistyping of her father’s bloodtype. 27 The Seventh Circuit found that although the negligence was incident to the father’s service, the FTCA did not bar recovery and the *Feres* doctrine was inapplicable. 28 The court found the *Feres* requirement that the relationship between the parties be distinctly federal was lacking. The daughter was ineligible for any other government benefits or allowances; furthermore, the concern in *Feres* of subverting military discipline by allowing recovery to servicemen for injuries incident to service, 99 U. Pa. L. Rev. 1022 (1951) (arguing that the distinction drawn between injuries incident to service is absurd and unfair to servicemen and concluding that whatever inconvenience may be placed on the government for liability from injuries incident to service is far outweighed by a policy of decreasing governmental immunity).

24. *Feres*, 340 U.S. at 140-41. Justice Jackson also noted that:

[the] FTCA was not an isolated and spontaneous flash of Congressional generosity. It mark[ed] the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented . . . . [This doctrine] was invoked on behalf of the Republic and applied . . . as vigorously as it had been on behalf of the Crown. As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government.

*Id.* at 139-40 (footnotes omitted).


26. *Id.* at 1121.

27. The mother’s and father’s bloodtypes were in fact incompatible. *Id.*

was noticeably absent, because bloodtyping is not distinctly military in nature.\footnote{West, 729 F.2d at 1124-26. For a detailed discussion and criticism of Feres, see Note, The Cancer Spreads: Atomic Veterans Powerless in the Aftermath of Feres v. United States, 6 Cardozo L. Rev. 391 (1984) (arguing that the refusal of the government to compensate veterans exposed to radiation in the 1950s leaves the veterans and their families to bear the full cost of the injury). See also Comment, An Interpretation of the Feres Doctrine After West v. United States and In re “Agent Orange” Product Litigation, 70 Iowa L. Rev. 737 (1985).}

Several years after Feres, Dalehite v. United States\footnote{346 U.S. 15 (1953).} provided an informative discussion of the legislative background of the FTCA and the discretionary function exception. In Dalehite, the plaintiffs brought an action against the Tennessee Valley Authority to recover damages for deaths caused by an explosion of Fertilizer Grade Ammonium Nitrate produced and controlled by the federal government in Texas City, Texas.\footnote{Id. at 17. Dalehite was a test case which represented 300 separate claims against the government for a total of more than $200,000,000. Id. The explosion and resulting fire which occurred was so tremendous that most of Texas City, Texas was levelled, and many lives were lost. Id. at 23. The claim stated that the United States, without properly investigating the chemical fertilizer, “shipped the substance to a congested area without warning of the possibility of an explosion under certain conditions.” Id. The Supreme Court ruled that the decision to institute the fertilizer export program was a discretionary act and the combustibility of the fertilizer under conditions likely to be encountered in shipping was to be determined by the discretion of those in charge of the production of the fertilizer. Id. at 37-38. The policy of producing and storing the fertilizer was undertaken as a means to deal with the government’s obligation after World War II, as occupying power of Germany, Japan, and Korea, to feed the populations of those countries. Id. at 19.} The Supreme Court held that the activity in question fell under the discretionary function exception to the FTCA and hence the government was immune from liability.\footnote{Id. at 41-42.} Justice Reed, writing for the majority, said the FTCA was the “offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of [its] employees in carrying out its work.”\footnote{Id. at 28 (footnote omitted). But see Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957). In Rayonier, the Supreme Court ruled that the United States was not immune from liability for the negligence of government firefighters (Forest Service) if under similar circumstances a private person would be liable. Justice Blackmun, writing for the majority, disagreed with the result in Dalehite and stated: It may be that it is “novel and unprecedented” to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.} However, Justice Reed added, “it was not contemplated that the Government should be subject[ed] to liability arising from acts of a governmental nature or function.”\footnote{Id. at 24.}
The decision in Dalehite to undertake the chemical production, storage, and transportation was made at the administrative level and thus was within the character of actions specifically exempted from liability under Section 2680(a) of the Act. The Court defined the scope of the discretionary function exception in clear language: 

"[T]he discretionary function or duty that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." Thus, not only was the decision to produce the fertilizer discretionary, but the actions taken to plan and carry out the operation were discretionary and unreviewable.

Problems for the federal courts arise when they are faced with the inevitable task of defining a discretionary act. The courts often struggle to categorize the negligent or wrongful acts as belonging to one of two categories, administrative/planning or operational. This effort to

Id. at 319.

35. Dalehite, 346 U.S. at 37.
36. See supra note 17 and accompanying text.
37. Dalehite, 346 U.S. at 35-36 (footnote omitted). See also Moffit v. United States, 430 F. Supp. 34 (E.D. Tenn. 1976). In Moffit, the plaintiff claimed that she was sexually assaulted by an employee of the United States Postal Service. She also claimed the assault was a foreseeable consequence of the negligence of the postal service in hiring the employee because he had a criminal record. Id. at 37. The court did not rule on the issue of whether the hiring of the employee was discretionary. Id. at 38. It did say, however, that "'the exemption for discretionary functions seeks to insulate from judicial inquiry the propriety of basic policy decisions made by officials . . . [who have] broad and pervasive decision-making responsibility.'" Id. at 38 (quoting Downs v. United States, 382 F. Supp. 713, 747 (M.D. Tenn. 1974)).
38. Dalehite, 346 U.S. 15. Although the Supreme Court found the actions taken by the government negligent but unreviewable, the Court weighed heavily the fact that the government had been producing and controlling fertilizer with no difficulty for over three years prior to the explosion. The Court found that since the government had experienced consistent success with past operations, it had no reason to believe it was operating dangerously. Id. at 38. The Court in Dalehite also had to deal with the issue of absolute liability. The petitioners argued that the government should be liable regardless of the nature of its conduct because the damages arose from a decision to engage in an inherently dangerous activity. Id. at 44-45. Justice Reed agreed that the degree of care used in performance of the activity is irrelevant when the issue is strict liability, however, the FTCA "requires a negligent act . . . [by an employee and it is the court's] judgment that liability does not arise by virtue . . . of United States ownership of . . . or . . . engaging in an 'extra-hazardous' activity." Id. at 45 (citing United States v. Hull, 195 F.2d 64, 67 (1st Cir. 1952)). Justice Jackson, writing for the dissent, advocated a stricter standard of due care to be placed upon the government. His position was that if the government is going to undertake an activity, it should be subject to the same standards of safety as a private individual or corporation. Id. at 53 (Jackson, J., dissenting). For a descriptive analysis of the Dalehite decision, see Mathews, Federal Tort Claims Act—The Proper Scope of the Discretionary Function Exception, 6 AM. U.L. REV. 22 (1957).
categorize usually results in an attempt to distinguish between a negligent implementation of a policy decision and a negligent policy judgment itself, without any clear guidelines. Traditionally, if the decision is categorized as a negligent policy judgment, the decision is immune.

Congress drafted § 2680(a) as a clarifying amendment to assure governmental protection from tort liability for errors in administrative decisions. The Supreme Court in Dalehite attempted to define the scope of the FTCA by quoting the testimony before the House Judiciary Committee of an Assistant Attorney General concerning the meaning of § 2680(a):

[The purpose of the exception is to avoid] "any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity," merely because "the same conduct by a private individual would be tortious." It was not "intended that the constitutionality of the legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort."

The Supreme Court in Dalehite viewed the FTCA as an historical achievement by Congress. By enacting the FTCA, Congress had manifested an intent to exclude the federal government from litigation for claims regarding distinctly governmental functions, and yet the government could be brought into court to answer for wrongs in some instances.

