INTRODUCTION

With the enactment of the Federal Tort Claims Act (FTCA) in 1946, Congress partially waived sovereign immunity by agreeing to allow the federal government to submit to certain types of suits for damages in tort. The Act, however, included a number of exceptions to the general rule that allows suit against the government. Among these is the discretionary function exception (section 2680(a) or the exception), which protects the federal government from liability arising out of the performance of, or failure to perform, a discretionary function or duty.
Since its enactment, the discretionary function exception has constituted grounds for dismissal of claims for damages against the government in a number of cases.\textsuperscript{3} Varying and often conflicting interpretations of the term "discretionary function," however, continue to confound both courts and litigants in their attempts to follow these precedents and to resolve equitably questions of governmental liability in tort.\textsuperscript{4}

Many of the cases from which the discretionary function doctrine evolved grew out of large-scale injury or loss of human life, often accompanied or caused by the government's use or introduction into the environment of highly dangerous substances and processes. Nuclear power is an example. Just as the discovery and development of nuclear power has brought with it both constructive and destructive results, the scientific community's latest discoveries and creations, intended to benefit society, often carry with them clear or hidden dangers to health and the environment. As the scientific community, in conjunction with the federal government, continues to advance, society will continue to face the new dangers to health and the environment that these discoveries present. Whether or not citizens harmed by these dangers will receive compensation for their injuries will largely depend on the courts' further interpretation and development of the discretionary function doctrine.

In the early 1950's, the United States government undertook a series of atmospheric nuclear tests in the Nevada deserts that lasted nearly a decade.\textsuperscript{5} The more than one hundred nuclear detonations that occurred during that period repeatedly exposed residents of the surrounding areas to the ionizing radiation of nuclear fallout. The government's analysis of the safety of such exposure was founded on outmoded concepts of radiation effects and ignored experts' warnings that there was no safe "thresh-

\textsuperscript{28} U.S.C. § 2680 (1982).

3. \textit{See}, e.g., United States v. Varig Airlines, 467 U.S. 797 (1984) (government protected from liability for failure to inspect and properly certify aircraft); Dalehite v. United States, 346 U.S. 15 (1953) (government protected from liability in Texas City explosion and fire); Myslakowski v. United States, 806 F.2d 94 (6th Cir. 1986) (government protected from liability for design, sale, and failure to warn buyers of propensity of former Postal Service jeeps to roll over), \textit{cert. denied.} 107 S. Ct. 1608 (1987); Begay v. United States, 768 F.2d 1059 (9th Cir. 1985) (government protected from liability for failure to warn uranium miners of radiation dangers); Cisco v. United States, 768 F.2d 788 (7th Cir. 1985) (government protected from liability for failure to warn members of housing development that dirt contaminated with dioxin had been used as a residential landfill); Russel v. United States, 763 F.2d 786 (10th Cir. 1985) (government protected from liability for negligent inspections of coal mines); First Nat'l Bank v. United States, 552 F.2d 370 (10th Cir. 1977) (government protected from liability for approval for sale of a fungicide that caused mercury poisoning in children), \textit{cert. denied}, 434 U.S. 835 (1977).


old” level of exposure. For a number of years, although it recognized its duty to educate the public about the dangers of radiation, the government failed to initiate any public education program. When it finally moved in that direction, its efforts were weak to the point of being counterproductive. Many of the residents in the areas surrounding the Nevada test sites eventually contracted cancers, and, in *Allen v. United States*, sued the government for its failure to protect and warn them adequately of the dangers to which it had exposed them. The trial court found the government liable in ten of the cases, but dismissed the fourteen remaining bellwether suits for lack of the necessary causal relationship between the radiation and the cancers.

Recently, on appeal, the United States Court of Appeals for the Tenth Circuit invoked the discretionary function exception to preclude government liability for the *Allen* radiation injuries. This Note discusses the *Allen* case and its role in the development of the discretionary function doctrine. Part I reviews the history of the FTCA and the discretionary function doctrine. Part II summarizes the background of the


9. See infra text accompanying note 131.

10. 588 F. Supp. at 443.

11. *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987), cert. denied, 108 S. Ct. 694 (1988). Following the 10th Circuit’s *Allen* decision, the 9th Circuit, citing the *Allen* decision and relying on the discretionary function doctrine, affirmed a lower court’s judgment of non-suit in a similar case. *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 996 (9th Cir. 1987), *aff’g* 616 F. Supp. 759 (N.D. Cal. 1985), cert. denied, 108 S. Ct. 1076 (1988). 42 U.S.C. § 2212(a)(1) (Supp. III 1985) provides that an action against the United States shall be the exclusive remedy for injuries “due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.” At trial in *Atmospheric Testing*, the government, joined by the contractors, moved pursuant to section 2212 to be substituted in for the contractors as sole defendant. 616 F. Supp. 759, 761. The government then moved to dismiss or for summary judgment in all actions, based on various exceptions to its liability under the FTCA. *Id.* at 761-62. The district court granted the government’s motion. *Id.* at 780.

On appeal, plaintiffs challenged both the substitution of the government as sole defendant in place of the private contractors under § 2212, and the barring of the suits under the discretionary function doctrine. 820 F.2d at 986, 992. The Ninth Circuit affirmed the district court’s action on both points. *Id.* at 1000. As to the discretionary function issue in *Atmospheric Testing*, the Ninth Circuit held that all decisions regarding safety plans and monitoring were protected by the doctrine. *Id.* at 995-96. It further held that the deliberation and judgment involved in a decision not to warn individuals about the dangers of irradiation protects that decision, and that even in the absence of such a conscious decision, the government’s failure to warn still would be protected. *Id.* at 996-99. Thus plaintiffs’ claims were dismissed. *Id.* at 996, 999.

Allen case, including the facts, the procedure, and the holding below. Part II also describes and analyzes the Court of Appeals' opinion, focusing on the court's misinterpretation of the discretionary function doctrine as applied to the federal government's failure to warn the public of the dangers of atmospheric nuclear testing. Part III discusses the latest developments in the case and offers some conclusions.

I

HISTORY OF THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION DOCTRINE

A. The Federal Tort Claims Act

Prior to the passage of the FTCA in 1946 the doctrine of sovereign immunity, which protects a sovereign from suit absent its own consent, immunized the federal government from tort liability. In enacting the FTCA after nearly thirty years of consideration, Congress had both

12. See, e.g., Indian Towing v. United States, 350 U.S. 61, 71 (1955) (Reed, J., dissenting) ("Before [the Act’s] enactment, the immunity of the Government from such tort actions was absolute."); Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1850) ("It is well settled, too, that no action of any kind can be sustained against the government itself, for any supposed debt, unless by its own consent, under some special statute allowing it . . . ."); United States v. Bevans, 16 U.S. (3 Wheat.) 336, 353 (1818) (Court accepted Attorney General's argument that "[a]ll jurisdiction is founded on consent; either the consent of all the citizens is implied in the social compact itself, or the express consent of the party or his sovereign."); Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 360 (1788) (Court accepted Attorney General's argument that "a sovereign is not amenable in any Court, unless by his own consent"); M'Carty v. Nixon, 1 U.S. (1 Dall.) 77, 78 (1784) (Court accepted Attorney General's argument that "all sovereigns are in a state of equality and independence . . . and accountable to no power on earth, unless with their own consent.").

