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Discretionary Function Exception and the Failure to Warn of Environmental Hazards: Taking the Protection Out of the Environmental Protection Agency

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THE DISCRETIONARY FUNCTION EXCEPTION AND THE FAILURE TO WARN OF ENVIRONMENTAL HAZARDS: TAKING THE "PROTECTION" OUT OF THE ENVIRONMENTAL PROTECTION AGENCY

In 1946, Congress passed the Federal Torts Claim Act (FTCA),[1] which largely eliminated the long-standing tradition of sovereign immunity. The Act allowed many tort actions to proceed against the government that courts had traditionally dismissed because of the shield of immunity surrounding the federal government.[2] Under the Act, the government could be found liable—much like a private individual—for negligence under general principles of tort law.[3] In eliminating general sovereign immunity, however, Congress was careful to carve out exceptions to the FTCA's declaration of potential government tort liability.[4] One of the most ambiguous and troublesome of these exceptions created by Congress was the discretionary function exception.[5] This exception

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1 28 U.S.C. §§ 2671-2680 (1988).

2 *See* Lockett v. United States, 938 F.2d 630, 632 (6th Cir. 1991) ("The Federal Tort Claims Act is a broad waiver by Congress of the United States' immunity from actions based on the tortious conduct of federal employees."); *see also* WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT 6 (1957) ("The intent of the Federal Tort Claims Act was the acceptance of liability under circumstances that could bring private liability into existence and was not the creation of new causes of action."); William P. Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law Negligence*, 60 ST. JOHN'S L. REV. 221, 221 (1986) ("The Federal Tort Claims Act was passed by Congress in 1946 as a means of providing compensation to those injured by the negligent acts of government employees without continually imposing upon Congress and the President the burden of 'disposing of such matters by private claim bills.'" (quoting S. REP. No. 1196, 77th Cong., 2d Sess. 5 (1942)).

3 28 U.S.C. § 2674 (1988) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.").

4 28 U.S.C. § 2680 (1988) (listing 13 different exceptions to liability under the FTCA).

5 *See generally* 5 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 27:11 (1978):

> The discretionary function exception has always been somewhat of an enigma to the courts. . . . Almost everything any administrator does involves discretion, and the literal words clearly and unambiguously say that the government is not liable for abuse of discretion. Yet Congress could not have intended the discretionary function exception to cancel out the rest of the FTCA.

id.; Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 871-72 (1991) ("Despite over forty-five years of implementation, no coherent framework for applying the discretionary function excep-

eliminates from general tort liability those government actions that are "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."[6] Defining a discretionary function and determining what discretion Congress intended to protect by this exception has engendered excessive litigation and inconsistent judicial application of the exception by the courts.[7]

A particular area of concern over the application of the discretionary function exception is the role of the Environmental Protection Agency (EPA) and its duty to warn of ascertained environmental hazards. Possible tortious liability arises when the EPA suspects a violation or hazard involving toxic waste and determines that the toxicity of the waste of a particular site exceeds an acceptable level, but then fails to warn those most likely to be affected by the toxic waste of the hazard. Affected parties have brought tort actions against the government for failing to warn them of detected environmental hazards. Courts frequently have found the failure to warn as within the discretionary function exception, and therefore unactionable, and dismissed such claims summarily.[8] These cases reflect the view that the warning of affected parties is a discretionary function of the EPA or government in general and therefore protected from action under the FTCA by the exception. Other courts, however, have held that such a failure to warn is actionable.[9] Whether Congress intended to protect this type of agency discretion from liability under the discretionary function exception has created considerable confusion among the circuits.

This Note traces the history of the discretionary function exception and presents specific applications of the exception to instances

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tion exists."); D. Scott Barash, Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1301 (1987) ("Because the drafters of the FTCA failed to define the term 'discretionary function,' the discretionary function exception has become the most litigated provision of a much litigated statute."); Terri Stilo, Note, *Failure to Warn of a Known Environmental Danger: Limits on United States Liability Under the Federal Tort Claims Act (FTCA)*, 6 PACE ENVTL. L. REV. 589, 589 (1989) (noting the "confusion surrounding application of the discretionary function exception").

6 28 U.S.C. § 2680(a) (1988).

7 *See* United States v. Varig Airlines, 467 U.S. 797, 813 (1984) (stating that it is impossible "to define with precision every contour of the discretionary function exception"); Lockett v. United States, 938 F.2d 630, 632 (6th Cir. 1991) (claiming that the Supreme Court has not been consistent in its application of the exception); Dube v. Pittsburgh Corning, 870 F.2d 790, 796 (1st Cir. 1989) (noting that law in this area has been a "patchwork quilt" rather than a "seamless web").

8 *See Lockett*, 938 F.2d at 639; Wells v. United States, 851 F.2d 1471 (D.C. Cir. 1988); Bacon v. United States, 810 F.2d 827 (8th Cir. 1987); Cisco v. United States, 768 F.2d 788 (7th Cir. 1985).

9 *See Dube*, 870 F.2d at 790.

of governmental failure to warn of environmental hazards. The Note then explains how these applications of the discretionary function fail to consider and apply existing statutory and regulatory language that implies a duty to warn on the part of the EPA. Even assuming that no duty to warn exists, this Note argues that courts have erroneously classified the failure to warn of environmental hazards as an economic, social, or political issue and have ignored its characterization as a safety decision. This Note also addresses counter-arguments raising concerns about separation of power and judicial review. Finally, this Note discusses the unique and dangerous consequences of improperly applying the discretionary function exception to shield governmental failure to warn of known environmental hazards.

I
THE CURRENT STANDARD OF THE DISCRETIONARY FUNCTION EXCEPTION

To understand the discretionary function exception and its application to environmental hazard cases, a brief history of judicial treatment of the exception leading to the current standard is necessary. Four Supreme Court cases comprise the main jurisprudence surrounding the discretionary function exception. The Court first treated the exception in *Dalehite v. United States*,[10] in which the government was excused from liability for deaths and injuries resulting from an explosion of ammonium nitrate fertilizer the government had stored in Texas Harbor. The Court held that the plan formulated by the government for the production and storage of such fertilizer, and the methods chosen to carry it out, were acts of discretion protected from liability under the FTCA by the discretionary function exception.[11] According to the Court, the exception was to be applied broadly to cover not only "the initiation of programs and activities" but also "determinations made by executives or administrators in establishing plans, specifications or schedules of operations." The exception also covers the "acts of subordinates in carrying out the operations of government in accordance with official directions."[12] Hence, *Dalehite* suggested that the discretionary function exception protected any government action that involved some level of policy discretion, regardless of whose discretion was involved or on what grounds the discretion was exercised.[13]

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10 346 U.S. 15 (1953).

11 *Id.* at 40-42.

12 *Id.* at 35-36.

13 *See* Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration* 42 OKLA. L. REV. 459, 459 (1989) (arguing that *Dalehite*

Shortly after *Dalehite*, the Court significantly narrowed the exception in *Indian Towing Co. v. United States*.[14] In this case, the Court upheld government liability for the Coast Guard's failure to maintain and repair a lighthouse and its failure to warn that the lighthouse was not functioning properly. In reaching its decision, the Court recognized a distinction between planning level and operational level discretion.[15] The "planning" level involves governmental policymaking or establishment of goals and programs for the economic and social well-being of the country.[16] The "operational" level, by contrast, consists of the day-to-day operation of that body.[17] Therefore, once the Coast Guard exercised its discretion at the planning level to operate the lighthouse and "engendered reliance" on this course of action, it was obligated to use due care in this operation. If the Coast Guard failed to use due care in operating and maintaining the lighthouse and damage resulted, the government could be held liable for its negligence.[18] This failure to take due care included the government's failure to warn those relying on the lighthouse that it was not functioning properly.[19] *Indian Towing*, therefore, narrowed the applicability of the discretionary function exception and devised a planning/operational distinction that would guide courts for the next 30 years.[20]

In a later Supreme Court case, *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, the Court addressed growing concern over the boundaries of the discretionary function ex-

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gave a "broad reading" to the discretionary function exception); Barash, *supra* note 5, at 1312 (stating that the *Dalehite* Court construed the discretionary function exception broadly by failing to "distinguish carefully between the policy judgment to proceed with the fertilizer shipment program and the implementation of the policy directive.").

14 350 U.S. 61 (1955).

15 *Id.* at 68; *see also* Reynolds, *supra* note 13, at 460 (stating that the planning versus operational distinction from *Indian Towing* provided a "more limiting reading of the exception"). Interestingly, the *Dalehite* Court had made a similar distinction in its discussion of the boundaries of the discretionary function exception. *See* 346 U.S. at 42 ("The decisions held culpable were all responsibly made at a planning rather than operational level . . . ."). Its concept of planning level discretion, however, was very broad and encompassed all decisions and actions involved in the case.

16 Reynolds, *supra* note 13, at 461.

17 *Id.*

18 *Indian Towing*, 350 U.S. at 69.

19 *Id.*

20 Krent, *supra* note 5, at 880 ("For the next thirty years, the lower courts applied the planning versus operational level distinction, with varying emphases. In general, broad policies formulated by government were protected, but applications of those policies were not."); *see, e.g.*, Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983); Green v. United States, 629 F.2d 581 (9th Cir. 1980); Gibson v. United States, 567 F.2d 1237 (3rd Cir. 1977); Abraham v. United States, 465 F.2d 881 (5th Cir. 1972); Mahler v. United States, 306 F.2d 713 (3rd Cir. 1962); Friday v. United States, 239 F.2d 701 (9th Cir. 1957).

ception.[21] This case represented claims against the United States Government arising from several aircraft accidents. The plaintiffs brought an action against the FAA for failing to detect the specific problems that led to the accidents and for negligently certifying aircraft design and manufacture in general.[22] The Court, finding that these claims against the FAA fell within the discretionary function exception, dismissed the claims. In so holding, the Court ignored any planning/operational level distinction and returned to the prior, more broad version of discretionary function exception expressed in *Dalehite*.[23] Seeking to discard any bright line test, the *Varig Airlines* Court stated that it was the nature of the conduct, not the status of the governmental actor, that guided the applicability of the exception.[24] According to the *Varig* Court, the exception covered not only agency policy and program formation. It also covered the discretionary actions of agency employees in carrying out these policies and programs, regardless of an employee's "rank," as long as that discretion was of "the nature and quality that Congress intended to shield from tort liability."[25] Specifically, the Court pointed out that the exception was designed to "encompass discretionary acts of Government acting in its role as a regulator of conduct of private individuals."[26] According to the Court, the exception was intended to prevent judicial intrusion into agency decisions grounded in economic, social, and political policy.[27] As applied, the Court held that the "spot-checking" program implemented by the FAA for aircraft certification was a discretionary decision grounded in such policy and could not be attacked by a tort action.[28] In addition, although the Court failed to clarify whether or not it was applying the planning/operational distinction, the Court focused its decision on the FAA's designation as an agency for the certification of aircraft. The FAA's choice of methods for such certification is clearly a planning level decision.[29]

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21 467 U.S. 797 (1984).

