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# IN THE 1990'S THE GOVERNMENT MUST BE A REASONABLE PERSON IN ITS WORKPLACES: THE DISCRETIONARY FUNCTION IMMUNITY SHIELD MUST BE TRIMMED

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Though the notion of "sovereign immunity" would seem associated with royalty, the doctrine was applied by federal courts as a total tort shield for the federal government.[1] If one were injured by the federal government, no matter how grievous its fault, the sole remedy was to have Congress introduce and pass a private claim bill granting the injured individual relief.[2] This remedy was used by both civilians and military personnel.

At the end of World War II Congress was deluged with private claim bills. In response, Congress enacted the Federal Tort Claims Act (FTCA)

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1. *See* Oxborn v. United States, 22 U.S. 738 (1824); W. PROSSER & P. KEETON, TORTS, 1033 (4th ed. 1984).

2. *See* JAYSON, HANDLING FEDERAL TORT CLAIMS § 21 (1988).

in 1946.[3] The FTCA constituted a significant change in public policy; Congress abolished total sovereign immunity, but the "repealer" came grudgingly. Congress put in place limits on liability that are not available to private defendants. For example, Congress exempted the federal government from punitive damages.[4] Moreover, Congress sharply limited the amount of plaintiff attorneys' contingent fees to 25 percent in litigated and 20 percent in settled cases.[5] This limitation discourages plaintiffs' attorneys from suing the United States in contexts where another defendant is available. Furthermore, Congress made a jury trial unavailable.[6] Many plaintiffs' lawyers believe that a jury (as contrasted with a judge) is the best fountain to gusher forth damages for pain and suffering. Congress also, at least as interpreted by the United States Supreme Court, shielded the federal government from strict liability.[7] In addition, Congress excluded specific types of claims.[8]

The topic of this article is a key exclusion known as the "discretionary function exception."[9] This FTCA exclusion is the most important of the exclusions; it is also the most amorphous. The purpose of the discretionary function exception was to prevent judicial interference in major governmental policymaking. Unfortunately, it has become a liability shield for serious acts of government negligence—acts that do not involve major public policy decisions. Many of these serious harms occur in workplaces that the federal government owns, operates, or controls. Curiously, when legislators have proposed amendments to overcome this problem in the Act, the Department of Justice has defended the status quo based on cost, not the need for the government to make decisions on public policy.[10] The purpose of this article is to demonstrate that it would be sound public policy for Congress to clarify the discretionary function exception and make clear that the government has no "discretion" to negligently expose its workers or others to harmful chemicals and substances.

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3. Pub. L. No. 79-601, 60 Stat. 842 (1946). The legislative history explains the objective of the Act: "To relieve Congress and the President from a substantial part of the burden of these 2,000 private claim bills appearing in each Congress would plainly aid our war effort." H. R. Rep. No. 2245, 77th Cong., 2d Sess., at 6 (1942).

4. 28 U.S.C. § 2674 (1982).

5. 28 U.S.C. § 2678 (1982).

6. 28 U.S.C. § 1346(b) (1982).

7. Laird v. Nelms, 406 U.S. 797 (1972).

8. Congress specifically excluded claims relating to certain governmental activities (e.g., loss or miscarriage of postal matter, collection of taxes and customs duty, detention of goods by law enforcement officers, fiscal operations of the Treasury) and claims stemming from particular types of torts (e.g., assault, battery, false imprisonment, malicious prosecution, libel, slander). 28 U.S.C. § 2680 (1982).

9. 28 U.S.C. § 2680 (1982).

10. *See Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 100th Cong., 2d Sess. 3-17 (1988) (statement by Brent O. Hatch, Deputy Assistant Attorney General, Department of Justice).

BACKGROUND TO THE DISCRETIONARY FUNCTION EXCEPTION

While opening the door to ordinary common law tort suits, Congress did not want to allow the threat of lawsuits to "handicap efficient government operations."[11] As suggested, Congress designed the discretionary function exception to protect against unwarranted judicial intrusion into governmental acts in making major policy decisions.[12] Congress' concern was that lawsuits challenging governmental policy determinations would impede the federal government's ability to function.