Two years after Dalehite, the Supreme Court substantially broadened the application of the FTCA and the discretionary function ex-

40. Id. at 27 (quoting Tort Claims Act: Hearings on H.R. 5373 and 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 25 (1942) (statement by Assistant Attorney General Francis M. Shea)). The House Report on the debate of the Act adopted language very close to that of the Assistant Attorney General. The report stated:

[This paragraph, § 2680(a), characterized as] a highly important exception, intended to preclude any possibility that the bill might be construed to authorize [a] suit for damages against the Government growing out of an authorized activity, such as, a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious . . . . The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.

ception in United States v. Indian Towing Co. In Indian Towing, the United States Coast Guard was held liable for negligently maintaining a lighthouse. The light in the lighthouse had gone out, leaving navigators in the area in a perilous position. The plaintiffs sued under the FTCA, alleging negligence due to the failure of the Coast Guard to check the battery and sun relay system, which operated the lighthouse. In ruling that the discretionary function exception did not exempt the government from liability in this instance, Justice Frankfurter stated: "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate the light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order . . . ."

The primary issue considered was whether there was negligence at the administrative or operational level. The Supreme Court concluded that the malfunctioning light was negligence at the operational level: thus, the government was held accountable. In sum, under the FTCA, the government could be held liable only for failing to maintain a certain standard of care after the discretionary decision to undertake the lighthouse had been made.

Recently, the Supreme Court returned to a narrow interpretation of the FTCA in United States v. Varig Airlines. In that case, Varig

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42. Id.
43. Id. at 62.
44. Id. at 63. For an argument that Indian Towing is explainable by the fact that operating a lighthouse is not a uniquely governmental function, see Case Comment, The Federal Claims Act After Indian Towing, 58 W. Va. L. Rev. 312 (1955). But see United States v. Indian Towing Co., 350 U.S. 61, 70 (1955) (Reed, J., dissenting) (the establishment of a lighthouse is a uniquely governmental function under 14 U.S.C. § 83).
45. Indian Towing, 350 U.S. at 69. Justice Reed, writing for the dissent, argued for a narrow interpretation of the FTCA, which he believed should not be read with "extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress." Id. at 75 (Reed, J., dissenting). He further argued that if Congress intended to create liability for all incidents, that intention should be made plain. Id. Thus, the cautious application of the FTCA in Feres and Dalehite was advocated as the solution to the problem in Indian Towing.
46. Id. at 63. See also W. PROSSER & W. KEATON, ON TORTS § 131 (5th ed. 1984). In this text the principle is derived that if the alleged negligent conduct is at the planning level it is protected by immunity, but once a decision is taken at the planning level it is not immune and must be carried out with reasonable care.
47. 467 U.S. 797 (1984). In Varig, a fire started in one of the lavatories on board a Boeing 747 owned by Varig. The fire caused the death of a majority of the passengers and the jet was destroyed. Id. at 800. The FAA had decided to implement a program under which it was left to the manufacturers of the jets to comply with government safety regulations. Id. at 805. The federal employees involved decided that the best way to enforce
Airlines brought an action against the United States under the FTCA, seeking damages for the deaths of passengers and for the destruction of a jet. The plaintiffs claimed that the Federal Aviation Administration (FAA) had been negligent by only “spot checking” and not fully inspecting the jet. The Supreme Court, relying heavily on Dalehite ruled that the actions taken by the (FAA) were discretionary:

As in Dalehite, it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception. . . . In administering the “spot check” program, these FAA engineers and inspectors [encountered certain] risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA’s alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the

these standards in light of limited resources was to perform “spot checks.” Id. at 817. Chief Justice Burger stated that, although negligent, the actions taken by the FAA fell within the discretionary function exception:

[The acts of the FAA employees in executing the “spot-check” program in accordance with agency directives are protected by the discretionary function exception. . . . The FAA employees who conducted . . . [the inspections] were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources.

Id. at 820 (citation omitted).

Both Varig and Indian Towing dealt with negligent inspections on behalf of the government. However, the distinguishing element between the cases is that the Court in Varig was primarily concerned with an allegedly negligent policy decision regarding inspection, while in Indian Towing the alleged negligence was the failure of the Coast Guard to inspect and maintain the lighthouse.

Varig only held that the spot checking policy was discretionary. It did not categorically hold that under all circumstances the negligent checking of an airplane would be inactionable. In other words, the government could not be held liable on the policy judgment made at the administrative level for the reasons set forth by Chief Justice Burger, but the government conceivably could, under the Indian Towing rationale, be held liable for the inspection at the operational level if some causal link between a negligent inspection and the resulting crash could be established.

State courts do not necessarily apply the same standards as the federal courts do when establishing liability for negligent inspections by state agencies. In fact, liability is often imposed for negligent inspections. For example, in Ingram v. Howard-Needles-Tammen & Bergendoff, 234 Kan. 289, 672 P.2d 1083 (1983), a truck driver was killed after his truck encountered a four foot by five foot-six inch hole in a bridge caused by deck deterioration. Id. at 290, 672 P.2d at 108. The Supreme Court of Kansas ruled that highway inspectors contracted by the State Transportation Department had a legal duty to the public to exercise reasonable care when inspecting the bridge. Id. at 292, 672 P.2d at 1084. Liability was imposed because the contractors had made only a visual inspection of a bridge and failed to recommend repairs for a bridge which was in obvious need of an overhaul.
Chief Justice Burger, writing for the majority, also expressed the view that courts should be reluctant to venture into an area where they have neither the expertise nor authority to determine what was or was not a good decision. "Judicial intervention . . . through private tort suits would require the government to 'second guess' the political, social and economic judgment of an agency exercising its regulatory function." 49

Therefore, the Court found the decision by the FAA to spot check and to place the duty of complying with the safety standards upon the manufacturers to be discretionary and unreviewable. 50 It is apparent that the Court was aware of the limited funds which Congress allocates to government agencies and the pressures inherent in allocating funds in a proper fashion. Because so much debate and controversy surrounds the system of allocation, the Court distanced itself from what is appropriately a legislative function. The decision by the Supreme Court in Varig Airlines reversed a lower court trend of setting strict limitations upon the discretionary function exception. 51 The Court maintained that the FAA has a duty to promote aviation safety but not to insure it. 52

Federal courts of appeals have applied extensively the discretionary function exception standards set forth in Dalehite. In Nevin v. United States 53 the Court of Appeals for the Ninth Circuit ruled that the government's choice to use a particular strain of bacterium in a simulated attack on the City of San Francisco in 1950 was made at the planning level and thus was exempt from liability under the discretionary function exception. 48

48. Varig, 467 U.S. at 813, 820.
49. Id. at 820. For a further discussion of Varig Airlines, see Comment, United States v. Varig: Can the King Only Do Little Wrongs?, 22 CAL. W.L. REV. 175 (1985) (arguing that the Supreme Court failed to seize a golden opportunity to define the scope of the discretionary function exception).
50. Varig, 467 U.S. at 820. Accord Shuman v. United States, 765 F.2d 283 (1st Cir. 1985). The First Circuit found the government not liable for failing to promulgate a policy regarding a duty to warn government contractors about the hazards of asbestos. Concluding that the omission fell within the discretionary function exception, the court applied the Dalehite and Varig decisions and concluded: "The government's omission of a policy requiring the Federal Department of Labor, or others acting under its authority, to warn the endangered workers themselves of a work hazard was a discretionary . . . function exception to the FTCA." Id. at 290.
51. See, e.g., De Bardeleben Marine Corp. v. United States, 451 F.2d 140, 146 (5th Cir. 1977) (holding that the government cannot resort to the discretionary function exception for admiralty claims).
52. Varig, 467 U.S. at 821.
53. 696 F.2d 1229 (9th Cir. 1983).
ary function exception to the FTCA. In reaching this conclusion, the Ninth Circuit relied on Dalehite and reaffirmed that the purpose of the discretionary function exception was to permit the government to be free from liability for negligence associated with planning level decisions. Echoing earlier concerns expressed by the Supreme Court, the Ninth Circuit showed a reluctance to have the courts evaluate the activity in question because it would "impair the effective administration of the government."