22 *Id.* at 800-01. The plaintiffs alleged that the FAA was negligent in failing to detect a faulty lavatory trash receptacle and in allowing a gasoline-burning heater that did not comply with FAA regulations to be installed in an airplane.

23 *Id.* at 811-12 (concluding that *Dalehite* is "a valid interpretation of the discretionary function exception").

24 *Id.* at 813.

25 *Id.*

26 *Id.* at 813-14.

27 *Id.* at 819-20.

28 *Id.*

29 *Id.* ("The FAA's implementation of a mechanism for compliance review is plainly discretionary activity" and, using this discretion, "the FAA has determined that a *program* of 'spot-checking' manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety.") (emphasis added).

The Court appeared to step back from *Varig Airlines* four years later in *Berkovitz v. United States.*[30] In this case, the parents of a minor who contracted polio after taking an oral polio vaccine brought an action against the government for approving and distributing a faulty batch of the vaccine. In deciding that the discretionary function exception did not protect the government's action, the Court established a two-part test for determining the applicability of the exception: first, the government conduct must involve an element of choice, and second, the discretionary function exception "protects only governmental actions and decisions based on considerations of public policy."[31] These public policy considerations, as the *Varig* Court had articulated, were those agency considerations grounded in social, economic, or political policy.[32]

Ultimately, the Supreme Court in *Berkovitz* reversed the lower court's dismissal of the tort action and found that the government could be liable. Mandatory regulations guided the FDA's conduct and required the receipt of safety data on the drug, examination of the product, and a determination that it complied with all safety standards.[33] Because the FDA failed to take these steps, its conduct was not discretionary and therefore not protected from liability by the discretionary function exception.

Although *Berkovitz* narrowed the applicability of the exception from the simple requirement in *Varig Airlines* of some level of discre-

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30 486 U.S. 531 (1988).

31 *Id.* at 537-39.

32 *Id.* at 537 (quoting *Varig Airlines*, 467 U.S. at 814). The exact definition of what is or is not an economic, social, or political consideration is not clear from any of the Court's decisions other than case by case determinations of what discretionary action falls within these considerations. Some guidance is provided, however, as to the polar ends of this definition in the *Varig* Court's citation to the legislative history behind the discretionary function exception. The Court quotes:

> It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like.
>
> On the other hand, the common law torts of employees of regulatory agencies, as well as of all other Federal agencies, would be included within the scope of the bill [FTCA].

Varig Airlines, 467 U.S. at 809-10 (quoting Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942)). What discretionary action between these two ends is considered based in economic, social, or political considerations has evidently been left to judicial determination. *See* Aslakson v. United States, 790 F.2d 688, 691 (8th Cir. 1986) ("The contours of the discretionary function cannot be defined with precision. Thus, each case must be analyzed individually based upon relevant criteria in determining whether the acts of government employees are protected from liability.").

33 486 U.S. at 546-47.

tion, the holding continued the focus on the nature of the conduct rather than on the status of the actor.[34] In other words, if a low-level government employee is granted discretion in his or her conduct, and that discretion involves considerations of economic, social, or political policy, action resulting from that discretion would be within the exception and immune from tort liability under the FTCA.

Although *Berkovitz* laid down a fairly clear test for applying the exception, the Court continued to leave some areas of the exception's applicability clouded in dictum. As in *Varig Airlines*, the Court failed to clarify whether the planning/operational level distinction still existed.[35] The Court did state that if an agency's policies or programs "allow" room for lower-level officials to make independent policy judgments, the exception would protect those decisions and conduct.[36] The Court failed to clarify, however, either when a program or policy "allows" independent judgment or whether the word "official" established a threshold test for who may not claim the exception. Despite this confusion, *Berkovitz* requires that, to be protected by the exception, the challenged discretion must involve public policy considerations.[37]

II
APPLYING THE CASE LAW TO GOVERNMENTAL FAILURE TO WARN OF ENVIRONMENTAL HAZARDS

A. Similar Applications, Different Results

Two recent cases show how courts have reached different results when applying the discretionary function exception to a governmental failure to warn citizens of detected environmental

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34 *Id.* at 536. The status of the actor had become an important element of the planning/operational distinction following the Court's decision in *Indian Towing*. In that case, the acts of Coast Guard personnel in failing to check the lighthouse battery and sun relay system and in failing to inspect the facility adequately on the day of the incident were questions of "operational level" negligence. *Indian Towing*, 350 U.S. at 62, 64.

35 Arguably, the Court's "nature of the conduct" test maintains an inherent planning/operational distinction. In fact, this distinction would provide a simple initial test of the nature of the conduct involved. *See infra* note 124 (Justice Scalia's concurrence in United States v. Guabert, 111 S. Ct. 1269 (1991)).

36 486 U.S. at 546.

37 DAVIS, *supra* note 5, § 27:12 (Supp. 1989) ("The term 'discretionary function' that is commonly used might well be changed to 'policy choice' in order to comply with the Court's holding in the Berkovitz case. . . . Making bad policy is not a tort.").

The Supreme Court recently addressed the discretionary function exception again in *Gaubert*, 111 S. Ct. at 1267. Although this case is logically relevant to a current understanding of the exception, it will be discussed in detail later in this Note because of its particular impact on the planning/operational distinction and because of its possible limitation to federal banking regulation practices. *See infra* notes 120-24 and accompanying text.

hazards. In *Lockett v. United States*,[38] the Sixth Circuit Court of Appeals affirmed the dismissal of suit brought by neighbors of a scrap reclamation operation against the EPA for failure to warn of dangerous levels of PCBs[39] on and around the site. The EPA had known for eight years that the level of PCBs exceeded safe levels. In 1981, a state inspector, acting on behalf of the EPA, visited the Carter Industrial, Inc. scrap reclamation site to test PCB levels on the property. The inspector found PCBs at a level of 560 ppm, over ten times the accepted level,[40] in an oil puddle on the property.[41] After being notified of these results, the EPA concluded that there was insufficient evidence of contamination of the site and took no action.[42] In 1984 the Carter site was tested again for PCB contamination. The results showed a range of contamination on and around the site including levels of 31 and 167 ppm from ground surrounding old transformers, 131 ppm from the main driveway of the property, and 2,340 ppm—almost 47 times the accepted level established by the EPA—taken from an alley just off the property.[43] A local EPA project officer was notified of these findings, but again the EPA decided the evidence of contamination was insufficient to take any action upon the site.[44] Instead, the EPA ordered only further monitoring of the site. In 1986, the site was again tested, this time revealing PCB levels as high as 90,000 ppm. The EPA finally took action, ordering an emergency cleanup and issuing advisory notices to the local media and the residents of the area surrounding the Carter site.[45]

The plaintiffs filed suit in 1988, claiming that the EPA had negligently failed to warn them of the detected levels of PCBs on the Carter site and had "fail[ed] to exercise reasonable care to prevent or at least decrease the risks from continued exposure to PCBs" after the 1981 test of the site.[46] The government moved for summary judgment, claiming that it was shielded from liability by the discretionary function exception. The district court, finding the exception applicable, granted the government's motion. According to the district court, the EPA's conduct was a matter of choice and involved

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38 938 F.2d 630 (6th Cir. 1991).

39 Polychlorinated biphenyls. Congress and the EPA have set aside PCBs as a specific toxic substance deserving special attention. *See* 15 U.S.C. § 2605(e) (1977); 40 C.F.R. § 761 (1990).

40 Fifty ppm is the regulated level of PCBs established by the EPA. 40 C.F.R. § 761.20 (1990).

41 *Lockett*, 938 F.2d at 631.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 631-32.

46 *Id.* at 632.

political, economic, or social policy considerations.[47] Therefore, under *Berkovitz*, the EPA's decision not to warn was the type of discretion that the exception protected.

On appeal, the Sixth Circuit upheld the summary judgment and agreed with the district court's reasoning. Specifically, the court of appeals rejected the petitioner's argument that the EPA had a mandatory duty after detecting a PCB hazard to warn potentially affected parties.[48] The court claimed that the relevant statutory and regulatory scheme involving PCB hazards granted the EPA discretion, providing the EPA with a range of action following the detection of an environmental hazard.[49] Specifically, the court found this discretion in a portion of the Toxic Substance Control Act (TSCA), which governs the use of PCBs, and which instructs the EPA administrator to consider "the environmental, economic, and social impact" of action taken under the Act.[50] The court then held that, since the EPA had discretion in its response to the tests at the Carter site, the EPA's response was the type of discretion the exception intended to protect. Accepting the EPA's contention that its decision merely to continue monitoring the site between 1984 and 1986 was primarily based on a desire to concentrate on the inspection of

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47 *Id.* (asserting that these EPA "administrative determinations are grounded in social, economic and political policy and are thus the type of decisions the discretionary function exception is designed to protect").

48 *Id.* at 638-39. The plaintiffs based their claim of mandatory duty on statutory and regulatory language: 15 U.S.C. § 2605(e) (1988) (requiring the Administrator to promulgate rules controlling the manufacturing, use, and disposal of PCBs); 42 U.S.C. § 6973(c) (1988) (requiring the Administrator to give public notice upon information of a imminent and substantial endangerment involving hazardous waste); 40 C.F.R. §§ 761.1-761.218 (1990) (regulations governing the manufacture, use, and disposal of PCBs); 52 Fed. Reg. 10,688 (1987) (Preamble to Polychlorinated Biphenyls Spill Cleanup Policy); 47 Fed. Reg. 37,342 (1982) (requiring the initiation of PCB Transformer spill cleanup within 48 hours of spill discovery).