Congress designed the discretionary function exception to protect the federal government's policymaking decisions against impediment by lawsuits in two ways. First, Congress precluded claims 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 is valid. Second, Congress precluded claims based upon the performance or failure to perform a discretionary function or duty on the part of a federal agency or an employee, whether or not the discretion involved is abused.[13] In particular, the second aspect of the exception focuses on protecting major policy *judgments* made by federal government officials acting in administrative or regulatory capacities. In the statutory language of the discretionary function exception, Congress sought to prevent courts from second-guessing policy decisions of that type.[14]

Although lacking in detail, the materials that comprise the Act's legislative history further explain Congress' intent in enacting the discretionary function exception. In a report accompanying the bill, the House Judiciary Committee explained:

> It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize

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11. *See* United States v. Varig Airlines, 467 U.S. 797, 814 (1984).

12. *See* Gray v. Bell, 712 F.2d 490, 506, 611 (D.C. Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984); Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981).

13. The text of the discretionary function exception reads as follows:

> The provisions of this chapter and 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 statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1982).

14. *See* JAYSON, *supra* note 1, at § 245.

> 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. 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. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies. Thus, section 402(5) and (10), exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions.[15]

## DEVELOPING THE DISCRETIONARY FUNCTION IMMUNITY SHIELD

Interpretation of the discretionary function exception by courts has run a less than even course. The struggle centered around defining the type of governmental activity that would be regarded as discretionary. Early court decisions attempted to distinguish between governmental activities at the planning level and governmental activities at the operational level.[16] In two leading opinions, the United States Supreme Court utilized this distinction for defining what was a discretionary function.

### *Dalehite v. United States—Planning v. Operational Rule*

*Dalehite v. United States*[17] involved a claim against the United States for deaths resulting from an explosion in 1947 on two ships harbored at Texas City, Texas. The ships were loaded with tons of fertilizer to be shipped abroad as part of a government program to increase the food supply in areas under military occupation following World War II. The fertilizer was produced at government-owned facilities operated by private contractors. The federal government developed a detailed set of specifications and sent the specifications to each plant. These government specifications required that the primary ingredient in the fertilizer be ammonium nitrate, a component used in explosives.

After the catastrophe, hundreds of claims were brought. Plaintiffs contended that the United States was negligent in utilizing ammonium

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15. H. R. Rep. No. 1287, 79th Cong., 1st Sess., at 5-6 (1945); *see also* H. R. Rep. No. 2245, 77th Cong., 2d Sess., at 10 (1942) (same statement in House Judiciary Committee Report on an earlier bill); S. Rep. No. 1196, 77th Cong., 2d Sess., at 7 (1942) (same statement in a Senate Judiciary Committee Report on an earlier bill).

16. *See* JAYSON, *supra* note 1, at § 249.01.

17. 346 U.S. 15 (1953).

nitrate, a chemical known to have explosive properties when blended with other chemicals in the fertilizer.[18]

The United States District Court for the Southern District of Texas found that the government committed four specific acts of negligence: (1) using a formula composed of a substance which made the fertilizer highly susceptible to fire or explosion, (2) directing that the fertilizer be sacked in bags made from paper or other substances which were easily ignited, (3) packing the bags at high degrees of temperature, which rendered the fertilizer more susceptible to fire and explosion, and (4) failing to label and mark the sacks of fertilizer as dangerous explosives and fire hazards as required by the Rules and Regulations of the Interstate Commerce Commission.

The United States Supreme Court held that the allegedly culpable acts were all made at a *planning* rather than operational level and that the acts "involved considerations more or less important to the practicability of the Government's fertilizer program."[19] The Court focused on the fact that "the acts found to have been negligent were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department. The establishment of this Plan, delegated to the Field Director's Office . . . clearly required the exercise of expert judgment."[20] Thus, the Supreme Court's decision relied primarily on the fact that the negligent acts involved "planning" as opposed to carrying out plans, but the decision also seemed to rely on the status of the actors.

*Dalehite's* policy/operational distinction did not put the issue to rest. Lower courts continued to wrestle with putting negligent acts of government officials into categories of "policy" versus "operational." Thirty-three years later, the United States Supreme Court took on the issue again.