Despite the broad interpretation of the discretionary function exception in Nevin, the Ninth Circuit in another instance has narrowed its application. In Lindgren v. United States, a water skier brought an action against the United States for damages sustained when the skier struck the bottom of the Colorado River below Parker's Dam, which was operated by the government. The claim alleged that the Bureau of Reclamation knew that the area was used for recreation but failed to warn users of the fluctuations in water level caused by the dam. In applying the discretionary function exception, the Ninth Circuit ruled that although government operation of a dam traditionally is considered to fall within the discretionary function exception, the government may have a duty to warn of a danger if the exercise of the discretion creates that danger. In this instance the operation of the dam created the danger and therefore the government had a duty to warn of the potential hazard.

54. Id.
55. Id. at 1230. See also Sellfors v. United States, 697 F.2d 1362 (11th Cir. 1983) (holding that FAA traffic controllers were not liable for failing to sight birds which were later ingested by a plane's engine and resulted in the crash of that plane and death of the pilot. The court ruled that no duty existed on the part of the controllers and, even if a duty did exist, the failure to sight the birds fell within the discretionary function exception to the FTCA).
56. Nevin, 696 F.2d at 1230.
57. See United States v. Varig Airlines, 692 F.2d 1205 (9th Cir. 1982), rev'd, 467 U.S. 797 (1984). In Varig, the Ninth Circuit ruled that the government is barred from resorting to the discretionary function exception when failing to comply with certain FAA standards and that the negligent inspection of the jet was similar to the negligence in Indian Towing. Id. at 1209.
58. 665 F.2d 978 (9th Cir. 1982).
59. Id. at 979.
60. Id.
61. Id. at 980-82. The court cited cases which held government failure to warn of hazards actionable: Smith v. United States, 546 F.2d 872 (10th Cir. 1976) (holding that the decision not to warn visitors of hazards in undeveloped areas of Yellowstone Park must be judged separately from the discretionary function exception); United States v. Washington, 351 F.2d 913 (9th Cir. 1965) (holding that the failure of the government to warn aviators of unmarked electric power lines was actionable).
B. Limits On The Scope Of The Federal Tort Claims Act As Applied To Admiralty Actions

Congress has legislated that there are certain activities to which the discretionary function exception does not apply.\(^62\) In such cases, the remedy against the government for liability arising out of that activity must be sought under the specific statute governing that activity. Admiralty actions provide one such example. The FTCA specifically provides in § 2680(d) that "provisions of this chapter and section 1346(b) of this title shall not apply to— ... (d) Any claim for which a remedy is ... provided [under the Suits in Admiralty Act (SIAA)] relating to claims or suits in admiralty against the United States."\(^63\)

General confusion over the scope of the discretionary function exception is compounded in the case of admiralty actions. Congress exempted suits under the SIAA from the limitation on liability in the discretionary function exception based upon a consensus among legislators that the liability of the government should be coextensive with that of private shipowners and shippers because the government was a primary participant in merchant shipping.\(^64\)

The relationship between § 2680(d) and the SIAA has been interpreted in various ways. On the one hand, some courts have read § 2680(d) to mean that the discretionary function exception does not

\(^62\) See supra note 17 and accompanying text.

\(^63\) 46 U.S.C. § 742 (1982) provides in part:

In cases where ... such vessel were privately owned ... or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against such corporation [mentioned in section 741 of this title]. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business. ...  

Id.

Enacted in 1920, the statute barred any proceeding in rem against a vessel or cargo owned by the United States. See H. Baer, Admiralty Law of the Supreme Court, 724-30 (3d ed. 1979).

\(^64\) De Bardeleben Marine Corp. v. United States, 451 F.2d 140, 143 (5th Cir. 1977). In De Bardeleben, plaintiffs brought an action against the United States under the SIAA for damage resulting when an anchor on a barge ruptured a natural gas pipeline. Id. In proclaiming that the discretionary function exception is not included in the SIAA, the court said "[t]he words of the statute, its legislative history, the liberal approach in interpreting waivers of immunity, and the senseless absurdities which would result belie the narrow reading that the Government ... give[s] to the [SIAA]." Id. at 145. See also G. Gilmore & C. Black, Jr., The Law of Admiralty 982-83 (1975). The authors state that this concern was due to the increased participation of the United States in the shipping business. The waiver of sovereign immunity in the SIAA was in order to subject the United States to the same liability as a private individual. Id.
apply to the SIAA. These courts have reasoned that if Congress had intended to include the SIAA within the discretionary function exception, it would have done so explicitly. On the other hand, some courts have been willing to apply the discretionary function exception to a claim brought under the SIAA. These courts have reasoned that by enacting the FTCA and the discretionary function exception, Congress intended that the government would not be held accountable for discretionary actions leading to claims brought under the SIAA.

II. THE EKLOF AND BROWN DECISIONS

The confusion over the scope of the discretionary function exception in the context of suits in admiralty was brought to the fore in the recent cases of *Eklof Marine Corp. v. United States* and *Brown v. United States*. In *Eklof*, the Second Circuit Court of Appeals found the discretionary function exception inapplicable and held the Coast Guard liable for inadequately marking a reef. In *Brown*, the First
Circuit Court of Appeals rejected the reasoning of *Eklof*, applied the discretionary function exception, and found the government not liable for the failure to repair a buoy used as a source of weather information.\(^{71}\)

**A. Eklof Marine Corp. v. United States**

On June 14, 1983, the M/V *Reliable* was travelling north on the Hudson River toward its destination of Albany, New York. The *Reliable* ran aground at Diamond Reef, the site of previous groundings.\(^{72}\) The Coast Guard, acting under its charter, 14 U.S.C. § 2,\(^{73}\) had marked the southern end of the reef with one navigational buoy. The crew of the *Reliable* relied upon the buoy when they passed through Diamond Reef. Due to the grounding, the *Reliable* suffered tremendous damage.\(^{74}\)

The Court of Appeals for the Second Circuit reversed the lower court decision and found for the plaintiffs.\(^{75}\) The court held that the Coast Guard had in fact been negligent, and reasoned that since the Coast Guard had decided to act, it must act reasonably or suffer the consequences of liability for negligence.\(^{76}\) The court concluded that once the Coast Guard had acted in a way that allowed navigators to rely on its action, it could be held liable for not measuring up to a proper standard of care. "It is reliance that gives rise to the Coast Guard's duty."\(^{77}\)