A number of authors have suggested that sovereign immunity is inconsistent with the concept of popular sovereignty, citing the Supreme Court's earliest treatment, Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in support of their argument. See, e.g., L. HURWITZ, THE STATE AS DEFENDANT 20-21 (1981) (arguing that Chisolm was a recognition that states could err and not be protected by sovereign immunity); H. STREET, GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 7-10 (1953) (sovereign immunity inconsistent with American government's rejection of centralized royal authority); Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act, 57 GEO. L.J. 81, 81 n.2 (1968) (interpreting Chisholm as a rejection of sovereign immunity in favor of popular sovereignty).

Chisolm, however, did not speak to the sovereign immunity of the United States, but instead addressed only the vulnerability to suit of the individual state governments. Justice Wilson's opinion makes clear that he believed that sovereign immunity should not protect the United States, see Chisholm. 2 U.S. (2 Dall.) at 458, 462 (Wilson, J., concurring), but he was probably alone among the members of the Court in holding this belief. In fact, Attorney General Randolph, arguing before the Court that State governments should not be immune from suit, added to his argument that "it will not follow, from these premises, that the United States themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members." Id. at 424 (argument of Attorney General Randolph). The Supreme Court had, from the beginning, simply adopted the concept of sovereign immunity from the English system. See L. HURWITZ, supra, at 18-20; H. STREET, supra, at 7-10.

practical as well as policy goals in mind. Previously, the only means of recovery for those injured by the negligence of governmental agencies and employees was by the private bill method. The private bill method required that the claims committees of both the House and Senate had to hear and report favorably on each private claim against the federal government, after which the full Congress had to address each bill. By the mid-1940's, this process had become unwieldy.

The Act was also "the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." Prior to the passage of the FTCA, many legal scholars and political scientists had urged a comprehensive statutory relaxation of sovereign immunity from tort liability because they adjudged the policy up to that point to be "fragmentary and haphazard[...] allow[ing] many occasions for injustice to continue." Lower courts, as well as the Supreme Court, consistently have interpreted the FTCA's purpose as diminishing federal governmental immunity from suit while spreading the economic loss suffered by plaintiffs.

Congress did not intend, however, that all governmental activities be vulnerable to suit in tort. To protect certain classes of activities, Congress listed in the Act a number of specific exceptions to the waiver of sovereign immunity. Among these is the exception preserving immunity for "discretionary" governmental functions.

14. A Senate Report detailed these problems:

There is no general law providing for the adjustment of tort claims against the United States by either General Accounting Office, administrative officers, or the courts. The consequence is that the claims committees of Congress are burdened with numerous private bills for the payment of tort damages caused by acts of omission or commission of officers of the United States, and a considerable part of the time of Congress is consumed in the consideration of such of the bills as are favorably reported by the respective committees. The burden on Congress and the injustice to claimants have become so great that provision should be made for the utilization by Congress of the assistance of the established machinery of the accounting office and of the judicial branch of the Government for the settlement of tort claims in the same manner as provision has been made for such utilization in the settlement of contract claims against the United States.

S. REP. No. 658, 72d Cong., 1st Sess. 2-4 (1932).

15. Dalehite, 346 U.S. at 24; see also Rayonier v. United States, 352 U.S. 315, 319 (1957) ("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."); Indian Towing v. United States, 350 U.S. 61, 68-69 (1955).

16. Foreword, 9 LAW & CONTEMP. PROBS. 179 (1942). For a sampling of the arguments and theses on sovereign immunity emerging from the scholarly community prior to 1946, see the Spring 1942 Symposium on Governmental Tort Liability in 9 LAW & CONTEMP. PROBS. (1942); Borchard, Theories of Governmental Responsibility in Tort, 28 COLUM. L. REV. 734 (1928); Borchard, Governmental Responsibility in Tort, 36 YALE L.J. 1 (1926).

17. Rayonier, 352 U.S. at 319-20; see also Begay v. United States, 768 F.2d 1059, 1063 (1985) and cases cited therein.


19. Id. § 2680(a). See supra note 2 for the text of the exception.
The initial version of the discretionary function exception, considered in 1933, provided that the government was not to be held liable for "[a]ny claim on account of the effect or alleged effect of an Act of Congress, Executive order of the President, or of any department or independent establishment." Later, in 1942, Congress drafted and considered the immediate precursor to the current discretionary function exception. Congress used narrower language in this version. It eliminated claims based on the execution of a statute or regulation or the performance of a discretionary function, and stated that it intended the version to be a "clarifying amendment to the House bill to assure protection for the Government against tort liability for errors in administration or in the execution of a discretionary function." Hence, the Act originally was intended to prevent the FTCA from being misconstrued as authorizing suits for damages against the government in tort cases not involving negligence, that is, in cases where purposeful acts resulted in harm. Congress did not wish to waive sovereign immunity in those situations where the exercise of legislative or administrative discretion resulted in harm, or even when a regulatory or other administrative agency abused its discretionary authority. This legislative history provided the foundation upon which the courts would later build the analysis and interpretation of section 2680(a): discretion implies judgment and weighing of risks and benefits. Judgment implies subjective decisionmaking—that is, decisionmaking based upon personal or individual notions rather than upon some external source or standard. To apply legal negligence analysis, courts need an external, objective set of standards against which to measure individual behavior. Where the only standards are the subjective standards of

21. Dalehite, 346 U.S. at 26 (citing H.R. 6463, 77th Cong., 2d Sess. (1942); S. 2207, 77th Cong., 2d Sess. (1942)). The current statutory language is almost identical to this early version.
22. Id.
23. Id. at 27 (citing Tort Claims: Hearings Before the Comm. on the Judiciary. House of Rep., on H.R. 5373 and H.R. 6463. 77th Cong., 2d Sess. 1. 4 (1942)).
24. Id. at 29-30. The Court set out language that it said had appeared "time and again" in the legislative history:

This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity... 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, or that the statute or regulation authorizing the project was invalid... Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort.

Id. at 29 n.21 (citations omitted).
25. See id.
the actor, the behavior will always meet the standards. Thus, where there is discretion there can be no negligence, and where there is no negligence there can be no suit against the government under the FTCA.27

B. Judicial Interpretations of the Act

Since the enactment of the discretionary function exception as part of the FTCA, courts have struggled in numerous tort cases to define the types of functions that are, in fact, "discretionary" when they have attempted to determine the federal government's vulnerability to suit. Although the Supreme Court has decided several of these cases, the precise meaning of its decisions is hardly clear.