### *United States v. Varig Airlines—Shielding the Regulators*

In July of 1973, a commercial jet aircraft owned by S.A. Empresa Ce Viacao Aerea Rio Grandense ("Varig Airlines") was flying from Rio de Janeiro to Paris when a fire broke out in one of the aft lavatories, causing 124 of the plane's 135 passengers to die from asphyxiation or the effects of toxic gases. Varig Airlines brought an action for damages to the destroyed aircraft against the United States under the FTCA. The families and personal representatives of many of the passengers brought a separate action under the FTCA for wrongful death. Both claims alleged that the Civil Aeronautics Agency ("CAA") had been negligent when it inspected the Boeing 707 and issued a type certificate to an aircraft that did not comply with CAA fire protection standards.[21]

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18. Dalehite v. United States, 346 U.S. 15, 23 (1953).
19. *Id.* at 42.
20. *Id.* at 39-40.
21. The Civil Aeronautics Agency was the predecessor to the Federal Aviation Ad-

In a consolidated action, the United States District Court for the Central District of California granted summary judgment for the United States on the grounds that California law did not recognize an actionable tort duty for inspection and certification activities, and that even if there were such a cause of action, recovery was barred by the discretionary function exception. The United States Court of Appeals for the Ninth Circuit reversed on the basis that inspection of aircraft for compliance with air safety regulations is not a function entailing the sort of policy-making discretion contemplated by the discretionary function exception.[22] The United States Supreme Court granted certiorari.

In a separate incident in October of 1968, a DeHavilland Dove aircraft developed a fire in midair and crashed, killing its pilot, copilot, and two passengers. The owner of the aircraft filed an action against the United States under the FTCA. The United States District Court for the Southern District of California found that the crash resulted from defects in the installation of a gasoline line, and concluded that the federal government was negligent in issuing a supplemental-type certificate for an installation that did not comply with FAA safety regulations.[23] Following appeal to the United States Court of Appeals for the Ninth Circuit, the Supreme Court granted certiorari on the issue whether the government could be subject to liability for the negligence of the Federal Aviation Administration in issuing a supplemental-type certificate.[24]

In an opinion on the two cases, the United States Supreme Court expressed its adherence to the *Dalehite* decision and set out two factors to be used in determining when the discretionary function exception protects the acts of a federal government employee from liability:

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. . . . Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability.
>
> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.[25]

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ministration. Under the Federal Aviation Act and FAA regulations, the FAA has responsibility for certifying new types of aircraft. 49 U.S.C. § 1423(a) (1982); 14 C.F.R. §§ 21.11-21.53 (1980). The type certificate, which must be obtained anytime a new type of aircraft is introduced, certifies that the aircraft's designs, plans, specifications, and performance data conform with minimum safety standards.

22. 692 F.2d 1205, 1208-1209 (9th Cir. 1982).

23. A supplemental type certificate must be obtained if an aircraft is altered by the introduction of a major change in its type design. 14 C.F.R. § 21.113 (1980).

24. 461 U.S. 925 (1983).

25. United States v. Varig Airlines, 467 U.S. 797, 813-14 (1984).

Applying these two factors, the Supreme Court held that the discretionary function exception immunizes the federal government from tort liability based upon the conduct of the FAA, or its predecessor the CAA, in certifying aircraft for use in commercial aviation.[26] The Court observed:

> Judicial intervention in such decisionmaking through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.[27]

Unfortunately, courts have seized upon the *Dalehite* and *Varig* opinions to immunize the federal government's negligent conduct where executive, broad, public policymaking "discretion" was not involved. The Supreme Court attempted to draw the line at agencies' determinations as to the *manner* of enforcing or implementing their regulations. As subsequent cases show, particularly in the context of occupational safety, this line is not clear.

## THE DISCRETIONARY FUNCTION IMMUNITY SHIELD—AN EXCUSE FOR GOVERNMENT DISREGARD OF OCCUPATIONAL SAFETY

### *Shuman v. United States—Let's Have Even More Leeway for Negligence*

The discretionary function exception to the FTCA has helped the federal government avoid tort liability for what has been proven, in court, to be a negligent exposure of workers at Navy shipyards to asbestos products.

As early as the 1930's, the federal government was aware of the hazards of asbestos and consequently, the government had imposed regulations for the safe handling of asbestos products.[28] During the mobilization efforts of World War II, however, these regulations and recommended protective measures for the safe handling of asbestos in Navy shipyards were largely ignored.[29]

In *Shuman v. United States,*[30] a shipyard worker's wife brought claims against the United States for asbestos-induced injuries that led to her

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26. *Id.* at 815-16.

27. *Id.* at 820.