49 *Id.* at 637.

50 *Id.* at 634 (quoting 15 U.S.C. § 2601(c) (1976)). That this statutory statement implies agency discretion throughout TSCA action is somewhat superficial. Certainly those sections of TSCA which state that the Administrator "shall" perform some action do not leave room for agency discretion. For example, see 15 U.S.C. § 2603(d) (1976), which states that the Administrator *shall* publish a notice of receipt of test data pursuant to establishing a priority list of substances to be controlled under TSCA. *See also infra* note 94 and accompanying text (discussing the use of the word "shall" and its accepted mandatory implications).

The *Lockett* court also pointed to the use of the word "may" as implying discretion in EPA control of toxic substances in the "Imminent Hazard" section of TSCA. 938 F.2d at 634-45 (citing 15 U.S.C. § 2606 (1976)). In the court's opinion, the EPA had discretion whether to bring a civil action in the event of a imminent hazard detection and in determining what should be included in the relief sought, including the possibility of public notice of the risk. *Id.* This seems to be an uneven reading of the statute. Although the EPA is granted discretion in deciding to bring a civil action, the district court hearing the claim is allowed the discretion in determining what type of relief will be granted. 15 U.S.C. § 2606(b)(1), (2) (1976).

waste-oil haulers within the state, the court held that the EPA's judgment was grounded in public policy and therefore the exception shielded the EPA from liability.[51]

Dissenting, Judge Edwards disagreed with the court's holding that notifying the public of the hazard was a matter of choice for the EPA. He cited several regulations that he believed required the EPA to act in a specific manner upon notice of dangerous levels of PCBs. Judge Edwards accepted the regulatory evidence the plaintiffs submitted on the summary judgment motion showing that it was improper for the court to assume the EPA's actions were a matter of choice.[52] In addition, he emphasized additional regulatory language stating that the EPA "will seek stringent penalties in any situation in which significant dispersion of PCBs occurs due to a violation."[53] Judge Edwards further stated that even if the government does have discretion to warn the public, the type of discretion the EPA exercised was not grounded in political, economic, or social policy, as required by *Berkovitz*, and therefore was not protected by the exception.[54] In sum, Judge Edwards believed that the EPA had failed to introduce sufficient evidence that public policy considerations justified its failure to warn.[55]

A similar factual situation led to a different result in *Dube v. Pittsburgh Corning*.[56] In *Dube*, the daughter of a Navy shipyard worker contracted mesothelioma after being exposed to asbestos fibers carried home on her father's work clothes. The defendant, an asbestos manufacturer, settled the claim and sought damage contributions from the U.S. government for failing to warn the workers and their families of the asbestos hazards in the work environment. Despite the district court's finding that the government had ascertained the risk and negligently failed to warn the workers and their families of the asbestos dangers, and that its negligence proximately caused the daughter's injury, the district court nonetheless held the government immune from liability under the discretionary function exception.

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51 *Id.* at 638-39.

52 *Id.* at 639-41.

53 *Id.* at 641 (quoting 44 Fed. Reg. 31,538 (1979)).

54 *Id.* at 640-41.

55 According to Judge Edwards,

> [t]he EPA has not brought forth any of the documents that are ordinarily produced in the course of public policy decisions to explain the agency's failure to prosecute Carter Industrials in 1981. It has produced no notes of policy meetings, no reports, no memorandums, no affidavits, no depositions: not an iota of information on who made the decision or why.

Id. at 640.

56 870 F.2d 790 (1st Cir. 1989).

On appeal, the First Circuit reversed the district court, finding that the discretionary function exception did not protect the government's failure to warn the families. While rejecting the appellants' argument that naval regulations mandated a governmental duty to warn the workers and their families, the court held that the government had negligently failed to warn of the danger. The discretionary function exception did not protect this negligent discretion.[57]

According to the First Circuit, the discretionary function exception is a narrow exception applicable only to actual decisions based on public policy. Such a decision did not exist in *Dube* since the government had never explicitly decided to forgo warning the workers and their families. The government had simply failed to do so.[58] The court concluded that "it is difficult to imagine the Navy justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or other policy grounds."[59]

These two cases illustrate the confusing and ambiguous line plaintiffs must walk when seeking to hold the government liable for failing to warn of environmental hazards. Both cases appear to present situations in which the government negligently failed to warn affected parties, an action not clearly based upon any policy issue. Both cases, however, reached different results through similar application of the discretionary function exception.

B. *Lockett* is the Rule, Not the Exception

Despite the differing views of the discretionary function exception expressed in *Lockett* and *Dube*, most recent cases have agreed with *Lockett* and held that the EPA's failure to warn of an ascertained environmental hazard falls within the discretionary function exception and therefore shielded from tort liability. Some of these cases involve remarkably broad deference to EPA action and decision at virtually any level without any clear explanation for such deference. For example, in *Wells v. United States*,[60] the D.C. Circuit dismissed an action against the EPA for failing to warn residents about high levels of lead contamination found in neighborhoods surrounding lead smelters. The court held that such a failure was grounded in public

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57 *Id.* at 799-800.

58 *Id.* at 796.

59 *Id.* at 799. While a similar argument would appear to apply to the EPA's failure to warn in *Lockett*, the *Dube* court was careful to point out that similar failures to warn by the EPA are within the exception, calling these "areas of activity where the government is under no affirmative duty to act in the first instance." *Id.* at 798. The reasons for treating the situations differently are not clear from the court's opinion.

60 851 F.2d 1471 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

policy and could not be attacked in a tort action.[61] Because the plaintiffs' complaint attacked the EPA's lack of immediate action, the court focused mainly on the economic and social evidence the government presented in support of its decision not to take such action.[62] This allowed the court to uphold the dismissal of the action without dealing squarely with the EPA's failure to warn the residents of the hazard.

The Eighth Circuit reached the same result in *Bacon v. United States*.[63] The court excused the EPA from liability for failing to warn of a known environmental hazard, high dioxin levels, that affected road workers repairing roadways. The Eighth Circuit held that because the EPA had not adopted a policy requiring a warning of potential dioxin danger, similar to the FDA policies requiring mandatory action in *Berkovitz*,[64] its failure to warn was discretionary and therefore protected by the exception.[65]

In *Cisco v. United States*,[66] a case preceding *Berkovitz*, the Seventh Circuit also claimed that the EPA had broad discretion, showing great deference to the EPA even though it made no decision at all. The court claimed that "Congress has left to the EPA to decide the manner in which, and the extent to which, it will protect individuals and their property from exposure to hazardous wastes."[67] The court offered no support for this declaration other than pointing to the absence of a Congressionally imposed mandatory requirement for the EPA to warn of environmental dangers. This logic is faulty, as is the *Bacon* court's search for a mandatory duty to warn, given the more recent Supreme Court treatment of the exception in *Berkovitz*. The Court stated that the discretionary function exception did not protect all discretion.[68] Only when choice is allowed and the decisions are grounded in economic, social, or political concerns will the action receive protection from liability.[69]

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61 *Id.* at 1476-77.
62 *Id.* at 1477-78.
63 810 F.2d 827 (8th Cir. 1987).
64 *See supra* notes 30-37 and accompanying text (discussing *Berkovitz*).
65 *Id.* at 830 (stating that no "safety policy requiring warnings" had been adopted).
66 768 F.2d 788 (7th Cir. 1985).
67 *Id.* at 789.
68 486 U.S. 531, 537-39 (1988).
69 *See supra* notes 30-37 and accompanying text (discussing *Berkovitz*).

III
REMOVING THE FAILURE TO WARN OF ENVIRONMENTAL HAZARDS FROM THE PROTECTION OF THE DISCRETIONARY FUNCTION EXCEPTION

These examples of how courts treat the failure to warn of an environmental hazard, while arguably consistent, ignore the proper characterization of the action under attack and, in some cases, fail to recognize both the statutorily mandated duties of the EPA as well as the general function of the agency. More recent cases have explicitly or implicitly iguored any distinction between planning level and operational level discretion, believing the distinction is no longer good law after *Varig Airlines* and *Berkovitz*.[70] Reevaluating the implications of governmental failure to warn of known environmental hazards shows that these tort actions should not be easily dismissed as unactionable under the discretionary function exception.

A. The Duty to Warn of Environmental Hazards as Mandatory for the EPA

Several arguments support the mandatory nature of the EPA's duty to warn of environmental hazards it has properly detected.[71] First, the EPA's enabling statute and its relation to the general public demonstrate that such a duty is concomitant with the EPA's purpose.[72] For example, although the explanations of the role and

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70 For a discussion of the Court's most recent treatment of this distinction, see *infra* notes 120-24 and accompanying text.

71 Deciding when a hazard is properly detected would seem to follow from the EPA's own guidelines concerning the levels at which waste becomes hazardous to public health and the environment. *See generally* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 138-39 (1985) (claiming that once regulations require the Army, Corps of Engineers to regulate dredged or fill material, it must make reasoned wetlands determinations); State of Maine v. Thomas, 874 F.2d 883, 889-90 (1st Cir. 1989) (stating that the EPA was under a statutory and self-imposed duty by the terms of its regulations to deal with regional haze and "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures").

For example, the EPA considers PCB concentrations greater than 50 ppm to "present an unreasonable risk of injury to health within the United States." 40 C.F.R. § 761.20 (1990). It would follow from this regulation that any PCB concentration detected above 50 ppm is an environmental hazard. Proper detection may also follow from the reporting requirement of PCB leaks or spills and the requirement of cleanup by the responsible party within 48 hours. 40 C.F.R. § 761.125 (1990). A notification from hazardous waste manufacturers or handlers to the EPA of such a spill or cleanup efforts would also be classified as proper detection of an environmental hazard.