In reaching this result, the Court of Appeals for the Second Cir-

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71. *Brown*, 790 F.2d at 203.
72. *Eklof*, 762 F.2d at 201.
73. 14 U.S.C. § 2 (1982) describes the primary duties of the Coast Guard: a) enforcement and assistance in the enforcement of federal laws on the high seas; b) administration, promulgation, and enforcement of regulations for the promotion of safety on the high seas; c) development, establishment, maintenance and operation of aids to navigation, icebreaking facilities and rescue missions; d) engaging in oceanographic research; and e) maintenance of a state of readiness to function in the Navy during times of war. *Id.* See also 14 U.S.C. § 81 (1982). Section 81 sets forth the general description of the Coast Guard's duties with respect to navigational markings for the military. It provides: "In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate: ... aids to maritime navigation . . . ." *Id.*
74. *Eklof*, 762 F.2d at 200. The plaintiff's claim was for a total of $382,000.
75. *Id.* at 201. The lower court dismissed for failure to state a claim under Federal Rule of Civil Procedure 12b(6).
76. *Id.* at 202. The court said that where the Coast Guard has acted to mark an obstruction or maritime danger, a duty arises to do so in a way that does not create a new hazard.
77. *Eklof*, 762 F.2d at 202-03. Reliance is a standard maxim of tort law.
cuit relied primarily on *United States v. Indian Towing Co.* The court in *Eklof* drew an analogy between the facts before it and *Indian Towing*. The Second Circuit recognized that under *Indian Towing* there was in fact no statutory duty of the Coast Guard to undertake the marking of the reef. However, the court concluded that although the "instant case does not present the situation of a malfunctioning lighthouse, . . . the duty of the Coast Guard . . . [was] essentially the same: once the Coast Guard acts, and causes others justifiably to rely on such action, a duty arises to act . . . with due care . . . ." The *Eklof* court reasoned that once the Coast Guard had made the discretionary decision to mark the reef, it was obligated to ensure that it was marked correctly and safely. A common element in both *Eklof* and *Indian Towing* was that the negligence by the government occurred at the operational level as opposed to the administrative level.

The Second Circuit contended its decision was consistent with the Fourth Circuit opinion in *Somerset Seafood Co. v. United States*. In *Somerset*, the Court of Appeals found the Coast Guard liable for negligence in maintaining a navigational buoy over 500 feet from the position of a sunken wreck. The court in *Eklof* adopted the reasoning in *Somerset*, and concluded that even if the decision to mark or remove the wreck be regarded as discretionary there should be liability for negligence in marking the buoy at Diamond Reef, even after the discretion has been exercised and the decision to mark the reef was made.

While approving the Fourth Circuit Court of Appeals' decision in *Somerset*, the court refused to follow the First Circuit's opinion in *Chute v. United States*. In *Chute*, the Coast Guard's decision to

79. *Eklof*, 762 F.2d at 203.
80. 193 F.2d 631 (4th Cir. 1951).
81. *Id.* at 640. In *Somerset*, shipowners brought suit under the FTCA against the government for damages arising from the sinking of the plaintiff's ship due to the negligent marking of a wreck by the United States. *Id.* at 633. The Fourth Circuit, finding the government liable, ruled that even if the decision to mark or remove the wreck were regarded as discretionary, there was liability for negligence in marking after the discretion had been exercised and the decision to mark had been made. *Id.* at 635. The court further stated that the proper location of a buoy depended upon "many factors, including . . . the width of the channel, . . . the depth of the water, . . . the volume of vessel traffic, and the probable effect of ice or storms on the buoy." *Id.* at 637. *See also* United States v. Travis, 163 F.2d 546 (4th Cir. 1947) (holding the government liable for placing a buoy 350 feet away from a wreck); United States v. Bickel, 46 F.2d 988 (4th Cir. 1931) (government was held liable when the buoy was placed only 200 feet away from the wreck).
82. *Eklof*, 762 F.2d at 203.
83. 610 F.2d 7 (1st Cir. 1979). In that case, an abandoned United States Navy vessel was being used as a bombing target by the Navy. The Coast Guard placed a buoy, three
mark a submerged navy wreck was held unreviewable. The First Circuit expressed the position that if the discretionary function is to remain meaningful, the choice as to when and how to mark the danger must in all cases be final. 84

The court in *Eklof* disagreed with three concerns expressed by the *Chute* court. First, the *Eklof* court took issue with the First Circuit’s fear that the jury would be unable to determine whether the Coast Guard breached its duty of care. To this concern the Second Circuit responded, “We commit for decision to courts and juries many issues of equal or greater complexity and importance than the question of whether a marine obstruction was properly marked.” 85 Second, the court in *Chute* held that imposing liability on the Coast Guard in this situation would force the Coast Guard to choose the most effective and best means of marking an obstruction, thus placing an unfair burden upon the Coast Guard and setting a dangerous precedent. 86 The Second Circuit in *Eklof* said the answer to this concern was that the method chosen must be proven only to be reasonable under the circumstances and not the “best” available. 87 Lastly, the Second Circuit disagreed with the First Circuit’s position that courts have “neither the expertise, the information, nor the authority to allocate . . . finite resources . . . among competing priorities.” 88 The Second Circuit responded to this concern by asserting that the standard of review is what is reasonable under the circumstances:

Every case must be judged on its particular facts, and liability must be determined, once a duty has been found to exist, by reference to the surrounding circumstances and the knowledge, or lack thereof, on the part of the alleged tortfeasor. In short, while reliance defines the duty, reasonableness defines its breach. 89

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84. *Chute*, 610 F.2d at 12.
85. *Eklof*, 752 F.2d at 204.
86. *Chute*, 610 F.2d at 13.
87. *Eklof*, 762 F.2d at 204.
88. *Chute*, 610 F.2d at 12.
89. *Eklof*, 762 F.2d at 204.
B. *Brown v. United States*

In *Brown v. United States*, the plaintiffs, representatives of several deceased fishermen, brought a claim in the United States District Court for the District of Massachusetts under the SIAA. The claim alleged that the federal government was negligent for failing to repair or replace a malfunctioning weather observation buoy. The lower court found the National Weather Service liable for the death of the fishermen because it had failed (primarily due to the defective buoy) to predict a storm, which led to the death of the fishermen.91

The National Weather Service formulates its predictions mainly from information received by the National Meteorological Center (NMC) in Washington, D.C.92 The NMC acquires the bulk of its information from weather observation buoys which transmit the information gathered via satellite to the NMC. This information is then sent to the regional NWS offices which use the information to prepare forecasts.93 The problem in *Brown* originated with the malfunctioning weather observation buoy 6N12, located at the Georges Bank buoy station, which apparently had been damaged by a passing ship. On September 9, 1980, the government discovered that the buoy was sending faulty wind speed and direction information.94 The NMC continued to log the data from 6N12 but ceased sending it to the NWS. The United States Government Data Buoy Center (NDBC) had made two unsuccessful attempts to replace 6N12 and had made no repairs to it.95

At noon on November 21, 1980, the fishermen of the boats F/V *Fairwind* and F/V *Sea Fever* left the port of Hyannis, Massachusetts to engage in lobster fishing. Prior to leaving, the crew, in accordance with custom, listened to the 11:00 AM weather forecast which predicted good weather. Early the next day, the boats arrived at the fishing spot and the weather turned severe.96 The reports that the NWS

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92. *Id.* Congress established the duties of the NWS in 15 U.S.C. § 313 (1982). That section reads: "The Secretary of Commerce shall have charge of the forecasting of weather . . . and flood signals for the benefit of agriculture, commerce, and navigation, . . . [and] the distribution of meteorological information . . . as may be necessary to establish and record climate conditions of the United States . . . ." *Id.*
93. *Brown*, 790 F.2d at 201.
94. *Id.* at 200. The wind sensor on the buoy was malfunctioning, a condition known as "spiking."
95. *Id.* at 202. The NDBC had on two separate occasions lost buoys which were destined to replace 6N12. The plaintiffs argued that the failure of the government to replace or repair 6N12, because the buoy was scheduled to be replaced the following January, was a breach of a duty of due care. *Brown*, 599 F. Supp. at 887.
96. *Brown*, 790 F.2d at 200.
had furnished were in error and by the time the reports accurately reflected the current weather it was too late to return to the harbor. The *Fairwind* sank in the violent storm and three of its crew were lost. 97