28. The Surgeon General of the Navy, in his 1939 Annual Report, concluded that further research into the hazards of asbestos and strict compliance with recommended protective measures were necessary to protect the safety and health of workers. He asked that asbestos pipe covering and insulation work be designated a "hazardous occupation." *Annual Report of the Surgeon General, U.S. Navy, Chief of the Bureau of Medicine and Surgery, to the Secretary of the Navy Concerning Statistics of the Disease and Injuries in the United States Navy For the Calendar Year 1939,* at 24-25 (1941).

29. *See* ARTABANE & BAUMER, DEFUSING THE ASBESTOS LITIGATION CRISIS: THE RESPONSIBILITY OF THE U.S. GOVERNMENT, 16-17 (1986).

30. 765 F.2d 283 (1st Cir. 1985).

husband's death. George Shuman worked as a shipfitter at a Navy shipyard during part of 1942 and from 1951-53.[31] Plaintiff contended that in this work, her husband was regularly exposed to high levels of asbestos dust, that respirators were not worn, and that the government did not provide adequate ventilation to areas where asbestos products were utilized. The United States District Court for the District of Massachusetts agreed.[32] In finding that the federal government was negligent in exposing private shipyard workers to asbestos hazards, and in failing to provide adequate warnings to those workers, the district court's specific findings of fact established that the Navy was aware of the health hazards posed by asbestos dust and that the Navy had created minimum requirements for the safe handling of asbestos in the Navy's shipyards.[33]

The United States Court of Appeals for the First Circuit reversed. Specifically, the First Circuit held that the determination whether and at what time the government should have undertaken a duty to warn the private shipyard workers under contract with the government about the hazards of working with asbestos was a matter that falls within the protection of the discretionary function exception.[34] The First Circuit held that *lack* of a federal government policy to warn workers of a work hazard is a discretionary act.[35] Despite the district court's finding of government knowledge of the dangers of asbestos, the First Circuit stated:

> [T]he omission of regulations and an enforcement apparatus designed to minimize occupational hazards in the shipyards was a

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31. In 1952, private shipyards contracted with the government for the construction of naval vessels. The government had representatives on site who were part of the supervisor of shipbuilding's staff.

32. Shuman v. United States, 765 F.2d 283, 285 (1st Cir. 1985).

33. The District Court made the following findings of fact:

(1) Navy inspectors from the Supervisor of Shipbuilding's staff inspected areas of the Shipyard in which asbestos and asbestos dust was open and obvious;
(2) upper echelon Navy officials knew at least as early as 1940, and probably earlier, that asbestos dust posed a significant health hazard;
(3) this information, including the fact finding studies that were performed, was disseminated through a number of channels;
(4) in 1943, after Shuman's first period of work at the Shipyard, the Navy promulgated a document entitled "Minimum Requirements for Safety and Industrial Health in Contract Shipyards," which dealt in part with the hazards of asbestos dust;
(5) the "Secretary of the Navy stated that he expected 'full and complete compliance' with the Minimum Requirements" and imposed these standards on Shipyards operating under Navy contracts as well as on the Navy's own yards."

*Id.* at 285-86.

34. *Id.* at 291.

35. *Id.* at 290, 292. Plaintiff argued that under the Walsh-Healey Act, the government was under a duty to warn plaintiff's husband that to engage in work requiring the use of asbestos was dangerous or hazardous to his health and safety. *Id.* at 290, *citing* Walsh-Healey Act, 41 U.S.C. § 35(e) (1982). The First Circuit rejected this claim, holding that the Walsh-Healey Act did not impose explicit, enforceable obligations on the government running to employees of government contractors. *Id.* at 290-91.

> matter of administrative, and perhaps even legislative, discretion protected by the discretionary function exception. Similarly, the Navy decision to provide technical inspectors on site to test for quality control and adherence to government plans and specifications, and not to provide inspectors with authority for promoting or ensuring the safety and health of the government contractor's employees, was a matter of protected discretion.[36]

Somehow a nondecision by the federal government, concerning the performance of a government contract at a Navy shipyard, was elevated to the high level policy function that Congress intended to free from the threat of tort suits.

### *Dube v. Pittsburgh-Corning Corp.—A Switch in Policy: No Discretion for Nondecisions*

In *Dube v. Pittsburgh-Corning Corp.*,[37] also a case involving asbestos products, four asbestos products manufacturers sought contribution from the United States Government for amounts that the manufacturers paid in settling the claims of a Navy shipyard employee's daughter. The United States District Court for the District of Maine found that the plaintiff, Joan Dube, died from mesothelioma caused by exposure to asbestos dust that her father inadvertently brought home on his clothing from the time Joan was nine years old in 1959 until she left home upon her marriage in 1973. Her father was employed at a Navy shipyard as an insulator or pipe coverer. The United States Navy owned and operated the shipyard and employed civilian workers such as Joan Dube's father.