72 For examples of courts looking to agency enabling or organic statutes to determine agency duties, see Azurin v. Von Raab, 803 F.2d 993, 995 (9th Cir. 1986) ("The starting point in determining the scope of [United States Customs Service's] duty lies in examining the language of the agency's enabling statutes."), *cert. denied*, 483 U.S. 1021 (1987); Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1248 (D.C. Cir. 1980) (stating that the Federal Land Policy and Management Act, the organic statute for the Bureau of Land Management, imposes on the agency a general duty "to plan for and manage fed-

function of the EPA set out in its enabling statute are ambiguous, a clear tone of protection pervades the statute.[73] The enabling statute refers to the "great importance" of "arresting environmental deterioration . . . [of] the quality of life in our country . . . ."[74] The first function of the EPA, the statute declares, is to provide "enforcement of environmental protection standards consistent with national environmental goals."[75] Additional evidence of the importance of protection as a central purpose of the EPA is found in the declaration of the primary purpose of the Toxic Substances Control Act (TSCA).[76] Congress enacted TSCA to "assure that . . . such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment . . ." and to provide authority "to take action with respect to chemical substances and mixtures which are imminent hazards."[77]

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eral land and resources"); Winnebago Tribe v. Ray, 621 F.2d 269, 272-73 (8th Cir. 1980) (stating that any action taken by a federal agency must fall within the agency's appropriate province under its organic statute), *cert. denied*, 449 U.S. 836 (1980); United States v. Jackson, 423 F.2d 506, 508 (9th Cir. 1970) (stating that duties and powers of Customs Service are limited to the type described in enabling statute), *cert. denied*, 400 U.S. 823 (1970); Boreali v. Axelrod, 517 N.E.2d 1350 (N.Y. 1987) (looking to the enabling statute of the Public Health Council to determine if the Council acted within its power in prohibiting smoking in public areas). *But see* Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth., 872 F.2d 1032 (D.C. Cir. 1988) (stating that agency construction of enabling legislation is accorded considerable deference and will be followed if reasonably defensible).

73 *See* Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1970), *reprinted in* 5 U.S.C. app. at 1343 (1988). The enabling statute declares that the EPA was created "to assure the protection of the environment by abating and controlling pollution on a systematic basis." *Id.*; *see also* 40 C.F.R. § 1.1 (1989) (reciting this same language as a purpose of the EPA). The knowledge gained through the agency is to "ensure the protection, development and enhancement of the total environment itself." 5 U.S.C. app. at 1345 (1988). While not pointing to any specific duty of the EPA, it is clear that the underlying purpose of the agency is protection.

74 5 U.S.C. app. at 1347 (1988) ("Advantages of Reorganization" section).

75 *Id.* ("Roles and Functions of EPA" section). What these national goals include is unclear from the statute, but the underlying purpose of protection is again expressed by this statement. *See also* 40 C.F.R. § 1.3 (1985) ("The U.S. Environmental Protection Agency permits coordinated and effective governmental action to assure the protection of the environment by abating and controlling pollution on a systematic basis."). These statements express a notion of limiting the amount of protection provided based on costs. While this is a concern of any governmental agency, the act of providing a warning of known environmental hazards involves only minimal costs and a failure to warn cannot logically be claimed to be the result of resource problems. *See supra* note 59 and accompanying text; Smith v. Johns-Manville Corp., 795 F.2d 301, 308 (3d Cir. 1986) (noting a lower court's discussion of the minimal costs of warning labels for asbestos products); Morgan v. Faberge, Inc., 332 A.2d 11, 15 (Md. 1975) (noting that balancing the minimal cost of warning to manufacturers against the benefit of a warning almost always weighs in favor of warning).

76 15 U.S.C. §§ 2601-2671 (1988 & Supp. 1992).

77 15 U.S.C. § 2601(b)(2), (3) (1988).

Critics may charge that these examples are too vague to impose any duty on the EPA to warn the public.[78] When considering the nature of the hazards over which the EPA has responsibility, however, the necessity for public warning becomes clear.[79] The EPA, especially in its control of toxic substances like PCBs, deals with substantial hazards that cannot be detected, in almost all cases, by the senses or intellect of the average individual.[80] The agency was specifically organized to fill this gap and to act as the environmental hazard "sensor" for the general public.[81] If that "sensor" has no duty to warn those it was designed to protect, little incentive exists for it to perform one of its main purposes—protecting those who are unable to protect themselves.[82] As the *Dube* court asserted in

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78 *But see* George F. Indest, III, Note, *Legal Aspects of HCFA's Decision to Allow Recovery From Children for Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes: A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act*, 15 S.U. L. REV. 225, 258-59 (1988) ("Where a federal agency pursues a course of action directly contrary to a statute which sets forth its purpose and duties, the acts of that agency have exceeded the scope of its authority, and are *ultra vires* and invalid.").

79 Consider the EPA's own discussion of the PCB hazards:

> 1. Health Effects
>
> EPA has determined that PCBs are toxic and persistent. PCBs can enter the body through the lungs, gastrointestinal tract, and skin, circulate through the body, and be stored in the fatty tissue. Available animal studies indicate an oncogenic potential, the degree of which would depend on exposure. . . . In addition, EPA finds that PCBs may cause reproductive effects, developmental toxicity, and oncogenicity in humans exposed to PCBs. . . . In some cases, chloracne may occur in humans exposed to PCBs. [Severe] cases of chloracne are painful, disfiguring, and may require a long time before the symptoms disappear. . . .
>
> 2. Environmental Effects
>
> . . . EPA has concluded that PCBs can be concentrated in freshwater and marine organisms. The transfer of PCBs up the food chain from phytoplankton to invertebrates, fish, and mammals can result ultimately in human exposure. . . . PCBs also are toxic to fish at very low exposure levels . . . .
>
> . . .
>
> Minimizing exposure to PCBs should minimize any potential risk.

49 Fed. Reg. 28,154 (1984). PCBs obviously present significant dangers to both human health and the environment, making a public warning of any dangerous concentrations necessary to avoid these dangers.

80 PCB contamination cannot be detected by sight, taste, or smell in almost all cases. The EPA recognized this unique danger by formulating specific regulations for the control and prohibition of PCB production. *See* 40 C.F.R. § 761 (1990).

81 *See* 5 U.S.C. app. at 1346 (1988) ("Advantages of Reorganization" section).

> The EPA would have the capacity to do research on important pollutants irrespective of the media in which they appear, and on the impact of these pollutants on the total environment. Both by itself and together with other agencies, the EPA would monitor the condition of the environment—biological as well as physical.

Id.

82 *See supra* notes 78-80 and accompanying text. No incentive exists to protect the public from environmental hazards if the agency is not forced to internalize the costs of failing to protect, for example, by failing to warn. *See* Krent, *supra* note 5, at 885 (arguing that the government would minimize prevention and accident costs "if forced to

holding the government liable for failing to warn of asbestos hazards, it is difficult to imagine the government "justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or other policy grounds."[83] This statement applies to the severe hazards certain substances, such as PCBs, pose for the public, substances which the EPA has been directed to control. A "simple warning" involves minimal costs yet could prevent substantial harm to the population and the environment as a whole.[84]

A useful analogy in this context can be generally based on the facts of *Varig Airlines*.[85] Suppose the FAA actually inspected the aircraft in question, detected that the design was indeed faulty, and knew that it presented a substantial hazard to anyone operating or traveling on the aircraft—but then failed to warn any likely affected parties such as passengers, pilots, or mechanics. If the aircraft subsequently crashes, resulting in injury or death, it is unlikely that a court with full knowledge of these facts would excuse the FAA's failure to warn as being within the discretionary function exception.[86] The FAA's failure is clearly negligent and detracts from a basic understanding of the FAA's purpose: to ensure the safe operation of the nation's aircraft services.[87]

Although this scenario may seem somewhat unlikely, it closely parallels the EPA's action—or lack thereof—in *Lockett*. The EPA inspected the Carter site, detected an environmental hazard, and knew it presented a substantial hazard to possible affected parties.[88] To allow the EPA to escape liability through the discretionary function exception for failing to warn of ascertained environmental hazards is to detract from the agency's underlying purpose of protecting the general public from such hazards.[89]

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internalize the costs of its actions."); *see also* infra notes 126-34 and accompanying text (discussing the need for an incentive to ensure reasonable agency action).

83 Dube v. Pittsburgh Corning, 870 F.2d 790, 800 (1st Cir. 1989).

84 *See supra* note 75 (discussing minimal cost of warning).

85 *See supra* notes 21-29 and accompanying text.

86 In fact, the Court in *Varig Airlines* specifically distinguished such a situation noting that there was no indication that the trash receptacle or cabin heater had been actually inspected. 467 U.S. 797, 814 (1984).

87 *See* 49 U.S.C. § 1348(a), (c) (1988) (FAA administrator is to prescribe air traffic rules and regulations for the protection of aircraft, persons, and property and to generally insure the safety of aircraft).

88 A PCB level almost 50 times above acceptable levels was detected just off the Carter site. *See supra* note 43 and accompanying text.

89 In response to this dichotomy, the EPA might point to perceived differences between the two governmental failures to warn. The EPA might express concern over the economic impact upon an industry or individual from the public warning of the environmental hazard. This concern exists in the FAA situation as well, however, since any public warning of faulty aircraft design is likely to economically impact both the airline and the manufacturer. A court would be unlikely to accept such a defense by the FAA.

The mandatory nature of this duty to warn of environmental hazards can also be based on specific sections of federal statutes and EPA regulations. For example, in adopting its specific treatment of PCBs, the EPA states that the agency "*will* seek stringent penalties in any situation in which significant dispersion of PCBs occurs due to a violation."[90] This statement appears to require some EPA action when a PCB hazard is detected.[91] Stronger evidence of a mandatory duty to warn is found in the Resource Conservation and Recovery Act (RCRA).[92] Under the heading of "Imminent Hazard," Congress proclaimed:

> Upon receipt of information that there is hazardous waste at any site which has presented an imminent and substantial endangerment to human health or the environment, the [EPA] Administrator *shall* provide immediate notice to the appropriate local government agencies. In addition, the Administrator *shall* require notice of such endangerment to be promptly posted at the site where the waste is located.[93]

The primary purpose of both agencies is to protect the public. Economic considerations should not easily overcome this purpose when clear violations of established regulations exist.