I. Dalehite v. United States

*Dalehite v. United States*28 was the first Supreme Court case to interpret the term "discretionary" in the context of section 2680(a). *Dalehite* arose out of a devastating explosion and fire connected with a United States government project in Texas City, Texas. Following World War II, the United States government, recognizing its obligation as an occupying power to feed Germany, Japan, and Korea, instituted a program to produce and distribute Fertilizer Grade Ammonium Nitrate (FGAN) for export to those countries.29 The project went into operation under the orders of the Director of the Office of War Mobilization and Reconversion, who was acting under power delegated to him by the President.30 The Army's Chief Ordnance Officer was to carry out the plan. He then appointed the Army's Field Director of Ammunition Plants to administer the program.31 Private corporations already involved in FGAN production supplied the personnel and requisite industrial knowledge and controlled the daily operations of the program.32

During the initial stages of the program, the government realized that it would be unable to produce sufficient amounts of the fertilizer grade explosive to fulfill plan specifications on schedule.33 It therefore contracted with the private producers to purchase shipment-ready FGAN from them. The producers later were permitted to replenish

27. Congress was clear, however, in expressing its intention that those cases involving negligence would not be precluded by the exception. *Dalehite*, 346 U.S. at 27-30.
29. *Id.* at 19-20. Although ammonium nitrate is an explosive, its "adaptability... for use in agriculture had been recognized long prior to 1947. The Government's interest in the matter began in 1943 when the TVA, acting under its statutory delegation to undertake experiments and 'manufacture' fertilizer... first began production for commercial purposes." *Id.* at 18-19 (footnote omitted).
30. *Id.* at 20 (citing Exec. Order No. 9347, 3 C.F.R. 1281 (1938-1943); Exec. Order No. 9488, 3 C.F.R. 344 (1943-1948)).
31. *Id.* at 20-21.
32. *Id.*
33. *Id.* at 21.
their private supplies with subsequently produced fertilizer from government lots. One producer purchased FGAN under such a replenishment agreement for resale with a broker to the French Government. The morning after independent stevedores loaded the FGAN aboard steamships, the cargoes ignited; the resulting explosion and fire razed much of Texas City and killed hundreds of people.

The suits for damages from the disaster claimed that the government was liable because the United States had participated in the manufacture and transportation of FGAN. As the Supreme Court summarized, "petitioners charged that the Federal Government had brought liability on itself for the catastrophe by using a material in fertilizer which had been used as an ingredient of explosives for so long that industry knowledge gave notice that other combinations of ammonium nitrate with other material might explode." Plaintiffs also raised certain issues of specific acts of alleged negligence, foremost among which was an allegation that warnings on the FGAN package labels were inadequate.

The District Court rendered judgment for plaintiffs based on causal negligence in both the plan adoption and the program administration and operation stages. The Court of Appeals reversed, and the Supreme Court, in a four to three decision, affirmed. The Court determined that the governmental activities surrounding the disaster were of the type that Congress intended to protect from suit with the discretionary function exception to the FTCA. In perhaps its most quoted Dalehite passage, the Court stated:

It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also in-

34. Id. at 21-22.
35. Id. at 22.
36. Id. at 22-23.
37. Id. at 23.
38. Id. at 39, 41.
39. See id. at 45-47.
40. Id. at 17.
41. Id. at 46-47. Justice Reed delivered the opinion of the Court. Justices Douglas and Clark took no part in the consideration or decision. Justice Jackson, joined by Justices Black and Frankfurter, dissented.
42. Id. at 34. The Court described the "discretion" protected as not that "of a judge—a power to decide within the limits of positive rules of law subject to judicial review," but that "of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law." Id. The Court cited Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) in support of this notion. Id. at 34 n.30. This reference to the traditional judicial deference granted the decisions of the executive and legislative branches of American government provided the foundation upon which subsequent courts would continue to construe the definition of the discretionary function doctrine.
cludes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.\[^{43}\]

The Court thus focused on the decisionmaking process—whether the government's activities reflected judgment and reasoned analysis. In applying the discretionary function exception, the Court did not review the substance of the administrative decisions, but rather took a process-oriented approach aimed at ensuring consideration and reason in the legislative and administrative decisionmaking involved.

The Court enumerated several facts that influenced its determination that the government's activities were reasoned judgments and thus discretionary. The FGAN plan had been developed at the "apex of the Executive Department."\[^{44}\] It had "clearly required the exercise of expert judgment"\[^{45}\]—something that does not lend itself to judicial review, in light of the Court's standard role as arbiter in an adversary setting, its retrospective rather than prospective focus, and its conspicuous dearth of technical expertise. The FGAN plan and program decisionmaking had involved a complex balancing process, a conscious weighing of the program's risks against its benefits.\[^{46}\] It was a "product of an exercise of judgment, requiring consideration of a vast spectrum of factors, including some which touched directly the feasibility of the fertilizer export program."\[^{47}\]

Finally, the Court framed its analysis in terms of the distinction between the planning and operational levels of government activity.\[^{48}\] Because in Dalehite the allegedly negligent decisions were all "responsibly made at a planning rather than operational level,"\[^{49}\] they must have involved judgment and, therefore, must have been discretionary. The Court's analytical framework was complete: a planning level decision implies judgment; judgment in turn implies discretion. And where a government agency has exercised discretion, its activities are protected from suit under the discretionary function doctrine.\[^{50}\] Thus, according to

\[^{43}\] Id. at 35-36 (footnote omitted).
\[^{44}\] Id. at 40.
\[^{45}\] Id.
\[^{46}\] Id.
\[^{47}\] Id.
\[^{48}\] Id. at 43 (citing Weightman v. Washington, 66 U.S. (1 Black) 39, 49 (1862)).
\[^{49}\] Id. at 42.
\[^{50}\] The problem with the planning/operational analysis is that it affords little help in determining whether a decision or activity is discretionary. The definition of "planning" is no less ambiguous than the definition of "discretionary." Moreover, it is not at all clear why the court considered the labeling of packages a planning level decision. It could not have been because labeling was included in the plan; certainly not everything in the plan involved policy judgment.
Dalehite, the discretionary function exception protects planning level government activity from tort liability. Yet applying the Dalehite formulation of the test—the planning/operational distinction—has proved vexing to courts and litigants since.

2. Indian Towing v. United States

The next pronouncement by the Supreme Court on the discretionary function doctrine came two years later in Indian Towing v. United States, where plaintiffs brought suit under the FTCA for damages sustained to a tug and a barge when the tug went aground, allegedly because of negligent operation of a Coast Guard lighthouse. The District Court dismissed the case and the Fifth Circuit affirmed. The Supreme Court reversed and remanded the case. The Government did not invoke the discretionary function exception as its defense against the claim under the FTCA. Rather, it contended that there could be no such cause of action under the FTCA, and that the case should be dismissed for failure to state a cause of action upon which relief could be granted. Specifically, the government argued that the language of section 2674 of the FTCA, imposing liability on the federal government "in the same manner and to the same extent as [on] a private individual under like circumstances" precluded government liability in "the performance of activities which private persons do not perform." Because private persons do not operate lighthouses, there could be no cause of action against the government under the FTCA.