Based on these facts, the Court of Appeals for the First Circuit reversed the lower court decision and found the government not liable for the negligent forecast. 98 The court in *Brown* dismissed the *Eklof* reasoning, stating: "[t]he *Eklof* court has read the discretionary function exception right out by finding it does not apply at precisely the place to which it is particularly directed." 99

The *Brown* court rejected the plaintiffs' claim that the government's failure to repair or replace the buoy was negligent. The government argued that it had no actionable duty and, even if it did, it had acted reasonably under the circumstances. 100 The First Circuit applied *Indian Towing* 101 and the rationale behind *Chute* 102 to reverse the lower court. The court defined the issue to be "whether the government, by issuing reports, assumed a duty to invest in that activity whatever resources a court might find necessary in order to achieve what . . . [the government] believed to be proper care." 103 Thus, the court relied on a different aspect of *Indian Towing*, finding that there were two principles involved in determining liability: "[T]he government's free right to engage, or not, in discretionary functions, but with a cut-off where by [sic] its conduct, . . . has induced justified reliance on its adequate performance." 104

In explaining these two principles, the court relied on the *Chute* interpretation of *Indian Towing*. 105 The court in *Chute* said, "[l]iability was not imposed in . . . [Indian Towing] because a more

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97. *Id.* The plaintiffs in *Brown* produced an expert witness who testified that if the correct reports had been coming from the buoy, the NWS would have been able to forecast the storm in time for the boats to return to port safely. The government countered this argument by stating that 6N12 was not malfunctioning at the time the storm developed and, therefore, the expert witness' testimony should not be given any weight. Further, the government argued that it was not using 6N12 at that time, and that it had no "actionable duty" toward the plaintiffs. *Id.* at 200-01.

98. *Id.* at 204.

99. *Id.* at 202.

100. *Id.* at 200. *But see* *Brown* v. United States, 599 F. Supp. 877 (D. Mass. 1984). The lower court held the government liable for the forecast by applying traditional tort standards of duty, breach, causation and damage. *Id.* at 884-88.


104. *Id.* at 201.

105. *Id.* For a further discussion of the *Chute* court's interpretation of *Indian Towing*, see M. NORRIS, supra note 67, at § 151.
powerful light or taller lighthouse would have been a better warning of the rocks marked by the lighthouse, but rather because the negligent non-functioning of the . . . [advertised] lighthouse misled plaintiff to his detriment." The First Circuit observed that "[t]he rationale of Chute was that although the Coast Guard is known to have undertaken marking dangers to navigation, the extent to which it will do so is a discretionary function. There can be no justified reliance upon, or expectation of, any particular degree of performance; something more is needed to establish liability." The First Circuit in Brown reiterated its earlier concern in Chute that courts have neither the expertise nor authority to allocate finite resources.

Perhaps the most important language in Brown is its sharp criticism of the Eklof decision. The court held that the Second Circuit had misunderstood the teaching of Indian Towing by failing to recognize "the pernicious consequences that could flow from its approach." For example, Coast Guard officials with necessarily limited funds, unable to afford three buoys, may decide to place no aids to navigation rather than risk the consequences which may arise if they mark the danger inadequately. These cases demonstrate that the role courts should play in the allocation of government resources has developed into a major area of disagreement between the First and Second Circuits.

III. THE REASONS FOR THE DIFFERENT OPINIONS AND THE FUTURE IMPLICATIONS

The extensive analysis and discussion in Brown and Eklof demonstrates that the respective courts have reached carefully reasoned decisions. Yet, the similarity of facts and issues in these cases inevitably gives rise to speculation about the different judicial treatment they have received.

On the one hand, the Eklof court ruled that once the Coast Guard acted, that action induced or engendered reliance which led to the grounding of the Reliable. Based on this logic, the court ruled that the action undertaken at the outset of the marking of the reef must be performed with a reasonable duty of care. The court found that the initial decision to mark the reef was an administrative decision and

106. Id. at 201 (quoting Chute, 610 F.2d at 13-14).
107. Id. at 201-02.
108. Id. at 202.
109. Id. at 202 n.5.
110. Id.
unreviewable. In consequence, if the Coast Guard had chosen not to mark the reef, it could not be held liable.\textsuperscript{111}

In \textit{Eklof}, the court found that the positioning of the buoy or the inadequacy of marking the site with a single buoy were the primary reasons for the grounding of the \textit{Reliable}.\textsuperscript{112} The court rejected the government's contention that the position of the buoy was a planning rather than an operational function.

The decision, however, to place a navigational aid at a particular location or to employ only one such aid at that location, as opposed to the initial decision to mark the obstruction, is not an expression of any "policy" of which we are aware and does not constitute an executive branch decision . . . .\textsuperscript{113}

Based upon this reasoning, the court found the marking of the reef to be reviewable.

On the other hand, the First Circuit in \textit{Brown} decided that the decision to continue to develop forecasts for the area where the fishermen met their demise without the aid of 6N12 was discretionary and, therefore, unreviewable.\textsuperscript{114} Thus, the discretionary decision to undertake the job of weather forecasting was unreviewable. In \textit{Brown}, it was established that the malfunctioning buoy, although allegedly not being used at the time, led to the inaccurate forecast. If the buoy had not been spiking, the NWS undoubtedly would have used the accurate information to calculate a more reliable forecast.

In sum, the courts were faced with two situations involving government positioned and employed buoys. There is little, if any, conceptual difference between a mispositioned buoy and a malfunctioning buoy; both foreseeably will cause damage. Significantly, in both instances the government was aware of the problems the buoys were creating. In \textit{Eklof}, other navigators apparently had relied on the buoy to their detriment.\textsuperscript{115} Yet the Coast Guard took no affirmative measures to secure the area to prevent further damage to passing ships.\textsuperscript{116} In \textit{Brown}, the NWS was aware of the spiking condition of 6N12 and the NDBC had attempted unsuccessfully to repair and replace 6N12. However, it continued to issue weather reports for the area despite

\begin{itemize}
\item \textsuperscript{111} \textit{Id.} See also Bearce v. United States, 614 F.2d 556, 560 (7th Cir. 1980) (the Coast Guard was held not liable for electing not to erect a light in Chicago Harbor as a navigational aid), \textit{cert. denied}, 449 U.S. 837 (1980).
\item \textsuperscript{112} \textit{Eklof}, 762 F.2d at 203.
\item \textsuperscript{113} \textit{Id.} at 205.
\item \textsuperscript{114} See supra notes 90-105 and accompanying text.
\item \textsuperscript{115} \textit{Eklof}, 762 F.2d at 201-02.
\item \textsuperscript{116} \textit{Id.} at 203-04.
\end{itemize}
ceasing to use data supplied by 6N12.117

In reaching different results, one point of disagreement between the courts of appeal was the interpretation of *Indian Towing*. The Second Circuit reasoned that since the Coast Guard in *Indian Towing* was under a duty to maintain the lighthouse in a manner which would not undermine the reliance engendered, it therefore followed that the Coast Guard in *Eklof* was under a duty to ensure that the reef was marked appropriately and would not become a trap for the navigator,118 instead of a warning of the danger.