Next, the EPA may contend that the information required to determine an environmental hazard is more scientific, requiring greater deliberation or evidence than an FAA determination of aircraft safety. This argument would also seem to fail given that the EPA sets the levels at which waste or pollution becomes hazardous and must only determine if these levels have been violated to determine the existence of a hazard. *See supra* note 71 and accompanying text.

The EPA may also point to the possible unforeseeability of danger inherent in some environmental hazards. Certainly those instances occur. The focus of this Note, however, is on situations such as *Lockett* in which the danger presented by the hazard is clear, given the level of toxicity detected.

Finally, the EPA might argue that an FAA failure to warn creates a more immediate danger to the public in the form of a major accident. This argument loses its force, however, when reconsidering the EPA's own explanation of the "immediate" dangers presented by such substances as PCBs. *See supra* note 79.

90 44 Fed. Reg. § 31,538 (1979) (emphasis added). Given the EPA's own discussion of the dangers of PCB contamination and its choice in establishing the regulated level at 50 ppm, a "significant dispersion" should be defined, for the purpose of warning the public, when contamination is detected above this level. *See supra* note 79 (discussing the dangers of PCB hazards).

91 No court other than the Sixth Circuit in *Lockett* has apparently addressed this EPA regulation in the context of a FTCA action against the agency. Even in *Lockett*, it was the dissent, not the majority or the plaintiffs, that recoguized the mandatory nature of this language in describing the regulation of PCB hazards by the EPA. 938 F.2d 630, 641 (6th Cir. 1991) (Edwards, J., dissenting).

92 42 U.S.C. §§ 6901-6992 (1988).

93 42 U.S.C. § 6973(c) (1988) (emphasis added). Given the EPA's concern over PCB hazards, the *Lockett* situation would appear to be an "imminent hazard," since the EPA detected PCB levels almost 50 times higher than the regulated level. *See supra* note 42 and accompanying text.

The use of the word "shall" eliminates any notion of discretion and establishes a requirement of public warning.[94] Consequently, the statute hinges on the interpretation of "imminent and substantial endangerment" to effectuate this mandatory duty to warn. Most courts interpret this phrase broadly to allow EPA action when no clear emergency or actual proof of harm exists.[95] This same interpretation would logically apply to instances when the EPA's duty to warn is triggered.[96] Other statutes and regulations, while not as clear as these two examples, also provide evidence of a mandatory duty of the EPA to warn of siguificant environmental hazards.[97] This argument, then, removes the EPA's failure to warn of environmental hazards from the protection of the discretionary function exception by demonstrating a mandatory duty to warn.[98]

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94 For examples of judicial recognition of "shall" as implying mandatory action, see Webster v. Reproductive Health Serv., 492 U.S. 490, 562 (1989) (noting use of the mandatory term "shall"); Califano v. Yamasaki, 442 U.S. 682 (1979) (stating that use of the word "shall" imposes a duty on Secretary of Health, Education, and Welfare to act); Anderson v. Yungkau, 329 U.S. 482 (1947) (noting that "shall" is ordinarily the language of command, implying mandatory action); Duncan v. Rolm Mil-Spec Computers, 917 F.2d 261, 265 (6th Cir. 1990) (stating that "shall" should be given mandatory meaning unless doing so clearly frustrates legislative intent).

95 United States v. Waste Indus., Inc., 734 F.2d 159 (4th Cir. 1984) (holding 42 U.S.C. § 6973 is not specifically limited to emergency situations); Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292 (D.C. Cir. 1975) (holding that "Imminent Hazard" is not limited to a concept of crisis; a substantial likelihood that serious harm will be experienced is enough); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985) (finding that endangerment posed by toxic wastes is a threatened or potential harm; proof of actual harm is not required).

96 The *Lockett* court recognized this warning requirement but summarily dismissed it as implying no duty on the EPA to warn the neighbors of the Carter site because it was only applicable if the EPA determined that an imminent hazard existed. 938 F.2d at 630 n.7. This treatment of the statute not only avoids the question but also creates a circular arrangement by which the EPA controls the effectuation of a statutory duty. If the EPA wants to avoid the "burden" of providing a simple warning to likely affected parties of an environmental hazard, by the court's reasoning, the agency will simply avoid classifying the hazard as imminent or dangerous. This defeats the purpose of a mandatory duty to warn "[u]pon receipt of information" that an imminent hazard exists. 42 U.S.C. § 6973(c) (1988).

At the same time, allowing the EPA to interpret "imminent hazard" broadly when the agency seeks to bring civil actions, *see supra* note 95, and then narrowly when faced with a duty to warn, is both illogical and unreasonable. *See* Foote's Dixie Dandy, Inc. v. McHenry, 607 S.W.2d 323, 327 (Ark. 1980) (agreeing with the idea that if citizens "must turn square corners when they deal with the government" it is difficult to understand why the government "should not be held to a like standard of rectangular rectitude when dealing with its citizens").

97 *See generally* 15 U.S.C. § 2605(e) (1988) (expressing congressional concern for the siguificant health and environmental dangers associated with PCBs); 47 Fed. Reg. 37,342 (1982) (stating that the EPA requires the initiation of clean up of PCB spills or leaks within 48 hours of discovery).

98 The *Lockett* court also addressed the regnlation requiring clean up of a PCB spill or leak within 48 hours. The court stated the regulation in terms that implied the duty to clean up in this time frame only fell on the land owner of the spill location. 938 F.2d at 636. This may be a reasonable reading of the regulation, but it fails to address the

B. The Duty to Warn of Environmental Hazards is Not Based on Public Policy Considerations

Even if the underlying purpose of the EPA and specific rules and regulations governing it do not impose a mandatory duty on the agency to warn of known hazards, the agency's failure to issue a public warning still must be recognized as a certain type of discretionary act or function in order to fall within the discretionary function exception.[99] This requires the discretion to be grounded in economic, political, or social considerations.[100] When applied to the EPA, such considerations properly allow agency discretion in several circumstances: the establishment of standards for emissions or toxic substance levels;[101] the choice of what action or what remedy the agency will seek against the violator;[102] and the establishment of methods and timing for cleanup of discovered environmental hazards or accidents.[103] These types of decisions, whether made by the Administrator or lower level officials, require a balancing of economic, social, and political concerus with the concern for environmental protection.[104] For the agency to function properly, these decisions must be left to agency discretion in order to benefit from expertise within the EPA. Discretion in these instances prevents the inhibiting effect of private tort action or the fear of such action. The discretionary function exception is un-

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question of the EPA's duty to warn of such a hazard. Also, the court seemed to base its determination that no duty to warn existed, at least in part, by pointing to the EPA's own view that its enforcement obligations toward PCB hazards were discretionary. *Id.* The EPA's view, however, seems irrelevant given the issue before the court. *See supra* notes 47-48 and accompanying text.

Few other courts have addressed specific regulations or statutes when confronted with the question of whether the EPA has a duty to warn of known environmental hazards. The court in *Cisco v. United States*, for example, while dealing specifically with SWCA/RCRA sections, eliminated any possible mandatory duty to warn under the statute through its broad deference to EPA decisions. 768 F.2d 788, 789 (7th Cir. 1985); *see supra* note 67 and accompanying text. Also, the *Cisco* court failed to recognize the existence of the "imminent hazard" section of SWCA as a possible source of a duty to warn. *See supra* notes 92-94 and accompanying text.

99 *See generally* United States Fidelity & Guar. Co. v. United States, 837 F.2d 116, 121 (3d Cir. 1988) ("[R]egulatory conduct is neither necessary nor sufficient for the application of the discretionary function exception. Not all regulatory acts are discretionary."), *cert. denied*, 487 U.S. 1235 (1988).

100 *See supra* notes 31-32 and accompanying text (discussing the *Berkovitz* Court's recognition of this requirement).

101 *See* 15 U.S.C. § 2605 (1988) (stating that the EPA, based on agency research, is to make determinations of what substances present an unreasonable risk to public health).

102 *See* 15 U.S.C. §§ 2610, 2615-2616 (1988) (relating to subpoenas, civil and criminal penalties, and seizure).

103 *See* 15 U.S.C. § 2606 (1988) (imminent hazards).

104 15 U.S.C. § 2601(c) (1988) (stating that congressional intent is to have administrators consider economic, environmental, and social impact of actions).

doubtedly effective and necessary in these particular areas of agency discretion.

A failure to warn likely affected parties of known environmental dangers, however, is a more difficult decision or nondecision to analyze as based on "economic, social, or political concerns."[105] An agency warning to those individuals likely affected by a known environmental hazard, even if no further EPA action is immediately taken, allows those individuals, at the very least, to take protective measures for themselves.[106] Making such a warning only involves considerations of the health and safety of the population.[107]

Many courts have stated that an agency's failure to warn of a hazard is a *safety* consideration and not one based on economic, political, or social policy decisions. In *Summers v. United States*,[108] the Ninth Circuit held that the discretionary function exception did not protect the National Park Service's (NPS) failure to warn the public about the potential dangers of hot coals when the NPS allowed fire rings on a beach. The court stated that the NPS's failure to warn departed from safety considerations inherent in the service's policies and did not represent a judgment based on economic, social, or political factors.[109] In a broader statement, the court also asserted that the discretionary function exception does not cover the failure

105 *See* Stilo, *supra* note 5, at 612 (noting that some courts have stated that a onetime warning by an agency presents no serious administrative or financial burden).

106 *Id.* (arguing that a warning at least allows individuals to protect themselves). Individual measures might include purifying the water supply, avoiding the contaminated area, or relocating temporarily.

To allow individuals to take these measures, the warning provided must be informational to some extent. In some situations, the information necessary to provide an adequate notice to the public may justify a brief delay between the EPA's initial knowledge of an environmental hazard and the issuance of a warning. In the majority of cases, however, the EPA is sufficiently familiar with the hazard detected and the dangers it presents to the public to issue an adequate warning soon after the initial detection of the hazard. *See also infra* note 117 (discussing the EPA's fear of public over-reaction to a warning).

107 This characteristic of public warnings also defeats any agency counter-argument concerning the scarcity of government resources. Separated from any other EPA action, public warnings require minimal economic resources and manpower. All that is necessary in almost all environmental cases is notice to the proper legal authorities, posted warnings on the contaminated site, or individual warnings to a small, localized population.