The Court rejected this argument and its implied distinction between governmental and non-governmental functions. It stated that the government read section 2674 too narrowly, and that where under similar but not exactly the same circumstances a private person would be liable, the government would also be vulnerable to suit. Under the common law "Good Samaritan" doctrine, once a private person chooses to undertake a task, he or she has a duty to perform the "good samaritan" task with due care. Thus, the government had a similar duty once it undertook to operate the lighthouse and induced reliance by the passing ships. Because there could have been a cause of action against a private party under similar circumstances, there was a cause of action

52. Id. at 62.
53. Id. at 62-63.
54. Id. at 70.
55. Id. at 64 (quoting 28 U.S.C. § 2674).
56. Id.
57. Id.
58. Id.
59. Id. at 64-65.
The Government conceded that the discretionary function exception was inapplicable, presumably because the activity was "operational" rather than "planning" in nature and had involved no purposeful decision not to warn the ships. The decision to operate the lighthouse was discretionary and thus protected, but once the government started operating the lighthouse and, absent any purposeful decision to cease its operation, the government's failure to maintain and operate it properly made the government vulnerable to suit. The Court determined that this was the type of activity contemplated under section 2674. Because the government could not escape liability by invoking the discretionary function doctrine, the Court reversed the holding below and remanded the case for reconsideration.

3. Rayonier v. United States

The third major case in which the Supreme Court addressed the FTCA and the scope of its sovereign immunity waiver was Rayonier v. United States. Plaintiffs sued the government under the FTCA for losses allegedly sustained because of Forest Service negligence in allowing a fire to start on government property and in failing to control the fire properly once started. The trial court dismissed, relying on statements in the Dalehite opinion referring to section 2674. The court decided that because negligence in public fire fighting had never been actionable at common law, it could not now be actionable under the FTCA. The Ninth Circuit affirmed.

The Supreme Court reversed and remanded, holding that Congress intended the FTCA to waive sovereign immunity in tort cases where a plaintiff would be able to bring suit against a private party. If, under state law, a plaintiff could sustain a cause of action against a private party for negligent fire fighting, then the federal government also would be vulnerable to suit, regardless of whether the local government was vulnerable to suit on the same grounds. The Court remanded the case to the lower court to determine whether private persons could be vulnerable to suit under state law for negligence in fire fighting. The Court also held that "[t]o the extent there was anything to the contrary in the

60. Id.
61. Id. at 64.
62. Id. at 69.
63. 352 U.S. 315 (1957).
64. Id. at 315.
65. Id. at 317.
66. Id.
67. Id. at 317-18.
68. Id. at 318-19.
Dalehite case it was necessarily rejected by Indian Towing."

Whether because it believed it had an airtight defense based on immunity from negligent public fire fighting or because, as in Indian Towing, it saw the subject activity as "operational" rather than "planning" in nature, the Government did not argue that the activity should be one protected by the discretionary function doctrine. The Supreme Court opinion thus also did not address the issue directly. In reiterating its Indian Towing decision, however, the Court seemed to reinforce the trend toward construing the Act broadly and the exception narrowly.

4. United States v. Varig Airlines

In both Indian Towing and Rayonier, the Supreme Court seemed to give the FTCA a more expansive scope than it had in Dalehite, leaving the government more vulnerable to suit. After the Court's decisions in these three cases, the lower courts construed the FTCA and its waiver of sovereign immunity quite broadly and its exceptions narrowly. As noted above, however, both Indian Towing and Rayonier focused on section 2674 and the types of activities that Congress intended to subject to liability with the FTCA—e.g., those circumstances where a private person would be responsible for similar negligence under state law. These two cases did not directly address the applicability of the discretionary function exception as an affirmative defense once a court determines that the activity is one vulnerable to suit under the FTCA. Thus, though these two cases do represent the Court's intention to construe broadly the waiver of sovereign immunity, they do not narrow (except possibly by implication from the Court's silence) the scope of the discretionary function exception developed in Dalehite.

This point was central to the analysis in United States v. Varig Airlines, the Supreme Court's most recent interpretation of the discretionary function doctrine. In Varig, the Court reversed a judgment of the

69. Id. at 319 (footnote omitted).
70. See Lindgren v. United States, 665 F.2d 978, 980 (9th Cir. 1982); Payton v. United States, 636 F.2d 132, 138 (5th Cir. 1981) (citing Indian Towing and Rayonier). Some courts have retreated to the underlying rationale for the discretionary function doctrine: the separation of powers. In Payton, for example, the Fifth Circuit embarked on a probing tour of the governmental interests at stake—particularly whether political issues were involved that potentially could have embarrassed the government—and the court's capacity for deciding the case along with the amenability of the issues at bar to the judicial process. Payton, 636 F.2d at 143-45. These were the issues that underlay the Court's deference to the other branches when it came to "discretionary" functions, and they are probably easier to evaluate than determining whether functions are "planning level" or "judgment oriented" or "discretionary." Still, it is not at all clear why the government should escape liability when it has done something that might be politically embarrassing, especially if more reasoned analysis, thought, and judgment could have avoided the situation.
Ninth Circuit\textsuperscript{72} that held the government vulnerable to suit for negligence in its aircraft certification and inspection process. The plaintiffs in that case brought suit for damages against the government for wrongful death and property damage following a plane crash caused by an onboard fire.\textsuperscript{73} The plaintiffs claimed that the Civil Aeronautics Agency, predecessor to the Federal Aviation Administration (FAA), negligently inspected and issued a “type certificate” to an aircraft that did not meet safety standards.\textsuperscript{74}

The district court dismissed the case, holding that under state common law there was no actionable tort duty of inspection and certification and, that even if there were such a duty, and the activity could come under section 2674, the discretionary function exception would bar the suit.\textsuperscript{75} The Ninth Circuit reversed, holding that the government should be judged, as it was in \textit{Indian Towing}, by the state common law “Good Samaritan” rule.\textsuperscript{76} The court held, furthermore, that there was a cause of action under section 2674 and that the discretionary function exception did not apply because the inspection and compliance activities did not entail the “kind of discretion contemplated by the exemption.”\textsuperscript{77}

In reversing the Ninth Circuit, the Supreme Court rejected the notion that the \textit{Dalehite} interpretation of the discretionary function doctrine had been eroded or overruled by \textit{Indian Towing} or \textit{Rayonier}.\textsuperscript{78} The Court reitered the \textit{Indian Towing} analysis of section 2674 but reaffirmed \textit{Dalehite}’s discretionary function interpretation. The Court accepted the Ninth Circuit’s interpretation of state law finding an actionable tort duty against the government under the “Good Samaritan” doctrine, bringing the inspection and certification activities within the scope of the FTCA’s waiver of sovereign immunity.\textsuperscript{79} The Court held, however, that the Ninth Circuit erred in finding that the discretionary function doctrine did not protect the government from liability. The Court found no evidence in the record that the FAA actually had inspected the faulty aircraft.\textsuperscript{80} Rather, the FAA had operated a “‘spot-check’ program designed to encourage manufacturers and operators to

\begin{thebibliography}{99}
\bibitem{72} Varig Airlines v. United States, 692 F.2d 1205 (9th Cir. 1982).
\bibitem{73} \textit{Varig}, 467 U.S. at 799-800.
\bibitem{74} \textit{Id.} at 801. The issuance of a “type certificate” is the first stage in the FAA compliance review. Anytime an aircraft manufacturer wishes to produce and put into operation a new model aircraft it must submit its plans and specifications to the FAA for review of the basic design. Once the type certificate is issued, the manufacturer must then submit proof that it has the consistency in its manufacturing processes to ensure that all subsequent aircraft produced based on the model will meet the standards of the prototype. \textit{Id.} at 805-06.
\bibitem{75} \textit{Id.} at 801.
\bibitem{76} 692 F.2d at 1207.
\bibitem{77} \textit{Id.} at 1209.
\bibitem{78} 467 U.S. at 812-13.
\bibitem{79} \textit{Id.} at 815 n.12.
\bibitem{80} \textit{Id.} at 814.
\end{thebibliography}
comply fully with minimum safety requirements."