The *Brown* court declared that this application went too far. The First Circuit inserted the facts before it into the *Eklof* formula and reached a startling result: "The government established the service for the benefit . . . of [the] fishermen; fishermen relied upon it; the government knew they would rely on it; therefore the government induced reliance; having induced reliance, it became obligated to use due care."119 The First Circuit agreed that this formula was ostensibly sound, but viewed the formula as proving too much, for, under its reasoning, non-users would be the only parties to whom the discretionary function exception would apply.120

The First Circuit was also very critical of the manner in which the Second Circuit applied the term "reliance." For the First Circuit, the issue was not just reliance, but "justified reliance."121 The *Brown* court concluded that there was a significant difference between a lighthouse and a navigational buoy. In *Indian Towing*, the Coast Guard decided to mark the danger with a lighthouse; this was the extent of its undertaking. The Coast Guard could be held liable, according to *Brown*, only for failing to maintain the lighthouse as advertised, but not for the extent to which it had marked the danger.122 In *Eklof*, the extent to which the Coast Guard marked Diamond Reef was with a single buoy. This decision was, therefore, according to *Brown*, a discretionary matter. The Coast Guard could be held accountable only if it failed to maintain the buoy as advertised.123

A further distinction between the two cases is that while both suits were brought under the Suits in Admiralty Act, the two courts applied the statute differently. This issue was for the most part not

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118. *Eklof*, 762 F.2d at 203.
120. *Id.*
121. *Id.* at 203.
122. *Id.* at 202.
123. *See* Chute v. United States, 610 F.2d 7, 12 (1st Cir. 1979).
discussed by either court. One reason for the silence may be the controversy which the courts have created concerning the SIAA.

The Second Circuit, in Eklof, barely mentioned that the suit was brought by the owners of the Reliable under the SIAA. It made casual mention of the waiver of sovereign immunity in the SIAA while discussing the Coast Guard’s duty of care. In concluding that the Coast Guard must do whatever is necessary to ensure that the placement of the navigational aid does not create a new danger, the court stated: “This [duty] is simply a consequence of the waiver of sovereign immunity represented by the Suits in Admiralty Act ... .” With this reasoning, the Second Circuit upheld its earlier decisions and the decisions of the Fourth and Fifth Circuits that the discretionary function exception does not apply to actions brought under the SIAA. These courts of appeals have held that by amending the SIAA in 1960, Congress attempted to cure only a jurisdictional problem within the SIAA. Furthermore, courts have expressed the view that past experiences with the FTCA compelled Congress to exclude it from the SIAA. The justification for this judicial interpretation is that the exclusion of the discretionary function exception will encourage careful planning and implementation of activities by government agencies.

The Brown court never dealt with the implication of refusing to apply the discretionary function exception to a claim brought under the SIAA. For whatever reason, the court simply disregarded the issue, perhaps because the court considered it to be fully adjudicated under the First Circuit’s previous decisions. The First Circuit’s view is that the exception must be implied in the SIAA because the 1960 amendment opened the door for suits against the government based

124. Eklof, 762 F.2d at 204.
125. Id.
126. Id.
127. See Keene Corp. v. United States, 700 F.2d 836 (2nd Cir. 1983) (under the SIAA the United States waives sovereign immunity with respect to cases which fall under 46 U.S.C. § 742 (1982)); Lane v. United States, 529 F.2d 175 (4th Cir. 1975) (the SIAA contains no discretionary function exception; furthermore, the FTCA contains a specific exception of claims for which the SIAA provides a remedy); De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971) (amendments to the SIAA disavow government immunity in admiralty actions).
128. See S. REP. NO. 1894, 86th Cong., 2d Sess., reprinted in 1960 U.S. CODE CONG. & ADMIN. NEWS. 3583. The report indicated that due to the confusing language of the SIAA as well as the Public Vessels Act, claimants spent an inordinate amount of time deciding in which forum to bring their claims. The result was a massive amount of misfilings. The difficulty arose from the attempt to distinguish between merchant and public vessel status. Id.
upon the standard "as a private person would be." The argument made is that Congress could not have overlooked the fact that the agency being sued will of necessity have limited resources available for the establishment of programs. The argument is furthered by the concern that by precluding the application of the discretionary function exception, the taxpayers and the public treasury will be burdened unfairly because all claims will be paid by the public. Another concern of the First Circuit was that fear of judicial review will result in inaction by agencies which traditionally act for the benefit of the public.

A. The Circuits Switched

Despite the disagreements over the interpretation of Indian Towing and the SIAA, the most important distinction between Brown and Eklof is that the fishermen in Brown relied on a weather forecast, rather than the buoy itself, as was the case for the navigators in Eklof. In the words of the First Circuit, "the representation was not the


130. The Seventh Circuit Court of Appeals has adopted the reasoning of the First Circuit and now applies the discretionary function exception to the SIAA. See Hillier v. Southern Towing Co., 714 F.2d 714 (7th Cir. 1983) (holding that there is no evidence that by amending the SIAA Congress authorized the courts to subject the United States to novel liabilities); Bearce v. United States, 614 F.2d 556 (7th Cir. 1980) (1960 amendment to the SIAA cured a jurisdictional problem only and Congress intended that the discretionary function exception should still apply to the SIAA), cert. denied, 449 U.S. 837 (1980).

131. Gercey v. United States, 540 F.2d 536, 538-39 (1st Cir. 1976). The Supreme Court, however, dismissed this concern in Rayonier Inc. v. United States, 352 U.S. 315 (1957). The Court ruled that the burden on the taxpayers of paying the costs of these suits will be relatively light because the cost will be spread out among the taxpayers. Id. at 320.

132. See, Comment, The Discretionary Function Exception and the Suits in Admiralty Act: A Safe Harbor for Negligence?, 4 U. Puget Sound L. Rev. 385, 411 (1981). The comment states that the legislative history is unclear and there is no certainty as to why Congress did not legislate expressly that the discretionary function exception should not apply to the SIAA. Id. The comment concludes that the fact that Congress did not provide for the exception either expressly or by reference is circumstantial evidence that it did not consider any of the FTCA exceptions necessary or applicable to the SIAA. Id. at 411-12. The conclusion is that the approach of the Fourth and Fifth Circuit Courts of Appeals is favorable because of the legislative history, proper statutory construction, more equitable results for injured parties, and encouragement of responsible agency operations which will benefit the public. Id. at 413. The comment dismisses the concern of agency inaction because that result simply has not occurred. Finally, the argument is made that if the public expense is of concern to Congress, Congress could always amend the SIAA and include the discretionary function exception. Id.
buoy, but the prediction." The fact that the representation relied on was a weather forecast weighed heavily on the mind of the court. The court made reference to the inherent unreliability of weather forecasts and expressed a reluctance to establish a reviewable duty of care in the area of government weather forecasting. "A weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources." The court noted that weather forecasts "fail on frequent occasions."

If the forecast itself were the only matter at issue, the First Circuit's decision in Brown would be entirely consistent with other decisions dealing with liability of the federal government for negligent weather forecasting. Virtually all of the cases which address this issue have ruled in favor of the government for two reasons: a weather forecast is a representation specifically exempted from review by virtue of 28 U.S.C. § 2680(h), and forecasting is never 100% reliable.

The Brown court faced a factually more complicated setting which dealt with government liability for weather forecasts. Unlike

133. Brown, 790 F.2d at 203.
134. Id.
135. Id. at 204. To hold the NWS to a higher standard would undoubtedly force the service to disclaim expressly the reliability of the weather forecasts, an uninviting and nonsensical prospect.
136. Id.
137. See Williams v. United States, 504 F. Supp. 746 (7th Cir. 1980). In that case, an airplane pilot brought an action against the Federal Aviation Administration and the NWS for failing to predict the weather accurately. The court, ruling for the government, said: "Predicting the weather is not an exact science . . . [and weather forecasting is a discretionary function exception to the FTCA]." Id. at 750. See National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954). In that case, the plaintiffs brought an action under the FTCA claiming the NWS had carelessly and negligently disseminated misinformation regarding the course of floodwater. The court held that there was no cause of action for recovery of damages from floods or floodwater and the weather service has a wide latitude of discretion to determine whether in their opinion, a particular forecast is appropriate. The forecasts or omissions of forecasts by the Bureau is a discretionary function. Id. at 750.