108 905 F.2d 1212 (9th Cir. 1990).

109 *Id.* at 1216; *see also* Johnson v. United States, 949 F.2d 332, 339 (10th Cir. 1991) (distinguishing between discretionary function exception cases involving program judgments based in economic, social, or political judgments in which the exception applies, and those cases involving failures to warn of hazardous conditions based on safety considerations in which the exception is not applicable).

to warn of a hazard simply because a discretionary function is in some way involved.[110]

In *Boyd v. United States*,[111] the court held that a failure to warn was a safety rather than an economic, social, or political question. In *Boyd*, the Tenth Circuit addressed the question of government liability when the Army Corps of Engineers failed to warn swimmers of dangerous conditions which resulted in the plaintiff's injury. The court held that while the decision not to zone an area for swimming was discretionary, the failure to warn of the dangerous conditions "d[id] not implicate any social, economic, or political policy judgments with which the discretionary function exception [was] properly . . . concerned."[112] These cases show that a failure to warn primarily involves safety considerations and does not involve the type of discretion that the discretionary function exception was intended to protect.[113]

The government in *Lockett*, however, avoided liability under the protection of the discretionary function exception by stating that it took no further action on the Carter site because it believed that the waste-oil haulers, problem deserved immediate attention.[114] Per-

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110 905 F.2d at 1214; *see also* Aslakson v. United States, 790 F.2d 688, 693 (8th Cir. 1986) (finding failure to warn boaters of low power lines under government control involved safety considerations of established policies and was not protected by the discretionary function exceptiou).

111 881 F.2d 895 (10th Cir. 1989).

112 *Id.* at 898; *see also* Seyler v. United States, 832 F.2d 120 (9th Cir. 1987) (failure to erect speed warning signs was not grounded in economic, social, or political considerations); Mandel v. United States, 793 F.2d 964 (8th Cir. 1986) (failure to warn of swimming hazards in national park was a failure of park service personnel to comply with safety policy and not a decision based on economic, political, or social concerns).

113 *But see* Stilo, *supra* note 5, at 608-09 (stating that the "failure to warn theory is not likely to prove any more viable an option than it had been before *Berkovitz*" and citing cases that have held the failure to warn resulted from a decision based on economic, social, or political considerations). Stilo specifically cites Wells v. United States, 851 F.2d 1471 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989), for this proposition. In that case, the court held that the EPA's failure to warn of the health risks created by lead pollution was an exercise of policy discretion and protected by the discretionary function exception. *Id.* at 1476-77. The *Wells* case, however, presents a very different situation than *Lockett*. In *Wells*, the questioned action was an EPA Deputy Administrator's decision to continue studying the effects of lead pollution to establish the appropriateness of a 1000 ppm standard. This action clearly required the Deputy Administrator to balance economic, social, and political concerns. *Id.* at 1473. By contrast, *Lockett* simply involved the detection of PCB contamination above an already established regnlated level of 50 ppm. No concern over establishing an appropriate standard for regnlation was present. For a discussion of *Lockett*, see *supra* notes 38-55 and accompanying text.

114 *See supra* note 51 and accompanying text. Confusion in the courts over applying the *Berkovitz* test to governmental failure to warn of environmental hazards can partly be attributed to the inability of both judges and plaintiffs to separate properly the failure to warn claim from any other claims made. In *Lockett*, for example, the plaintiffs' claim included not only that the EPA had failed in its duty to warn, but also that the EPA was negligent in failing to inspect the sight after 1981 and in failing to clean up the site. Lockett v. United States, 938 F.2d 630, 634 (6th Cir. 1991). The court then treated

haps EPA's exercise of discretion in this instance should prevent an attack upon the agency for failing to issue a penalty to the site operator, to seek an injunction against plant operation, or to clean up immediately the detected hazard. This type of discretion is the type the exception is aimed at protecting. The discretion to concentrate on waste-oil hauling, however, should not immunize the EPA's negligence in failing to warn applicable parties of the PCB hazard in their area.[115] In *Lockett*, the EPA did not claim, nor could it claim, that a hazard was not detected or not understood. Given the EPA's general charge to protect the public, considerations of economic, social, or political concerns cannot justify a failure to warn of the hazard.[116] One might assert arguments based on an economic consideration that justify the failure to warn.[117] Such arguments, how-

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these claims as a single claim of negligence for EPA inaction and found the discretionary function exception applicable to elements of this inaction. 938 F.2d at 638-39.

115 This is more evident when the failure to warn is seen as a separate issue. *See* Stilo, *supra* note 5, at 613-14 ("The more equitable approach considers failure to warn as a separate and discrete issue, independent of other regulatory acts and decisions, and looks to state tort law principles to determine liability."); *see also* Zumwalt v. United States, 928 F.2d 951, 955 (10th Cir. 1991) (recognizing that a failure to warn claim should be considered separately from a claim of failure to implement agency policies); Smith v. United States, 546 F.2d 872, 877 n.5-a (10th Cir. 1976) (differentiating between policy decisions and separate determinations about safety devices and warnings); Harry L. Dorsey et al., *1990 Contract Law Developments—The Year in Review*, 1991-Feb. ARMY LAW. 3 (several circuits have uniformly recognized a failure to warn claim as a separate and distinct tort theory in government contractor defense issues).

By analogy, many courts have recognized a failure to warn claim as a separate cause of action in products liability. *See, e.g.*, Westbrock v. Marshalltown Mfg. Co., 473 N.W.2d 352 (Minn. Ct. App. 1991); Huber v. Niagara Mach. and Tool Works, 430 N.W.2d 465 (Minn. 1988); McCauley v. City of San Diego, 190 Cal. App. 3d 981 (Cal. Ct. App. 1987); Mackey v. Maremount Corp., 504 A.2d 908 (Pa. Super. Ct. 1986).

116 As discussed previously, a central purpose of the EPA is to protect both the public health and the environment. *See supra* notes 73-77 and accompanying text.

117 An example of such an argument can be seen in Barnson v. United States, 816 F.2d 549 (10th Cir. 1987), *cert. denied*, 484 U.S. 896 (1987), in which the failure by the government to warn uranium mine workers of the dangers of radiation was protected from liability by the exception. The exception applied because the government's decision was based on its concern that the miners, if harmed, would refuse to work, thereby endangering the nation's uranium supply. This argnment, however, is not applicable to the situation described in *Lockett* since no national economic factor was endangered by a warning to the eventual plaintiffs. The site of the hazard, Carter Industrial's scrap yard, presented no substantial national economic factor and was only involved in the reclamation of old electrical transformers. *Lockett*, 938 F.2d at 631.

An argument that does apply to the *Lockett* situation is the EPA's fear of public overreaction to the warning of an environmental hazard. Although the EPA has not made such a claim, this might be seen as both an economic and a social consideration. Because the EPA's purpose is to protect the public and the environment, however, a tenuous concern for public overreaction should not overcome the need for a public warning. *See* Dube v. Pittsburgh Corning, 870 F.2d 790, 800 (1st Cir. 1989) ("[I]t is difficult to imagine the [government] justifying a decision not to issue a simple warning to domestic

ever, lack force when compared to the realistic need of the public to be warned of such environmental hazards.[118]

C. Protecting the EPA's Failure to Warn at an Operational Level Inhibits Proper Incentives for Reasonable Agency Action

Following the Court's rulings in *Varig Airlines* and *Berkovitz*, the legal significance of the planning/operational distinction articulated in *Indian Towing* was uncertain.[119] The Court, however, answered

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bystanders of such potentially devastating danger, based on economic or other policy grounds.").

An analogous situation in which public safety is found more important than the fear of public overreaction is the Federal Sunshine Act. 5 U.S.C. § 552(b) (1988). This Act requires meetings of agency heads to be held in public unless exempted under the statute. The purpose of the Act is to ensure public access to agency information and to provide an additional political check on agency action. ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 554-57 (1989). The concern over public reaction to sensitive information is not allowed to overcome the Sunshine Act even though "[t]here is a natural tendency for agency heads and staff to prefer that their tentative discussions about politically sensitive matters be kept out of the public eye." *Id.* at 557.

118 *See supra* note 79 (discussing the dangers of PCB contamination and the EPA's concern for this hazard).

A recent case, while rejecting government liability, more clearly presents the need for public warnings of environmental hazards. In Allen v. United States, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), plaintiffs brought suit against the government, alleging over 500 deaths and injuries resulted from open-air atomic bomb tests in Nevada during the 1950s and 1960s. The plaintiffs claimed the government was negligent for failing to warn the public and for failing to provide public information about radioactive fallout. A reluctant court reversed the district court's finding of government liability, holding that all of the government's attacked action and inaction fell within the discretionary function exception. *Id.* at 1427. The magnitude of the claims in *Allen* shows the need of a relying public to be warned of such environmental hazards.

For a criticism of *Allen* and its outcome, see DAVIS, *supra* note 5, § 27:12-1 (supp. 1983) (noting that simple instruction of measures like wearing a hat, showering or bathing, or laundering clothes would have been effective in reducing the harm caused by the fallout); *see also* D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 179 (1986) (The need for precise standards is greatest in such areas as safety regulation in nuclear power plants and aspects of the environment since "in such circumstances the risks in allowing decisions to be made on a more incremental basis are too great, considering the damage that may result from the smallest errors.").