The Court held that this inspection and certification procedure fell within the planning category. Congress had specifically delegated to the Secretary of Transportation the discretion to develop a policy and program for enforcing compliance with safety standards according to her best judgment. Considering that there were only a limited number of inspectors and engineers available to ensure compliance, the FAA had determined that complete inspection of every aircraft was impossible and thus developed the spot-check policy instead. The Court found that because there was no actual inspection of the aircraft, the plaintiffs were not challenging negligent inspection but rather were seeking review of the spot-check policy itself, which the FAA had adopted after balancing agency objectives against available resources. Though the Secretary was under direction from Congress to promote safety, she was not required to ensure it. The spot check program was consistent with the objectives of the agency, limited as the agency was by available resources, and therefore the Court would inquire no further.

The Court attempted in Varig to flesh out the discretionary function analysis it had set forth in Dalehite. It pointed to two particular factors that it considered useful in determining which government activities should be protected. First, the Court held that the nature of the conduct and not the level of the actor or government employee governs. Plaintiffs had argued that because the government employees performing the inspections and certifications were not policymakers but ministerial workers, the functions they performed must be merely operational and not planning-level activities and thus, under Dalehite, should not be protected. Because the nature of the act and not the level of the actor controls, the Court held that even the inspectors are protected in carrying out the policy promulgated by the FAA. In rejecting the "employee level" analysis in favor of "the nature of the function" analysis, the Court provided protection for the operations-level employee carrying out a planning-level function—that is, one involving judgment and purposeful

81. *Id.* at 815.
82. *Id.* at 816.
83. *Id.* at 818.
84. *Id.*
85. *Id.* at 816.
86. See generally *id.* at 814 ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort"); Rayonier v. United States, 352 U.S. 315, 320 (1957) ("There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."); Indian Towing v. United States, 350 U.S. 61, 69 (1955) (Court should not "as a self-constituted guardian of the treasury import immunity back into a statute designed to limit it").
87. *Varig* 467 U.S. at 813.
88. *Id.* at 820.
decisionmaking. On the other hand, a high- or low-level government official performing an operational task would be vulnerable to suit under the FTCA.

Second, the Court pointed to what it found to be the "underlying basis" for the inclusion of the discretionary function exception in the FTCA: that "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." The determination to conduct only random checks was a policy decision involving the best judgment of the Secretary. Any interference through judicial review would require the second-guessing Congress hoped to avoid by creating the exception. Where, as in Varig, an activity that otherwise might seem ministerial is a vital part of a federal program and the result of conscious decisionmaking, it is inappropriate for the judiciary to substitute its own determinations for those of the executive branch. Further, because the FAA took calculated risks, "encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals," the inspection and certification activities constituted a discretionary function protected from judicial review by the exception. This, then, was the nature of the discretionary function doctrine as it existed when the Allen case came before the United States District Court in Utah.

II

THE ALLEN CASE

A. Background

In the aftermath of World War II and the atomic bombings of Hiroshima and Nagasaki, the United States Congress created the Atomic Energy Commission (AEC). Congress created the Commission to "conduct experiments and do research and development work in the military application of atomic energy." Congress directed the AEC to conduct such research only to the extent authorized by the President and authorized it "to make arrangements . . . for the conduct of research and development activities relating to . . . the protection of health during research and production activities." The Atomic Energy Act of 1946

89. Id. at 814.
90. Id.
91. Id. at 820.
92. Id.
94. Id. § 6(a), 60 Stat. 755. 763 (codified at 42 U.S.C. § 2121(a) (1982)) (formerly 42 U.S.C. § 1806(a)).
contained several references to the AEC's authorization to design such arrangements, regulations and standards as the Commission deemed necessary or desirable "to protect health and to minimize danger from explosion[s] or other hazard[s] to life or property."97 Likewise, the 1954 amendments to the Act98 provided for "a program to encourage . . . development and utilization of atomic energy . . . to the maximum extent consistent with the common defense and security and with the health and safety of the public."99

Even before the testing began, nuclear scientists were aware of the pathological and genetic dangers of ionizing radiation, especially as it relates to the development of various forms of cancer.100 Information about the deleterious biological effects of X-rays on human beings grew rapidly after the discovery of X-rays near the beginning of this century.101 The first report of radiation-induced human injury came soon after Roentgen's 1895 paper announcing the discovery of x-rays,102 and the first case of radiation-induced cancer was reported in 1902.103 As

99. Id. § 3(d) (codified at 42 U.S.C. § 2013 (1982)).
100. Ball, supra note 6, at 271 (citing Health Effects of Low-Level Radiation: Joint Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and For. Com. and the Health and Scientific Research Subcomm. of the Senate Labor and Human Resources Comm. and the Senate Comm. on the Jud., 96th Cong., 1st Sess. 204-05 (1979) [hereinafter Health Effects] (statement of Dr. Donald S. Frederickson, M.D., Director, National Inst. of Health); Address by Dr. John C. Bugher, Seventh Annual Industrial Health Conference (Sept. 23, 1954), cited in AEC-FCDA Relationship: Hearing before the Subcomm. on Security of the Joint Comm. on Atomic Energy, 84th Cong., 1st Sess. 19 (1955) [hereinafter Security Subcomm. Hearing] (reporting a significant increase in leukemia among those who received heavy gamma radiation exposure in the attack on Hiroshima and Nagasaki, as well as genetic alterations and mutations, and stating that "[i]t appears to be well established that there is no definite threshold for this effect"); Security Subcomm. Hearing, supra. at 39 (conversation between Lewis Strauss, Chairman of Atomic Energy Comm., and Rep. Cole regarding Mr. Strauss' determination that nuclear fallout was a hazard of major proportions as early as the first Marshall Islands tests in 1946). See generally The Nature of Radioactive Fallout and its Effects on Man: Hearings before the Special Subcomm. on Radiation of the Joint Comm. on Atomic Energy. 85th Cong., 1st Sess. (1957) (over 2,000 pages of testimony and exhibits discussing the danger of radioactive fallout and its somatic and genetic effects on man).
early as 1913, a set of radiation protection rules was formulated in Germany to protect against dangerous and occasionally even deadly exposure to repeated radiation from X-rays. At the outset of scientific research into the somatic and genetic effects of ionizing radiation many researchers assumed that a safe threshold level of exposure to radiation or "tolerance dose" existed, below which there would be limited adverse biological effects. By the late 1920's, however, the Organization for Radiation Protection recognized the fallacy of this assumption, reporting that "genetic effects of some order are produced for any size dose." The organization's Committee on X-ray and Radium Protection thus recommended that the term "permissible dose" be substituted for "tolerance dose" to indicate that though usable as a "practical and expedient value" it was "not necessarily safe." Although by the early 1950's the newly formed National Center for Radiation Protection "came to the conclusion that there probably was no safe threshold" level of exposure, the AEC continued to operate the weapons testing program based on the threshold concept.