The United States District Court for the District of Maine found that the federal government was one third responsible for Joan Dube's damages because the government had been aware of the risks of working with asbestos since 1964, had no policies either before or after 1964 to warn or protect household members of employees of its shipyards from asbestos exposure, and provided no warnings to either employees or the household members. Nonetheless, the district court held that the government was *not* liable for any of Joan Dube's damages, reasoning that the discretionary function exception protected the government from liability because the decision *not* to protect household members, although *not* made by the government, was "susceptible" of discretion. Furthermore, the United States District Court for the District of Maine held that the federal government's failure to properly enforce safety regulations concerning asbestos fell within the discretionary function exception because the safety regulations were not intended for protection of household members of employees at Navy shipyards. Again, the discretionary function exception

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36. *Id.* at 292.

37. No. 83-0224P (D. Me. 1988) (1988 W.L. 64733).

was stretched to cover a nondecision to ignore safety in a federal government workplace.

In a significant switch in policy, however, the United States Court of Appeals for the First Circuit, which earlier issued the *Shuman* opinion, reversed the United States District Court for the District of Maine in *Dube*. The First Circuit held that the federal government's failure to make a decision about whether to warn about a danger was *not* a discretionary function.

### *Lively v. United States—Repeated Protection for Government Negligence in Its Workplaces*

*Lively v. United States,*[38] a very recent case, was another controversy brought by stevedores exposed to asbestos at government shipyards in the early 1960's involving allegations of government negligence. As in *Shuman* and *Dube,* the plaintiffs argued that the federal government was negligent in failing to warn shipyard workers of the danger of exposure to asbestos, and in failing to provide proper equipment to reduce that danger.[39] The United States District Court for the Middle District of Louisiana dismissed the claims holding that they were barred by the discretionary function exception.

The United States Court of Appeals for the Fifth Circuit affirmed. The Fifth Circuit reasoned that the government's decision to stockpile asbestos and its decision not to have a safety policy or program for workers it exposed to asbestos were rooted in policy. The Fifth Circuit determined, therefore, that the government's decisions were of the "nature and quality" that Congress sought to protect with the discretionary function exception.

The *Shuman, Dube* and *Lively* cases exemplify that the United States Supreme Court's opinions in *Dalehite* and *Varig Airlines* left the door open for lower courts to speculate about the government's responsibility for ordinary negligence in its workplaces. Most of the cases, however, have favored the federal government. Thus, the government argued successfully that its decision not to warn uranium miners of the dangers of radiation was a "discretionary function."[40] The government argued successfully that the Nuclear Regulatory Commission's failure to warn workers of possible radiation dangers and failure to adequately protect workers from radiation exposure were "discretionary functions."[41] And the government argued successfully that its failure to warn about unsafe and unseaworthy conditions of a vessel it had inspected, and its failure to require the proper repair of those conditions as well as its failure to direct

38. 870 F.2d 296 (5th Cir. 1989).
39. Lively v. United States, 870 F.2d 296, 297 (5th Cir. 1989).
40. *See* Begay v. United States, 768 F.2d 1950 (9th Cir. 1985).
41. *See* Sizemore v. United States, 651 F. Supp. 463 (M.D. Fla. 1985).

a prompt rescue mission were "discretionary functions."[42] Time and time again, the discretionary function exception has been stretched to allow the federal government to escape responsibility for its exposure of workers to risks without adequate protection or instructions.

Recall the fundamental purpose of the discretionary function exception—to prevent the chilling or disruption of governmental operations and policymaking. Congress intended to prevent unwarranted judicial intrusions into governmental acts in formulating fundamental policy.[43] But these cases boil down to whether requiring the government to use basic safety precautions in the workplace can occur without compromising executive judgment and decisionmaking.