119 *See* Chamberlin v. Isen, 779 F.2d 522, 524 (9th Cir. 1985) ("This circuit abandoned the planning/operational level distinction in light of *Varig*'s focus on the 'nature of the conduct in question.' "); Flammia v. United States, 739 F.2d 202, 205 (5th Cir. 1984) (no liability for INS's "specific operational decision" to permit a Cuban refugee known to be a convicted felon to enter the U.S.); *cf.* Henderson v. United States, 784 F.2d 942, 943 n.2 (9th Cir. 1986) (FTCA liability possible for government missile facility's safety decision not made at the planning stage, but "operational in nature"); Alabama Electric Coop. v. United States, 769 F.2d 1523, 1528 (11th Cir. 1985) ("*Varig Airlines* actually supports the planning/operational distinction when that distinction is properly understood."); Barash, *supra* note 5, at 1319 ("The planning versus operational test is basically a sound, common sense inquiry, and it is doubtful that the Court intended to jettison it entirely without making such an intention explicit."); Donald N.

any question about this distinction's propriety in a recent decision concerning whether the discretionary function exception protected the Federal Home Loan Bank Board's (FHLBB) actions. In *United States v. Gaubert*,[120] the Court held that the FHLBB's supervision of a savings and loan association's daily operations involved the exercise of public policy discretion and that the discretionary function exception shielded it from tort action.[121] The Court rejected the plaintiffs' claim that action occurring at the operational level of agency programs was outside the discretionary function exception. In the Court's opinion, "[d]iscretionary conduct is not confined to the policy or planning level" and includes the "[d]ay-to-day management of banking affairs."[122] As long as the action involved was a matter of choice and based on economic, social, or political considerations, it was within the perimeters of the discretionary function exception, regardless of the level of agency action involved.[123] In sum, the *Gaubert* decision appears to eliminate any inquiry into a planning/operational distinction when considering the applicability of the discretionary function exception to agency action.[124]

Accepting that the planning/operational distinction is no longer valid, the courts still have reason to inquire into the level of agency action involved when the EPA fails to warn of a known environmental hazard. Most often, such failures to warn would occur

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Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act*, 110 MIL. L. REV. 115 (1985) (suggesting the planning versus operational test is not conclusively dead after *Varig* and might be used to determine which policy judgments are protected).

120 111 S. Ct. 1267 (1991).

121 *Id.* at 1279-80. The particular action challenged by the plaintiffs was the federal agency's selection and replacement of new officers and directors of the savings and loan association and its participation in the association's daily management. *Id.* at 1272.

122 *Id.* at 1275.

123 *Id.* at 1278-79. In reaching its decision, the Court unconvincingly denied that previous cases such as *Dalehite* and *Indian Towing* created the planning/operational distinction in the first place. *Id.* at 1275-76. This ignores the langnage of these cases and the treatment of the discretionary function exception in the 30 years that followed. *See supra* notes 10-20 and accompanying text (discussing *Dalehite* and *Indian Towing*).

124 *But see id.* at 1280-82 (Scalia, J., concurring):

> [T]he level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter *and* the office of the decisionmaker.
>
> . . . Ordinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions.
>
> . . . Moreover, not only is it necessary for application of the discretionary function exception that the decisionmaker be an official who possesses the relevant policy responsibility, but also the decisionmaker's close identification with policymaking can be strong evidence that the other half of the test is met—*i.e.*, that the subject-matter of the decision is one that ought to be informed by policy considerations.

Id. at 1280-81.

when a lower-level employee[125] fails to take the proper steps to provide public notice of the hazard.[126] The EPA exercises considerable discretion through formulating policy in several circumstances: deciding which substances are toxic or hazardous; ascertaining what levels of these substances present a substantial threat to public health; and determining actions or penalties for violations of these standards.[127] Providing additional protection of discretion exercised when lower-level employees act under these policies removes much of the incentive for agency employees to execute programs or policies with reasonable care. If discretion at all levels is shielded equally from any tort liability, an agency has little incentive to insure that lower-level employees will carry out its programs or policy decisions without negligence.[128] As a result of this protection, there is no functioning mechanism to prompt the agency to carry out its operation properly.[129]

Those harmed by a failure to warn, especially in situations like that in *Lockett*, have little, if any, political recourse against the agency's actions or inactions.[130] As an executive agency, no part of the EPA is directly elected by populous vote. Although Congress must confirm the administrator's appointment, the executive branch selects the administrator without direct input from the general pub-

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125 Lower-level employees in this context means non-policymaking employees.

126 *See, e.g.*, Lockett v. United States, 938 F.2d 630, 630-32 (6th Cir. 1991) (indicating that only three employees, local inspectors of no major policy formulating authority, were involved in the investigation and decisionmaking that led to the failure to warn by the EPA).

127 *See generally* 40 C.F.R. § 761 (1992) (showing application of these decisions to the regulation of PCBs).

128 *See* Krent, *supra* note 5, at 893 ("The possibility that officials will be disciplined by their superiors always exists, but by itself constitutes a relatively weak check against wrongdoing."); *id.* at 889 n.81 ("Supervisors may not know of the negligence, supervisors may condone the negligence, or supervisors may value the employee to such an extent that discipline for the negligent acts is unlikely.").

129 *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 88-89 (1983) (immunity rules impede cost-shifting, allowing government to escape the burden of official misconduct); Victor E. Schwartz & Liberty Mahshigian, *In the 1990's the Government Must be a Reasonable Person in its Workplaces: The Discretionary Function Immunity Shield Must be Trimmed*, 46 WASH. & LEE L. REV. 359, 371 (1989) (stating that if the discretionary function exception is reduced to more reasonable boundaries, "the [federal] government will have incentives to avoid liability" if it "jeopardizes the health and safety of persons in workplaces it owns, operates, or controls"); Stilo, *supra* note 5, at 613 (A balancing approach to the discretionary function exception would "encourage the exercise of reasonable care by government agencies."); *cf.* JOHN H. ELY, DEMOCRACY AND DISTRUST 130-34 (1980) (criticizing Congress for delegating expansive authority to less politically accountable agencies).

130 Krent, *supra* note 5, at 892-93 ("[W]hile a loose political check may constrain the initial delegation decision, no comparable check influences the subsequent exercise of delegated authority.").

lic.[131] Similarly, the public exerts little influence on the hiring of most officials and employees within the agency.

In contrast, those who are adversely affected economically by the setting of a particular emissions standard, for example, often have greater political recourse than members of the general public. Manufacturers or industrialists often have influential lobbying groups that can influence congressional approval of key administrators or congressional adoption of statutory regulations governing the EPA.[132] These parties generally maintain the political power and monetary means to be heard to a far greater extent than the general public.[133] The protection of EPA decisions, such as the establishment of emissions standards, through the discretionary function exception, does not preclude recourse for parties adversely affected. Thus, even without relying on a planning/operational distinction when examining agency action, a court should still examine the level of action involved to determine if any reasonable political or governmental incentives exist at that level to encourage reasonable care by agency employees when carrying out programs or policies.[134]

To summarize, three reasons suggest that the discretionary function exception should not mechanically cover the EPA's failures to warn of environmental hazards. First, the reasons for establishing the EPA and its central purpose to protect the public health and the environment imply that the agency has a duty to warn about such hazards. Furthermore, specific congressional directives and EPA regulations suggest the EPA has a mandatory duty to warn citizens when it detects an environmental hazard. Second, even if no mandatory duty to warn exists, the discretion involved in failing to warn of environmental hazards is more properly characterized as a safety concern, and not as one based on economic, social, or political considerations. Finally, extending the discretionary function ex-

131 *See* Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1970), *reprinted in* 5 U.S.C app. at 1343 (1988) ("The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.").

132 *See* Jack L. Landau, Chevron, U.S.A. v. NRDC: *The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENVTL. L. REV. 285, 302 (1985) ("Responding to pressure from industry lobbying, and to executive policy, the Environmental Protection Agency attempted to apply the bubble concept in each of the Clean Air Act's three permit programs . . . ."). For an example of a lobbying group in action, see Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1184 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

133 Also, these groups are better organized than a random selection of individuals and can, therefore, create more forceful collective action. These groups can also avoid the "free rider" problem which is inevitable in any attempt at general community action. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 23-24 (1991); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

134 *See supra* note 124 (discussing Justice Scalia's concern for continued recognition by the courts of the level of agency action or decision involved).

ception to the failure to warn, without examining the level of action involved, removes incentives for lower-level agency employees to execute agency programs and policies with reasonable care. These arguments suggest that courts dealing with situations similar to *Lockett* should not mechanically apply the discretionary function exception to the EPA's failure to warn of ascertained environmental hazards.

IV

JUDICIAL REVIEW AND SEPARATION OF POWERS CONCERNS

A. Judicial Review of Agency Failure to Warn Does Not Inhibit Proper Policy Formation

One of the strongest arguments in favor of the discretionary function exception is that it prevents judicial "second guessing" of agency policy determinations and programs.[135] By preventing judicial intrusions into the discretion accorded the agency, except when the agency acts arbitrarily or capriciously,[136] the agency performs its duties without the inhibiting fear of judicial interference or the possibility of civil penalty.[137] That is, some might agree that protecting agency discretion based on economic, political, and social concerns is essential for agency operation. Otherwise, it might be argued, the agency would be forced to over-plan, over-investigate, and over-research in order to protect itself from the possibility of error leading to some type of judicially mandated recourse.

This protection, however, is unnecessary when a court deals with the EPA's failure to warn of a known environmental hazard. When analyzing the agency's failure to warn, a court relies on the EPA's own established policies, such as allowable emissions and toxic substance levels or investigation techniques. Such policies are properly given the protection of the discretionary function exception.[138] The policy reasons behind the exception, however, do not extend to an agency's negligent failure to warn, since analyzing such

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135 *See* Berkovitz v. United States, 486 U.S. 531, 536-37 (1988).

136 *See* Chevron v. NRDC, 467 U.S. 837 (1984) (finding deference should be given to the EPA if its interpretation of statute is reasonable and not arbitrary or capricious).

137 Krent, *supra* note 5, at 895 ("Permitting judicial oversight of executive branch policy decisions through tort suits would . . . threaten to frustrate agency policy making.").

138 *See supra* note 71 and accompanying text. These types of decisions are, of course, not totally free of any meaningful oversight. Congress is free to impose on the agency mandatory directives if it feels the agency has established an unreasonable regulation. *See generally* BONFIELD & ASIMOW, *supra* note 117, at 493-94 (explaining that Congress can use a notice requirement to influence agency action and enact a statute to prevent, alter, or cancel a rule).

a claim only requires the court to make a basic negligence determination based upon the agency's own guidelines.[139]

B. Separation of Powers Does Not Require Unchecked Agency Action or Inaction

The constitutional principle of separation of powers arguably provides another justification for the discretionary function exception.[140] According to this view, the judiciary branch breaches the separation of powers ideal when it reviews the exercise of discretion that the executive branch granted to an agency. A judicial determination that an agency acted improperly is believed to represent a judicial attempt to influence or check the agency's policy, a role delegated to the executive branch with approval by the legislative branch.[141] Inherent in the concept of separation of powers is the notion that each branch of government will operate as a "check" on the power of the other branches.[142] The discretionary function exception, it is argued, will remove this constitutional check when certain types of agency action are involved.