From the beginning of the weapons testing program the government also apparently recognized that it should inform the public of the hazards created by the program and that it should be prepared to warn people in advance of hazardous situations. The AEC delegated the responsibility for educating the public about the nature and effects of radiation and nuclear fallout to the offsite radiation safety organizations. By 1954, however, the government's Committee to Study Nevada Proving Grounds observed that the radiation safety organizations had failed in their job of promoting safety through education, warnings, and reports. The Committee noted that

104. Allen, 588 F. Supp. at 358 (citations omitted).
105. Id.
106. Id. (citation omitted)
107. Id. at 359 (citation omitted).
108. Ball, supra note 6, at 271. Even these threshold levels were not always observed. One author reports that onsite personnel at the Nevada Test Site altered radiation exposure readings to ensure that they fell within AEC standards. Id. at 276.
110. Id.
111. Id. at 388 (citing ABSTRACT OF REPORT, supra note 109, at 20, 21).
Public ignorance of the nature and biological effects of radiation—a result of the government’s failure to educate—then became the government’s rationalization for its failure to warn of specific impending hazardous situations. The offsite radiation safety organizations claimed that the public education programs were not sufficiently advanced to prevent the potential public concern that might result from specific preshot or postshot warnings of fallout. As the Allen court noted, “The shortage of public information about fallout compound[ed] itself: operational personnel decided that inadequate public education justified a failure to warn.”

The Committee recommended in its final report that the radiation safety organizations advance their essential goals through “prompt, frank and comprehensive warnings and reports [and] by extensive and intensive education and information as to hazard reduction and avoidance of hazard.” In response, the radiation safety organizations began an educational program using pamphlets, public lectures, and films to inform the public of the dangers it faced. The information it disseminated, however, downplayed the nature and extent of the hazards involved and was replete with broad reassurances of safety:

No one inside Nevada Test Site has been injured . . . . No one outside the test site in the nearby region of potential exposure has been hurt. . . . The path of fallout . . . does not constitute a serious hazard to any living thing outside the test site. . . . [N]o person in the nearby region has been exposed to hazardous amounts of radiation, even from this heavier fallout and no crops or water supplies have been made hazardous to health.

Nowhere in the literature did the government advise residents that they should decontaminate themselves through simple bathing and laundering of clothes even where contamination was merely suspected. Instead, the pamphlets stated that residents would be advised by program safety officers if such procedures were ever necessary. The citizens of St. George, Utah, however, were never advised of the off-the-scale radiation dangers following the detonation of the atomic bomb HARRY, even though monitors on Highway 93 directly in line with that city measured fallout with an intensity of greater than 1000 millirads per hour. Rather, the safety officers let people rely on the empty assurances they

112. Id. (quoting ABSTRACT OF REPORT, supra note 109, at 20-21) (emphasis added).
113. Id.
114. Id.
115. Id. at 392 (citing ABSTRACT OF REPORT, supra note 109, at 54-55).
116. Id. at 393.
117. Id. (citing ABSTRACT OF REPORT, supra note 109, at 2, 17, 18).
118. Id. at 394.
119. Id. at 390-91. The following exchange between Frank Butrico, a local radiation safety monitor, and plaintiff’s counsel at the Allen trial reveals the lack of preparation and the failure to advise or warn:
read in the pamphlets—assuming the pamphlets ever reached them at all.\(^{120}\)

Between 1951 and 1963—when the Atmospheric Nuclear Test Ban Treaty was signed—the United States government exploded over 100 nuclear bombs in eight series of open-air tests.\(^{121}\) The test detonations each were executed according to detailed plans that the AEC officially reviewed and adopted.\(^{122}\) The AEC also adopted separate plans for protecting the public from radiation overexposure.\(^{123}\) The operation plans established specific radiation exposure limits—based on the outdated threshold concept—that would apply to each test in the absence of an emergency. Where an emergency situation arose, the field commander had authority to exceed the limits if he determined that the exigencies so required.\(^{124}\) In 1953, as part of the safety program, the AEC also devel-

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Q: And did [the radiation safety official] have a concrete plan for you to carry out at that point?
A: No, other than ... to try to get people indoors. To do this via some communication mechanism such as radio or television.
Q: Did you know at that point, Mr. Butrico, whether there was a radio station in St. George or not?
A: No ....
Q: Did [the radiation safety officer] tell you to decontaminate yourself?
A: Well, we were just having this kind of a conversation that I was pretty hot, and that I was going to do this, and this was a good idea ....
Q: Did you take a shower?
A: Yes, a number of them that afternoon ....
Q: Did [the radiation safety officer] tell you that you should tell other people in St. George to decontaminate themselves?
A: No. That subject was not brought up.

... .
Q: But the people of St. George who were out of doors would have gotten the same exposures that you did?
A: Yes. That’s a reasonable assumption.

*Id.* at 390-91. Butrico was further advised to discard his existing clothing and purchase fresh clothing. *Id.* at 391.

120. The only warning given was by radio, at a time when many people were outside, away from their radios. *Id.* at 391-92.

121. Allen v. United States, 816 F.2d 1417, 1419 (10th Cir. 1987).

123. “The Safety Plan developed for each test series was designed to minimize exposure to radiation consistent with the purposes of the tests.” *Atmospheric Testing*, 616 F. Supp. at 773. However, the *Allen* district court noted that:

[A]: no time during the period 1951 through 1962 did the off-site radiation safety program make any concerted effort to directly monitor and record internal contamination or dosage in off-site residents on a comprehensive person-specific basis ....[W]arnings to stay indoors [to avoid hot particles] were sporadic and lasted only a couple of hours.

*Allen*. 588 F. Supp. at 374, 376.

124. *Atmospheric Testing*, 616 F. Supp. at 773 (citing Joint Task Force 7, Command Task Group 7.3, *Operation Plan*, Dec. 7, 1953); see also *ABSTRACT REPORT*, supra note 109, at 37 (“Radiation Exposure. On-site exposure guide will continue to be 3.9r/13wks. with any exception. Test Organization or military subject to the concurrence of Test Management. Major deviations will be subject to prior AEC authorization.”).
oped the Off-Site Monitoring Program to measure radioactivity resulting from the atomic tests in the areas surrounding the weapons testing grounds. The Program consisted of a handful of fixed air sampling and surface monitoring stations augmented by four mobile units.