### *Berkovitz v. United States—The Government Cannot Violate Its Own Regulatory Standards*

In *Berkovitz v. United States,*[44] the United States Supreme Court placed at least one limit on the scope of the federal government's use of the discretionary function immunity shield. The Court held that the government's failure to comply with its *own* regulations was not protected. In *Berkovitz,* the Food and Drug Administration licensed a pharmaceutical company to produce a particular polio vaccine without first receiving the required test data. The Supreme Court held that the failure to test all lots of the vaccine for compliance with safety standards, as required by regulatory standards, was not a matter of judgment or choice based on public policy.[45]

### Safety in the Workplace: Should the Government Be Immune?

The federal government does not have the same incentives as private industry to create safety in workplaces that the government *controls.* First, the government remains untouched by the sanctions of the Occupational Safety and Health Administration. The federal government is for the most part exempt from the Occupational Safety and Health Act ("OSHA").[46] Although heads of federal agencies are required to establish and maintain health and safety programs consistent with OSHA standards,[47] there are no penalities for their failure to do so. When a federal agency violates its self-imposed health and safety programs, the Act's civil and criminal penalties are nonexistent.[48]

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42. *See* Marine Coal Transport Corp. v. United States, No. 84 Civ. 5265 (S.D.N.Y. 1985) (ADS).

43. *See supra* notes 10-11 and accompanying text.

44. 108 S. Ct. 1954, 56 U.S.L.W. 4549 (1988).

45. Berkovitz v. United States, 108 S. Ct. 1954, 1960-1963 (1988).

46. 29 U.S.C. § 651 *et seq.* (1982).

47. 29 U.S.C. § 668 (1982).

48. Section 3(5) of OSHA excludes from the definition of "employer" public or government employment. 29 U.S.C. § 652(5) (1982). Thus, the federal government is exempt from the Act's general health and safety standards, programs and inspections.

Under OSHA, employers who violate the Act's requirements or any OSHA standards may be subject to civil and criminal penalties. *See* 29 U.S.C. § 658-659, 666 (1982).

As the discretionary function cases demonstrate, tort law, a great engine to promote safety, also does not place incentives on the government to keep its workplace safe. When the federal government has endangered persons in places it owns, creates, or controls, it avoids tort law exposure by hiding behind the discretionary function immunity shield.

## CONCLUSION

The *Berkovitz* and *Dube* decisions appear to recognize that the discretionary function immunity shield should not be allowed to splurge beyond at least two fundamental barriers: (1) there should be no discretion for the federal government to violate its own safety regulations, and (2) the lack of a safety decision is not "discretion."

We would take the process one step further: as we enter the 1990's, negligent operation of government workplaces that results in harm to workers is not worthy of protection by the discretionary function immunity shield. That protection should be reserved for high level executive decisionmaking, as envisioned by Congress in creating the discretionary function exception. If the federal government is to take a leadership role in promoting workplace safety, it should assume responsibility for tortious harms caused by its own negligence.

Legislation that was considered in the 100th Congress[49] and is being reviewed in the current (101st) Congress[50] can help accomplish this end. The legislation would clarify that the discretionary function exception does not shield the federal government against negligence claims where the federal government either: (1) violated its own occupational safety or health standards, or (2) was negligent at any workplace it owned, operated, or had under contract.

The principal argument against these bills is that they will cost too much. But one must remember all of the tort protections that the federal

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49. H.R. 4991 and S. 2709, 100th Cong., 2d Sess. (1988).

50. H.R. 1095 and S. 464, 101st Cong., 1st Sess. (1989). H.R. 1095 and S. 464 provide:

> To promote safety and health in workplaces owned, operated or under contract with the United States by clarifying the United States' obligation to observe occupational safety and health standards and clarifying United States' responsibility for harm caused by its negligence at any workplace owned by, operated by, or under contract with the United States.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
>
> SECTION 1. USES OF DEFENSE.
>
> (a) INAPPLICABILITY OF DF PROVISION.—The limitation on liability of the United States based upon exercise or performance or the failure to exercise or perform a discretionary function or duty as provided under section 2680(a) of title 28, United States Code, shall be inapplicable in any legal or administrative proceeding seeking damages against the United States in which the plaintiff alleges and proves that the harm for which the damages are sought was caused by the United States violation of occupational safety or health standards or which was caused by the United States negligence at any workplace owned by, operated by, or under contract with the United States.

government will still enjoy: for example, no punitive damages, no jury trials, and no strict liability.[51] Most importantly, the legislation need not cost money—if the federal government jeopardizes the health and safety of persons in workplaces it owns, operates, or controls, the government will have incentives to avoid liability. There is an old maxim among tort law specialists: if you do not commit any torts, you do not have to pay anything.

51. *See supra* notes 3-7.