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STUDENT MATERIAL

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FEDERAL TORT LIABILITY FOR NEGLIGENT MINE SAFETY INSPECTIONS

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I. INTRODUCTION

Generations of American workers have gone into the mines to remove coal and other valuable minerals. They have played a crucial role in our nation's industrial development. The dangers of the miner's way of life are well known. This article explores a particular facet of the law as it relates to these dangers—the potential tort liability of the federal government for negligence in conducting mine safety and health inspections.

In essence, two concerns are the impetus for this discussion. First, the extent and importance of the government's mine safety inspections cause one to

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1 In 1920 some 840,000 miners worked in America's bituminous coal mines. By 1969 there were about 132,000 coal miners in this country with the total production of coal about the same as in 1920. Howerton, The Federal Coal Mine Health and Safety Act of 1969, 16 ROCKY Mtn. Min. L. Inst. 539, 539-40 (1971) [hereinafter cited as Howerton]. Today the total number of coal miners in this country is approximately 245,000, of which 151,000 are employed underground. COMMITTEE ON UNDERGROUND COAL MINE SAFETY, COMMISSION ON ENGINEERING AND TECHNICAL SYSTEMS, NATIONAL RESEARCH COUNCIL, TOWARD SAFER UNDERGROUND COAL MINES 66 (1982) [hereinafter cited as TOWARD SAFER MINES].

2 A recent study of coal mine safety in this country concluded that "underground coal mining emerges as one of the most dangerous, if not the most dangerous, occupational activity undertaken by a significant number of people in the United States." TOWARD SAFER MINES, supra note 1, at 40.

The Bureau of Labor Statistics annual survey indicates that while the lost workday injury rate for the mining industry dropped in 1981 to 145.7 days per 100 full-time workers, this still leaves the mining industry with the highest rate of any industry. 4 MINE S.H. REP. (BNA) No. 14, at 273 (Dec. 1, 1982).

In the 1930's and 1940's some 1000 miners were killed on the average each year in underground coal mines. The number today is about 100 per year, although there are far fewer mines now. TOWARD SAFER MINES, supra note 1, at 2. In 1980 there were 133 fatal accidents in mines. In 1981 this increased to 153 of which 121 were in underground mines. 3 MINE S.H. REP. (BNA) No. 23 at 424, 445 (April 7, 1982). For 1982 preliminary figures indicate 122 fatalities resulted from mining accidents of which 83 were in underground coal mines. 4 MINE S.H. REP. (BNA) No. 18, at 396 (Jan. 26, 1983).
question what legal liabilities, if any, the government has when it fails to act responsibly in the exercise of these important functions. Second, and in part as a product of the first concern, when one examines the law generally as it relates to federal government liability for negligent inspections and specifically its liability regarding mine inspections, one finds considerable dispute among the courts and often, hostility to the notion that the federal government should assume any legal liability in such situations.\footnote{1}

A. Background—Federal Mine Safety Legislation

The federal government’s concern with mine health and safety is not new.\footnote{2}


\footnote{2} This article examines federal mine safety legislation and the potential liability of the federal government for negligent mine safety inspections. The states, however, have long been active in the area of mine safety. State law has generally recognized that employers have a common law legal duty to provide workers with a reasonably safe workplace. See Toward Safer Mines, supra note 1, at 49; 54 Am. Jur. 2d, Mines and Minerals § 239 (1971).

Many courts, given the hazardous nature of mining, imposed on mine operators a higher duty of care toward miners. Ashland Coal & Iron Ry. Co. v. Wallace, 101 Ky. 628, 42 S.W. 744 (1897). Regarding such common law liability, it has been observed: [T]hese judicially created “common law” doctrines only provided compensation in money damages after an injury or fatality had already occurred. At best, this duty of reasonable care provided merely an indirect incentive to greater workplace safety. At worst, it was illusory, because other common law doctrines, such as contributory negligence, assumption of risk, and the fellow servant rule, as often combined with the rather nebulous standard of “reasonable care” to defeat even the modest recovery of a few thousand dollars for a lost life or a serious injury.