Members of the public in the areas surrounding the test sites thus remained in a state of ignorance until they learned of the unusually high incidence of cancer among their numbers, a fact discovered through numerous medical studies and legislative investigations conducted years after the testing had been abandoned. In the late 1970's, as more extensive and more shocking information on the extent of government knowledge of radiation dangers in the 1950's became available, plaintiffs began to file administrative claims with the Department of Energy (DOE), charging the government with negligent acts resulting in injury to themselves or their decedents. The DOE ignored the claims and, after the six months allowed for DOE consideration, plaintiffs filed suit in federal district court under the FTCA. Ultimately, 1,192 cases were consolidated in Allen v. United States. Twenty-four of these claims were heard in their entirety as "bellwether" cases against which the issues in the subsequent cases could be matched and measured.

The district court determined that although the decision to test nuclear weapons was a policy decision protected as discretionary by section 2680(a) of the FTCA, the "manner in which the tests were conducted, carefully or carelessly, was . . . a matter of choice but was not a matter of discretion because such operational conduct was subject to a standard, a limitation." That limiting standard, said the district court, required that the government act with reasonable care under the circumstances. The court relied on the distinction drawn in Dalehite between operations and planning to explain what in the nature of the acts made them subject to these limitations. It distinguished "policy-making" decisions at the Commission level from "details" at the Test Site personnel level. It

125. Ball, supra note 6, at 275.
126. Id. at 276. For the surface radiation measurements, the monitors used film badges and portable monitoring devices. For air sampling, the primary piece of equipment was "an Electrolux tank vacuum cleaner modified to collect materials on the surface of a filter." Id. at 276 (quoting Health Effects, supra note 100, at 2281-82).
127. See id. at 283-92 (describing medical and political investigations).
128. See id. at 291.
129. See id. at 297.
131. Id. At the time of the District Court's decision, the action had been pending for nearly five years. During the course of the trial, which produced a transcript of more than 7,000 pages, the trial court received into evidence over 54,000 pages of written material. The District Court's opinion itself covers over 200 pages in the Federal Supplement Reporter. Nearly half of these, id. at 260-329, are devoted to background on basic principles of radiation and nuclear physics that the court used to frame its negligence analysis.
132. Id. at 336.
133. Id.
found that "where operational enforcement of those policy judgments were [sic] concerned, responsibility clearly fell upon the Test Organization." The court further held that:

At the operational level, where the stated effort at public safety was to be achieved on a day-to-day basis, actions taken were negligently insufficient—not as a matter of discretion at all—a matter of deliberate choice making—but as a matter of negligently failing to warn, to measure and to inform, at a level sufficient to meet the stated goals of the Congress, the Executive Branch and the Atomic Energy Commission. The court carefully separated and individually analyzed each of the twenty-four bellwether cases as to the causal relationship between radiation exposure and the plaintiffs' injuries. Ultimately the court determined that ten of the twenty-four cases merited compensation. It took the district court only twelve of its 200-plus pages to find the discretionary function exception inapplicable to the case. It took the Tenth Circuit even less than that to dismiss the analysis of the district court—along with the remaining suits against the government.

The timing of the Allen trial is significant. The district court delivered judgment relying on the Supreme Court's Dalehite, Indian Towing, and Rayonier decisions as precedents. The latter two cases seemed to reflect the Court's intent to construe broadly the government's waiver of immunity under the FTCA. In combining this gloss with the Court's admonitions in Dalehite to "carry out the legislative purpose of allowing suits against the Government for negligence" and to include within the scope of the exception "only those circumstances which are within the words and reason of the exception," many lower courts had interpreted the case law as having narrowed the scope of the exception. After the district court judgment in Allen, however, the Supreme Court decided Varig, in which it both explicitly denied that either Indian Towing or Rayonier had invalidated the Dalehite analysis of the discretionary function exception and averred a judicial intention to protect administrative judgments and purposeful decisions from judicial scrutiny. This
apparent change in the discretionary function doctrine left the district court's decision in Allen open to appeal.

B. The Tenth Circuit's Decision

On appeal by the government the Tenth Circuit court dismissed the magnum opus of the Allen district court and held the government immune from liability under the discretionary function doctrine.\textsuperscript{143} The Tenth Circuit determined that the district court had erred in deciding the plaintiffs' two basic charges: first, that the government had failed to provide for adequate safety and protection for those in the areas surrounding the test sites, and second, that the government had failed to warn plaintiffs of the danger to which they were exposed.\textsuperscript{144}

The Tenth Circuit specifically held that the district court had erred in "basing its finding of government liability squarely on a distinction between high-level and low-level government activity."\textsuperscript{145} Because Varig—decided in the interim—had "explicitly rejected distinctions based on the administrative level at which the challenged activity occurred,"\textsuperscript{146} the district court's decision could not stand.

Although the AEC had a general statutory duty to promote public health and safety, Congress had left to the AEC, and those to whom the AEC delegated responsibility, to determine how and to what extent it would do so.\textsuperscript{147} Even the onsite "operational" personnel had a great deal of discretion in determining when detonations would take place and what sort of precautions as to "safe" exposure levels, for example, would be taken.\textsuperscript{148} These decisions, although made at a low level, involved policy choices and judgment and were, therefore, protected under Varig.\textsuperscript{149} Further, the court found that the plaintiffs had not proved that any operational personnel failed to follow plans made at a higher level.\textsuperscript{150} The Tenth Circuit viewed the district court's opinion as mere criticism of the initial AEC safety plans themselves, which were clearly policy-based, planning-level decisions, protected by the discretionary function exception.\textsuperscript{151}

The claim that the government should be held liable for its failure to warn merited no more than a footnote in the Tenth Circuit's opinion. In that note, the court stated that it was "irrelevant whether the alleged failure to warn was a matter of 'deliberate choice,' or a mere over-

\textsuperscript{143} Allen v. United States. 816 F.2d 1417, 1424 (10th Cir. 1987).
\textsuperscript{144} Id. at 1419, 1421.
\textsuperscript{145} Id. at 1420.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 1421.
\textsuperscript{148} Id. at 1419.
\textsuperscript{149} Id. at 1421.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 1424.
sight."

Citing with approval the Sixth Circuit's decision in Myslakowski v. United States, the court held that even the failure of an agency to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made. Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical, matters in discretionary decisionmaking that the statutory exception exists.

In short, the court found "all challenged actions surrounding the government atomic bomb tests in the 1950's and 1960's to be immune from suit," as the government thumbed its sovereign nose at the injured and the dead.

C. Analysis

The Tenth Circuit's decision on some of the Allen claims is correct, but on others it is disturbingly incorrect because it ignores the fundamental purposes of the discretionary function exception. The court's analysis of the claims regarding the safety plans and monitoring is unassailable. There is no way to avoid the legal conclusion that the discretionary function exception protects the plans. As the district court in Allen pointed out, the language of the Atomic Energy Act empowers the AEC to provide for the health and safety of the public but does not require it: "As in the 1946 Act, any arrangements made by the AEC (now the Nuclear Regulatory Commission) concerning research and development as well as production and utilization of nuclear materials 'shall contain such provisions (1) to protect health, [and] (2) to minimize danger to life or property . . . as the Commission may determine.'"