For an analysis of National Manufacturing, see Note, Federal Tort Claims Act—The Non Liability of the United States for Negligent Weather Forecasts, 23 GEO. WASH. L. REV. 228, 228-32 (1954) (arguing that unlike a radio station or newspaper, the weather bureau is in the business of weather forecasting (warning) and should be held liable as a corporation would be for acting negligently).

138. 28 U.S.C. § 2680(h) (1982) specifically says the government cannot be held liable for any misrepresentations by its employees or services. For a listing of the other exceptions to the FTCA see supra note 17.

139. See Chanon v. United States, 350 F. Supp. 1039 (S.D. Tex. 1972), aff'd, 480 F.2d 1227 (5th Cir. 1973). In Chanon, the administrators of the estates of two deceased fishermen brought suit against the United States under the FTCA claiming negligence on
the previous cases, there was an act or omission in Brown which made the forecast less reliable than it would have been had the buoy been functioning properly. The government in Brown knew about the possibility of an inaccurate weather forecast because of 6N12, but did not take any measures to warn of the possible consequences.140

The Second Circuit probably would have ruled that the actions taken by the government in Brown were reviewable and ultimately negligent. The Second Circuit likely would reason that the nature of the activity is irrelevant and it is the decision to act and create the forecast which engenders reliance on the forecast and, therefore, the government must use reasonable care in carrying out this activity. While a reliance standard appears to be ostensibly sound, it is not the standard Congress called for in the FTCA. Congress called for liability to be imposed on the federal government if, under the same circumstances, a private person would be liable.141

The question asked by the Brown court was whether the steps taken by the government in Eklof were reasonable. For the First Circuit the answer to this depended upon congressional allocations of resources combined with the concept of justified reliance on the part of the plaintiff.142 To rule otherwise would cause the courts to second-guess the legislature, a task which the First Circuit refused to undertake.143 Therefore, according to Brown, under all the circumstances in Eklof the actions taken by the Coast Guard were reasonable because limited resources were allocated to these agencies to undertake the activities, and the buoy was positioned as advertised. The First Circuit also applied standards not expressly set forth in the FTCA: justified reliance was not contemplated by the Congress. It appears that the circuits are applying judge-made rather than congressional standards.

An inconsistency appears when one applies the justified reliance
reasoning to the facts of Brown, for it seems to mandate a finding of liability. There is no doubt that the government was not employing 6N12 at the time of the storm; thus the forecast was not as reliable as the government advertised it would be. The extent of the NWS undertaking was to employ 6N12 as a properly functioning weather observation buoy. It would be interesting to see what the First Circuit would have ruled if the government had not expended resources to attempt to repair or replace 6N12, or if the government lacked accurate information from all weather buoys in the area, but issued a forecast anyway. Perhaps, in the face of such facts, the court would have imposed liability because of the sheer inadequacy of the equipment. In Brown the overriding factor was, of course, the nature of the activity relied upon: the weather forecast. From its language, the First Circuit implied that the government would still remain protected in this instance even if it did nothing:

In the case at bar, the government did not create the weather; it merely failed, in the [lower] court's opinion, to render adequate performance. . . . [T]his was a discretionary undertaking . . . [by the government, and the lower court] failed to respect the . . . provision . . . [in § 2680, which is] "whether or not the discretion involved was abused."145

In the court's opinion, the discretion was not abused by deciding to issue weather forecasts for the area.146

Obviously, the Second Circuit would disagree strongly with the above reasoning. For the Second Circuit, the entire question revolved around the standard of reasonableness. The Eklof court maintained that the solution to the inconsistency in the cases dealing with governmental liability would be to apply the traditional negligence standards: "The law of negligence teaches . . . that one who acts must do so reasonably in light of what is foreseeable and that reasonableness is the threshold to liability."147

When this reasoning is applied to the facts of Eklof, the imposition of liability seems logical and equitable. Since the Coast Guard was aware of the other groundings at Diamond Reef, it was reasonably foreseeable that the other accidents would occur. The court, however,

144. Brown, 790 F.2d at 204. But see Brown v. United States, 599 F. Supp. 877, 887 (D. Mass. 1984). The plaintiffs did not contend the government was negligent because the weather forecast was incorrect, but rather because the government failed to replace 6N12. Id.
146. Id. at 202.
147. Eklof, 762 F.2d at 204.
carried this reasoning further than its application in *Indian Towing* when it stated that "the Coast Guard must maintain navigational aids in proper working order with whatever cost that entails, it also must ensure that its placement of those aids does not create a new danger . . ."\(^\text{148}\)

The court in *Brown* offered two reasons for disagreeing with the conclusion that an agency must expend whatever resources are necessary to ensure safety. First, the court echoed the concern of the Supreme Court in *Varig* that judicial interference in the area of legislative allocation of resources would lead to undesirable results.\(^\text{149}\) The argument is made in *Brown* that the courts are not in a position to review how much money is available for certain agencies and their respective undertakings. The allocation of finite resources is not a judicial undertaking and therefore the only branch of government with the ability to handle these matters is the legislature.\(^\text{150}\) Second, if the Coast Guard, or any agency, were subject to such strict standards the result would be a reluctance to carry out their duties, duties which in the long run benefit the public.\(^\text{151}\) The response to these concerns is that the courts have never had difficulty interpreting congressional intent, and the idea of judicial review would likely spur agency action rather than inaction.\(^\text{152}\)

It is difficult to envision that a reasonableness standard would result from the application of the *Eklof* approach. Under *Eklof* reasoning, the discretionary function exception seems to be stripped of its purpose.\(^\text{153}\) A slight change in the surrounding environment which

\(^{148}\) *Id.* (citations omitted).

\(^{149}\) *Brown*, 790 F.2d at 204. One of the possible results suggested by the Supreme Court in *Varig* is that federal courts could become a forum for arguments on the allocation of federal tax dollars to government agencies, a task much better left to the legislature. *Varig*, 467 U.S. at 814.

\(^{150}\) *Brown*, 790 F.2d at 202. The argument is based on the separation of powers enunciated in the United States Constitution. The First Circuit in *Brown* was echoing this argument from the earlier cases: *Varig*, 467 U.S. 797; Dalehite v. United States, 345 U.S. 15 (1953); Bearce v. United States, 614 F.2d 556 (7th Cir. 1980), cert. denied, 449 U.S. 837 (1980); Gercey v. United States, 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977).

\(^{151}\) In contrast to this concern, one article suggests that fear of liability for negligent decisions will lead to desirable results. See Comment, *supra* note 133. For example, if the Coast Guard knew in *Indian Towing* of the possible consequences of the failed light it would have been compelled to inspect the light. See *supra* note 98. The argument is made that lack of a discretionary function exception to the SIAA has not resulted in undesirable results as the First and Seventh Circuits might suggest. There has been no discernible rate of inaction by government agencies.

\(^{152}\) See *supra* note 132 and accompanying text.

\(^{153}\) *Brown*, 790 F.2d at 202.
would go undetected during a routine inspection of a marked site or the placement of a buoy could, under certain circumstances, be found to have been unreasonable and thus negligent. The *Eklof* court would probably dismiss this concern and rejoin that the government would be held liable only for foreseeable consequences. It does, however, seem illogical to hold a government agency with limited resources liable under this standard, because it is necessarily constrained by congressional appropriations which are, of course, discretionary.