Toward Safer Mines, supra note 1, at 48.

During the nineteenth century a number of states began enacting statutes to promote safety in mines and protect the health of miners. See Toward Safer Mines, supra note 1, at 50-51; Morrison, Inspections and Investigations, 1973 Rocky Mt. Min. L. Found. Mine Health and Safety L. Inst. 4-1, 4-1; 54 Am. Jur. 2d, Mines and Minerals § 177 (1971); Annot. 25 L.R.A. 848 (1934). In the face of employer efforts to attack such statutes, in Holden v. Hardy, 169 U.S. 366 (1898), the Supreme Court upheld the constitutionality of a Utah statute limiting the hours of employment of miners in underground mines to eight hours per day.

Federal mine safety legislation emerged eventually from a perception that state legislation was ineffective. See Toward Safer Mines, supra note 1, at 52. Despite the considerable growth of federal legislation directed at mine health and safety, however, many states continue to regulate in this area. Federal legislation specifically recognizes the validity of such state legislation so long as it does not conflict with federal law. 30 U.S.C. § 955(a) (1976). There is no invalidating conflict between the various states and federal governments’ regulatory programs even though state legislation may be more stringent than federal legislation or encompass areas not provided for by federal law. 30 U.S.C. § 956(b) (1976). Thus, it has been held that federal mine legislation does not pre-empt state mine safety legislation. Troy Gold Industries, Ltd., Cal. Occupational Safety & Health
As early as 1865, legislation was introduced in Congress to create a Federal Mining Bureau. However, it was not until 1910, after a number of mining disasters drew the public's attention to the area, that Congress passed legislation establishing the Bureau of Mines. This legislation, which in part mandated that the Bureau investigate mining operations, particularly with regard to the safety of miners, was soon criticized as being of little real value given its failure to provide for federal mine inspections. In fact, the law specifically denied the Bureau inspection authority. Thereafter, Congress passed at various times a number of statutes aimed at mine safety. In 1941, for example, Congress passed for the first time legislation providing for limited federal mine inspections. However, this legislation failed to provide enforcement authority. The Bureau was limited to publicizing its findings and recommendations. In 1952, legislation was passed providing for the first time for federal enforcement au-


Given the extent of federal mine safety regulation, however, some states have cut back on their own involvement in mine safety or at least have considered doing so. For example, legislation was introduced (although not enacted) in Colorado recently to eliminate state inspection of small coal mines given that they are duplicative of federal inspections. H.B. 1222, cited in 3 MINE S.H. REP. (BNA) No. 21, at 389 (March 10, 1982). Further, the costs of enforcement have strained many states. See statements of Willard Stanley, Kentucky Commissioner of Mines, in 3 MINE S.H. REP. (BNA) No. 22, at 408 (March 24, 1982). Still, a recent study has emphasized the continued importance of state mine safety efforts, particularly in regard to safety education. Toward Safer Mines, supra note 1, at 22-23. Further, Assistant Labor Secretary Ford B. Ford recently urged greater cooperation between state and federal mine safety agencies. 4 MINE S.H. REP. (BNA) No. 13, at 246 (Nov. 17, 1982).

In terms of state law relevant to mine safety and liability for injuries to miners it should be noted that as a general rule miners who are injured in mining operations are covered under state workers' compensation laws. See 81 Am. Jur. 2d Workman's Compensation § 126 at 189 (1976). Some workers' compensation laws expressly cover mine operators and miners, while others, by their definition of those who are covered, necessarily include these persons. Typically the compensation provided under such compensation laws to injured workers is limited. Id., § 308. The effect of coverage by workers' compensation laws is generally to deny an injured employee other remedies at least as to the employer. Id., § 306. Whether an employee whose injury is covered by workers' compensation is also barred from any recovery from a third party (e.g., an insurance company) is an unsettled issue. Id., § 65. This may depend on the specific language of pertinent statutes. Id.