Thus Congress left to the AEC the discretion to determine the necessary health and safety measures during atomic testing. Under the discretionary function exception the results of such decisions clearly are protected from suit, even if the agency abuses its discretion. The AEC and those to whom it delegated power did make purposeful decisions regarding the health and safety of the residents in the areas surrounding the tests. Whether or not they were the right decisions is, under the exception, irrelevant. That those in charge deliberated and weighed the risks of exposure against the benefits of the program is enough to warrant

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152. Id. at 1422 n.5.
154. Allen, 816 F.2d at 1422 n.5.
155. Id. at 1424.
158. See Ball, supra note 6, at 269-83.
barring any suits based on those decisions. The law as it now stands has decided that such a result is proper. As long as there was deliberation and judgment involved there was discretion, and where there is discretion—regardless of how reprehensible the results of that decision might be—the discretionary function exception precludes suit.

The Tenth Circuit's cursory dismissal of the failure to warn issue, however, brings into doubt the soundness of the decision. It is the separation of powers doctrine that inspires the exception: the notion that it is best to balance power among the branches of government rather than consolidate power in one branch. At the heart of the discretionary function doctrine is an intent to protect the policy decisions of the administrative and legislative branches from interference by the judiciary. The discretionary function doctrine thus protects the balance of powers by preventing substantive judicial review of the deliberative decisions of the legislative and administrative branches.

The exception protects the results of the deliberative process whether they are right or wrong, fair or unfair, insightful or misinformed. Its purpose is not to protect the substance of any one decision but to allow the process to continue unimpeded. Thus, to protect an activity that was not the result of judgment, deliberation, and choice is anathema to the entire purpose of the doctrine. To immunize an activity—such as the failure to warn of hazards from nuclear detonations—that was not the result of a considered analysis but simply a result of inattention is to grant judicial approval to the substance of the activity, rather than to protect the process that supports the balance of powers.

The discretionary function exception was originally meant to be a restatement of what is inherent in the FTCA—that is, that no action can lie against the government absent negligence. Where there is a purposeful decision resulting from judgment, policy weighing, and deliberation, there can be no negligence analysis because there are no external standards against which to measure the behavior. The standards are only self-imposed, and if the judiciary is to respect the independence of the other two branches it has no choice but to accept these internal standards of conduct.

The judiciary need not, however, accept a complete absence of standards or a lack of government action when action is appropriate. The courts have the power to prod the other two branches into action when

159. See, e.g., United States v. Varig Airlines, 467 U.S. 797, 820 (1984) (holding that discretionary function doctrine applies to decisions that "require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding" and in which the government "necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the [agency's] regulations and operating manuals.")
they are sluggish and unwilling to act or merely negligent in their failure to act.\textsuperscript{160} This is where the Tenth Circuit erred in its decision. The plaintiffs argued that the government had neglected to warn the inhabitants of the test area—that the government had made no conscious decision not to warn. In response to this allegation, the court wrongly concluded that the failure to consider whether to issue a warning necessarily falls within the exception as well.\textsuperscript{161}

That conclusion evinces a profound misunderstanding of the policies and principles underlying the discretionary function exception. Though a decision whether or not to warn might have involved weighing the benefits of the program against the “potential consequences of creating public anxiety and the health hazards inherent in the medical responses to the warning,”\textsuperscript{162} nowhere does the Tenth Circuit in Allen point to evidence that any weighing or deliberation of a policy not to warn actually took place. If the principle underlying the exception is separation of powers and judicial deference to legislative and executive decisions, then the protected decisions must be those normally accepted as legislative or executive decisions. An unreasoned, misinformed edict is not acceptable legislative or executive conduct.

If the exception protects the results of judgment and deliberation, however harmful those results may be, then it is unclear why an activity that involved no judgment whatsoever should also be protected. In holding that such an absence of judgment and deliberation was protected, the Tenth Circuit disregarded the focus on procedural protection and turned to a review of the substance of the administrative behavior. This is precisely the type of review that the exception was designed to prevent.

The type of warning decision that would be protected under the discretionary function doctrine is well illustrated by a hypothetical presented in the district court opinion in Allen. The court described a situation in which decisionmakers purposefully choose, after knowing the dangers inherent in a choice and weighing them against the exigencies at hand, to sacrifice the safety of some members of the public for the general public interest.\textsuperscript{163} This same point is illustrated by another case, more tragic because it is not hypothetical. In Begay v. United States,\textsuperscript{164} the Ninth Circuit found that where the Public Health Service (PHS) had made a decision grounded in social policy not to warn Navajo uranium miners of radiation dangers to which they were exposed, the discretionary function doctrine protected the government from liability because the

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\textsuperscript{160} See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-72 (1803).\textsuperscript{161} Allen. 816 F.2d at 1421, 1424.\textsuperscript{162} In re United States Atmospheric Testing Litigation, 820 F.2d 982, 997 (9th Cir. 1987). \textsuperscript{163} Allen v. United States, 588 F. Supp. 247, 338 (D. Utah 1984). \textsuperscript{164} 768 F.2d 1059 (9th Cir. 1985).\end{flushright}
PHS had made a purposeful decision. The Ninth Circuit explained that "at the time, in order to get the cooperation of the owners of the various mines and to retain the members of the cohort for study, PHS decided not to warn the miners of the possible radiation hazards associated with uranium mining." Because this decision was based on PHS' judgment of the best course of action under the circumstances, i.e., because the PHS director had performed the delicate weighing of options, the court found his decision protected under the exception. The government made a purposeful choice to use these miners as guinea pigs, and because its choice involved policy judgment, it was protected. In Allen, if, as the district court hypothesized, the government had in fact made such a choice regarding the issuance of warnings, that choice would be protected. No such choice was made in Allen.

The emphasis on process in the Begay opinion, however unfortunate the result, reflects the intent of Congress that the judiciary defer to those choices made through quasi-legislative procedures. In protecting the substantive activity of the government where there was no evidence that any deliberation took place, the Tenth Circuit misconstrued the purpose and principles of the discretionary function doctrine.

III
CONCLUSION

On January 11, 1988 the Supreme Court denied certiorari in the Allen case. Newspapers exclaimed that the denial of certiorari meant that the Supreme Court had ruled that the federal government would not be liable for health problems caused by nuclear testing, and that the Court had dismissed the final appeal of the atomic bomb victims. The denial of certiorari does not resolve the issue. Though the denial may indicate the Court's intention to let stand the Tenth Circuit's decision, it may also indicate simply that the Court believes the issue has not yet fully ripened or that another factual scenario may arise that is better suited to decision. When the Court finally does decide to hear and resolve the issue, it should bring the deliberative process back to the heart of discretionary function analysis and defuse the dangerous Allen precedent.

165. Id. at 1064.
166. Id.
167. Id. at 1065.
168. Id. How through-the-looking-glass it seems that because the government intentionally harms its citizens it remains free from liability, whereas if it is merely negligent it must answer to them.
171. Id. at A11, col. 3.