Perhaps the best way to show the future effect of the *Eklof* approach is to apply the standards to a further situation. If the Coast Guard had marked Diamond Reef with four or five buoys and an accident occurred, the result conceivably would be liability on the part of the government. This outcome is possible because it would be for a jury to determine whether the marking was reasonable and whether, once the Coast Guard undertook the marking, it was required to expend whatever resources were necessary to make the reef danger proof. Similarly, if the facts of *Brown* were before the Second Circuit, the government arguably would have been held liable for the negligent forecast because it failed to expend whatever resources necessary to make the forecast accurate, a duty the government incurred by establishing a weather service.

IV. A PROPOSED AMENDMENT TO THE DISCRETIONARY FUNCTION EXCEPTION

A. The Need for an Amendment

The choice must be made whether to allow government agencies to act with discretion or subject them to a strict standard of review. The decision reached by the First and Seventh Circuit Courts of Appeals seems appropriate. These courts reason that it is better for the government to undertake the activity and perform to the extent of its resources. If the courts choose to follow the reasoning of the Second, Fourth, and Fifth Circuits, the government official may choose to not act at all. The counter argument is that, realistically, agencies will not cease their activity and deprive the navigator of "half a loaf, usually thought better than none," but rather the actions

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154. *Eklof*, 762 F.2d at 204.
155. See *supra* notes 77-81 and accompanying text.
156. See *supra* notes 129-30 and accompanying text.
157. See *supra* note 127 and accompanying text.
158. *Brown*, 790 F.2d at 202 n.5. The First Circuit used this phrase when discussing the implications of non action by government agencies. The phrase clarifies the court's
taken truly will benefit the public. The problem with this view is that it undermines the scope of the discretionary function exception.

Is half the loaf usually better than none? A navigator who sees one buoy and follows standard operational procedures stands a much greater chance of avoiding a disaster than one who has no navigational buoy to follow. The same can be said for the lobster fisherman who will undoubtedly benefit in the long run from the weather forecasts provided by the NWS. Unfortunate circumstances will sometimes result, but the strong argument remains that it is better to act than not.

There may be a need for a more accurate weather service or more accurate marking of navigational dangers, but this is not an area where a reasonable standard of care rationally can be applied. The application of this standard may produce judicial second-guessing of legislative decisions and the imposition of unwarranted liabilities on government agencies.

The solution to the inconsistent application of the FTCA among the United States Courts of Appeals is not readily apparent. Perhaps a ruling by the Supreme Court concerning issues similar to those posed in Brown and Eklof would provide an answer. The Court previously has ruled that the judicial branch of the government should be reluctant to venture into areas traditionally governed by the legislature. The Court’s present point of view is that agency action is better than inaction and that such a strict standard of review placed upon government agencies might very well result in a cessation of action. Inher-

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159. See supra note 131.

160. Brown, 790 F. 2d at 202. See supra notes 12-40 and accompanying text. The original intent behind the discretionary function exception was to insure that unprecedented liabilities were not placed upon the government, and that the government would remain strong due to the freedom of agency decisionmaking. See also W. Katzke, The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law Negligence, 60 ST. JOHN’S L. REV. 221 (1986). The article argues that the courts should take into consideration various factors in determining whether government activity falls within the discretionary function exception, including the ability of the court to evaluate the reasonableness of the conduct or decision; whether it is an area where the courts should be intruding, the extent and seriousness of the injury, and the relationship between the government and private interests in each situation. Id. at 285.

161. See supra notes 10-61 and accompanying text.

162. United States v. Varig Airlines, 467 U.S. 797, 814 (1984). The Supreme Court in Varig dealt with a policy judgment by a regulatory agency dissimilar to an agency such as NWS. See Brown v. United States, 599 F. Supp. 877 (D. Mass. 1984), rev’d, 790 U.S. 199 (1st Cir. 1986), cert. denied, 107 S. Ct. 938 (1987). The Supreme Court in Varig offered a test to determine whether liability should be imposed on a regulator. The first question to be asked under this test is whether the government is acting in its role as a regulator of the
ent in agency action are certain risks encountered by officials who plan and implement policies. The risks are not discounted by the officials; rather, they are balanced against the benefits to the public good. If the benefits outweigh the risks, the policy is implemented.

In light of the nature of the activity undertaken combined with the efforts to repair 6N12, the First Circuit opinion in Brown would likely be upheld by the Supreme Court. The relevant precedent applied would be Indian Towing and Varig Airlines. The Court would have to distinguish reliance on a weather forecast and a lighthouse, ultimately balancing its conclusion against the pro-governmental immunity language in Varig. Cognizant of the Second Circuit opinion in Eklof, the Supreme Court may be reluctant to impose liability on the government for the discretionary undertaking. Again, the court would need to balance the issue of reliance with the current Court position on discretion.

B. The Proposed Amendment

The ultimate solution to the problem is to be found within the legislature. Perhaps the cure for judicial inconsistency would be for Congress to incorporate a reliance standard into the FTCA. This could be done by amending the discretionary function exception to read:

Section 1346(b) of this title shall not apply to (a) 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 regulation be valid, or 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 be abused. But if in the execution of such discretion the government should cause a claimant to justifiably rely upon the exercise or performance of the function or duty, the government may under the circumstances be held liable.

This amendment would serve two purposes. The courts would at last have a mandate to apply a standard which they have been eager to utilize. Secondly, since the reliance standard has precedential legiti-
macy, the courts would be prohibited from venturing into new standards of liability. Thus, the end result should be consistency.

By incorporating this terminology into the discretionary function exception, the congressional Act would appear to be consistent with the Supreme Court's holding in *Indian Towing*. In an identical situation, a claimant would need to establish that, through the exercise of the discretion, the government caused the plaintiff to rely justifiably on the establishment of the lighthouse. However, assuming such an adoption, it does not appear likely that a court would impose liability on the government for a negligent forecast because of the inherent unreliability of forecasts. To prevail, the plaintiff would need to prove that, under the circumstances, the government caused a reasonable person justifiably to rely on the forecast. If the government were found liable, the case would not establish a precedent for all negligent forecasts, just those regarding which the plaintiff established justifiable reliance. In a scenario of a misplaced or mispositioned navigational buoy, the plaintiff would need to show that a reasonable person under all of the circumstances would have justifiably relied on the placement of the buoy.

The reliance standard will not necessarily undermine the purpose of the discretionary function exception. Rather, it will provide the discretion asked for by Congress and also provide a standard by which aggrieved parties can bring a cause of action. The reliance standard, while totally absent from the legislative history, may actually help to further the original intent of Congress in enacting the FTCA. Injured parties will be able to present their cases in a judicial forum but, in order to do so, they will need to meet a specific reliance standard. It seems unlikely that this standard will invite more actions against the government, because the burden of proof will be clearly established prior to the beginning of litigation. The statute will not require the plaintiff to prove the merits of the case prior to litigation, but rather will force the plaintiff to focus on the issues to determine whether the action is justified.

V. CONCLUSION

The courts are in desperate need of further legislative clarity. Unless the courts receive such guidance in interpreting the scope of the FTCA, the discretionary function exception, and the SIAA, the government will find that it is liable in some courts for actions ruled im-

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163. See supra notes 41-45 and accompanying text.
mune from liability in others. The prospect of future inconsistency places an unfair burden upon government agencies seeking to implement beneficial programs nationwide.

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