By extending the discretionary function exception to its current boundaries, however, the courts have actually *over-protected* the government.[143] Over-protection results because the exception removes any check on agency action that may go unchecked by the agency itself.[144] Professor Harold Krent argues that application of the discretionary function exception should not hinge on the "nature of

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139 For example, the court in *Lockett* could measure the actual danger created by the PCB contamination by looking to the EPA's own definition of unreasonably dangerous levels of PCBs. *See supra* notes 48-55 and accompanying text (discussion of *Lockett*); *see also* Dube v. Pittsburgh Corning, 870 F.2d 790, 794-95 (1st Cir. 1989) (referring to the Navy's own recognition of the dangers of asbestos in discussing the actual danger about which the government failed to warn); *supra* note 71 (giving examples of courts holding agencies to regnlatory duties).

140 *See* Barash, *supra* note 5, at 1327 ("First, and probably foremost, the discretionary function exception promotes the separation of powers by limiting judicial scrutiny of executive decisions."); Krent, *supra* note 5, at 894-95 ("The discretionary function exception unquestionably preserves the allocation of powers among the branches." Without the exception, the "judiciary would become the final arbiter of 'good' government.") (footnote omitted).

141 Krent, *supra* note 5, at 905 ("Courts cannot evaluate the agency officials' overall regulatory priorities, allocation of resources, and estimates of regulatory effectiveness without arrogating much of the administrative function to themselves."); *see also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 962-63 (1983) (explaining that, although the Constitution does not contemplate three branches of government, each with precise boundaries, one branch may not interfere with another's constitutional powers).

142 Buckley v. Valeo, 424 U.S. I, 119-23 (1976) (arguing that the doctrine of separation of powers was developed to prevent any branch of government from wielding its power unchecked by the other branches).

143 Krent, *supra* note 5, at 873.

144 *See supra* notes 126-34 and accompanying text.

the governmental action challenged (as it currently does under *Berkovitz*), but on the process by which that action is reached."[145] When formulating policies and programs, the agency is equipped with its own internal checks, such as deliberation and debate, as well as statutory checks, such as the requirement of public hearings in some contexts.[146] Many agency decisions, particularly those most often made by employees as individuals, especially at the operational level, are not subject to these internal agency checks.[147] In these cases, there is no deliberation, debate, or public input to guide the decision-maker or the agency. Therefore, given the current state of the discretionary function exception, these actions or inactions go unchecked.[148] Professor Krent argues that the judiciary does not violate separation of powers when it provides a check for otherwise unchecked action.[149] The courts offer an acceptable backstop for this type of agency action when no other check exists.

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145 Krent, *supra* note 5, at 874.

146 *Id.* at 900; *see, e.g.*, 15 U.S.C. § 2605(c)(2)(C) (1988) (EPA shall provide opportunity for informal hearing when determining regulations for possible toxic substances).

147 Krent, *supra* note 5, at 899 ("If an agency relies only on an individual's judgment, then the public cannot effectively participate in that decision."); *see also supra* notes 126-31 and accompanying text (discussing public inability to affect low-level agency actions); *infra* notes 148-49 and accompanying text (discussing ineffective internal agency checks on employee action). *See generally* Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1773-74 (1989) (arguing that a stronger check on agency action may come from holding the agency responsible for acquiescing in inappropriate subordinate employee actions).

148 An argument might be made that this action is not wholly unchecked given the existence of normal employee "checks" such as demotion, dismissal, or reprimand within the agency. The sufficiency of these checks in controlling employee negligence or improper action, however, has been severely questioned by commentators. *See* Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 368 (1991) (Supervisors or "collateral" employees, "whose job is to ostensibly provide an internal check on agency integrity . . . are known to have a certain philosophical 'bent.' These individuals can also rationalize official conduct—some might use the word 'whitewash'—that is of doubtful propriety."); Krent, *supra* note 5, at 889 n.81 (claiming that the "possibility of discipline does not generally supply a satisfactory check. Supervisors may not know of the negligence, supervisors may condone the negligence, or supervisors may value the employee to such an extent that discipline for the negligent acts is unlikely."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 508-09 (1987) ("Because they lack internal checks and balances, administrative agencies pose special risks. . . . Dangers of factionalism and self-interested representation have been the foremost concern of modern administrative law. Most proposals for regulatory reform, whether judicial, executive, or legislative, stem from that preoccupation.").

149 Krent, *supra* note 5, at 899 ("[N]ondeliberative action[s]" are unlikely to "reflect the agency's mission to act as Congress' partner in fashioning national policy. Judicial review in that context is unlikely to disturb any policy making function.") (footnote omitted); *see also* Barash, *supra* note 5, at 1327 (arguing that the separation of powers concern is nonexistent when considering the tort liability for negligent execution of mandatory regulations: "[T]he judiciary has always sought to hold the executive to its own declared policies . . . .").

In addition, when the judiciary acts as a check on unrestrained agency action, it corrects a possible lack of incentive. As discussed above,[150] an unchecked actor may have little incentive to take reasonable care when carrying out directives. With a judiciary check in place, the actor and the directing agency will have the necessary incentive to insure that programs and policies are implemented with reasonable care.[151]

CONCLUSION

Although the Federal Tort Claims Act was designed to eliminate the idea of sovereign immunity by allowing for governmental liability, the discretionary function exception, by necessity, carves out a part of government operation and removes it from general liability. The discretionary function exception is an important mechanism that allows federal agencies to make public policy decisions through statutorily authorized discretion. Such discretion removes the fear of constant judicial interference in agency activity through the threat of tort liability. This Note has argued, however, that courts have extended the exception beyond its functional necessity and, as a result, that courts have over-protected the government and its discretionary functions. This over-protection is most clearly seen in the willingness of the courts to classify the EPA's failure to warn of ascertained environmental hazards as within the discretionary function exception.[152]

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150 *See supra* notes 126-34 and accompanying text.

151 Krent, *supra* note 5, at 915 ("With respect to deterrence, the federal government should, if possible, be forced to internalize the costs of accidents unless the political and administrative process has provided adequate safeguards.").

152 For commentators calling for change in the application of the discretionary function exception, see SCHUCK, *supra* note 129, at 114 ("Precisely because virtually all actions are 'discretionary' in some sense, the term should be restricted to non-routine, essentially judgmental, policy-type decisions."); Krent, *supra* note 5, at 915 ("Instead of stressing the nature of the governmental action, courts should focus on the decision making process underlying the governmental action challenged."); Reynolds, *supra* note 13, at 481 (calling for the Supreme Court to reconsider the basic purpose of the FTCA—"to make the government liable to those it tortiously injures"—through proper application of the planning v. operational test.); Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception and to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 739:

> The number and complexity of discretionary function cases suggest that Congress might usefully examine whether section 2680(a) is serving congressional purposes. . . . Congress could benefit both government agencies and plaintiffs by clarifying some of the rules of the game. In doing so, Congress could also recognize that some discretionary function questions that have been played out in the courts in recent years (usually with plaintiffs receiving an ultimate dismissal on section 2680(a) grounds) should be handled by Congress.

id.; Stilo, *supra* note 5, at 612-13 (advocating an approach to the application of the discretionary function exception by balancing between the foreseeability and seriousness of

To extend the exception to a failure to warn by the EPA is to ignore the type of discretion at work when such a failure occurs. Almost always this failure is not the result of carefully deliberated concern over public policy, but instead the result of simple negligence or lack of care.[153] More importantly, classifying this failure as one involving protected discretion detracts from the basic purpose of the EPA: to protect a general public unequipped to protect itself from environmental hazards. Therefore, cases such as *Lockett* have been wrongly decided because they were based upon a faulty premise. The litigation in *Lockett* should have continued to the ultimate question of governmental liability because the discretionary function exception should not mechanically cover the EPA's failure to warn of known environmental hazards. Similar cases, which are sure to arise in the future, must be approached from a more realistic analysis of the role of the EPA and the dangers of overextending the discretionary function exception.

Jamon A. Jarvis

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the injury and the burden of imposing a duty to warn); *see also* Allen v. United States, 816 F.2d 1417, 1424-25 (10th Cir. 1987) (McKay, J., concurring) (expressing concern that the discretionary function exception is interpreted to apply "in all but the most trivial of matters"), *cert. denied*, 484 U.S. 1004 (1988). *But see* David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act:* Dalehite *to* Varig *to* Berkovitz, 25 IDAHO L. REV. 291, 328 (1988-89) (arguing that the current application of the discretionary function exception is a "sensible framework, rooted firmly in congressional intent. Consequently, the approach taken by most of the appellate decisions after *Varig* was a sound one, and it would be unwise and unnecessary for that handiwork to be undone."); Tomea C. Mayer, Note, *The Federal Tort Claims Act: A Sword or Shield for Recovery from the Government for Negligent Hazardous Waste Disposal*, 39 WASH. U. J. URB. & CONTEMP. L. 173, 194 (1991) ("Despite the emotional and environmental impact of hazardous waste issues, . . . allow[ing] an FTCA claim to police the implementation of general policy . . . oversteps the bounds of the *Berkovitz* decision.").

Interestingly, a proposal for amending the discretionary function exception recently came before the House Subcommittee on the Judiciary. H.R. 2536 would amend the FTCA to apply the exception "only if the discretionary function or duty involves the formulation of policy rather than the implementation of the policy at an operational level." H.R. 2536, 101st Cong., 1st Sess. (1989). This proposal is currently pending before the Subcommittee.

153 *See supra* note 126 and accompanying text.

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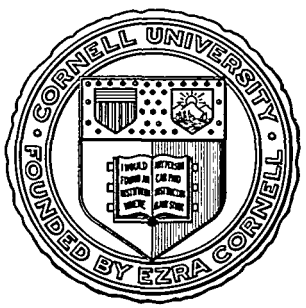

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Bonnie P. Tucker, B.S., J.D., Visiting Professor of Law (Spring 1993)
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Susan H. Williams, B.A., J.D., Associate Professor of Law (on leave 1992-93)
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