8 In 1865 Senator William Morris of Nevada, one of the developers of the Comstock lode, introduced a bill to establish a Federal Mining Bureau. S. 31, 39th Cong. (1865). See Howerton, supra note 1, at 541.


10 Id., § 6(b), 55 Stat. 177, 178. The law was intended only to supplement state safety efforts and thus did not give the Bureau any authority to promulgate coal mine safety standards. Blackwell, supra note 7, at 1-6.
tority in connection with its inspections. Often such legislation was passed in the wake of devastating mine disasters.

In the coal mine industry prior to 1977, the most important safety legislation was the Federal Coal Mine Health and Safety Act of 1969. This Act provided for promulgation of mine health and safety standards, inspections of underground coal mines and a variety of enforcement mechanisms including closure, civil penalties and criminal actions for violations. The Federal Metal and Nonmetallic Mine Safety Act of 1966 likewise provided for mine safety inspections and various devices to remedy violations in noncoal mines.

For a variety of reasons, including perceived inadequacies of both of these statutes in terms of mine safety, Congress in 1977 extensively revised federal mine safety legislation when it passed the Federal Mine Safety and Health Amendments Act of 1977 (the Act). This Act significantly changed the 1969 Coal Mine Safety Act, repealed the 1966 Metal and Nonmetallic Mine Safety Act, and placed all mines under a single federal safety statute. Further, the Act, along with creating within the Labor Department the Mine Safety and Health Administration (MSHA), sought through a variety of provisions to provide more effective mechanisms for assuring the health and safety of what the Act labeled as the mining industry’s “most precious resource”—the miner. One such mechanism was the mine safety inspection.

The provisions of the 1977 Act call for a variety of inspections by authorized government representatives. The inspections are conducted for a number of purposes related to miner health and safety including determining whether

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12 For example, the 1952 Act was passed following the death in 1951 of 119 miners in an accident at West Frankfort, Illinois.
15 FEDERAL MINERAL HEALTH AND SAFETY ACT OF 1977: LAW AND EXPLANATION (CCH) ¶ 101 (1977) [hereinafter cited as LAW AND EXPLANATION].
17 LAW AND EXPLANATION, supra note 15, at ¶ 102.
18 Id. at ¶ 106.
20 Id., § 813(a); LAW AND EXPLANATION, supra note 15, at ¶ 127. Under 30 U.S.C. § 813(i) (Supp. IV 1980) a representative of the mine operator and an authorized representative of the miners must be given an opportunity to accompany the government inspector during inspections and to participate in inspection conferences. At least one miner representative who is an employee must be paid regular wages for inspection time. If there is no authorized representative the mine inspector is to consult with a reasonable number of miners concerning the mine’s health and safety conditions.
imminent dangers exist and whether there has been compliance with mandatory health and safety standards. These inspections include regular inspections of the entire mine at least four times a year for coal and other underground mines and at least two times a year for all surface mines. Further, certain so-called “gassy” mines (mines that emit excessive quantities of methane or other explosive gases) are subject to more frequent “spot” inspections. Additionally, upon receipt of a written complaint citing a violation or imminent danger, authorities are authorized to make a special inspection.

The Act provides for a detailed system of written citations for violations, abatement periods, follow-up inspections to assure proper compliance and the use of closure orders where violations have not been corrected. Further, among other penalties (including criminal sanctions for willful violations), a safety violation may result in a civil penalty of up to $10,000 for each violation, as well as an additional penalty of as much as $1,000 per day for each day during which the violation continues after the permitted correction period. The Act also provides special procedures for withdrawal of miners from dangerous areas in those instances where an inspection reveals an imminent danger of harm.

B. Federal Mine Inspection Liability—Questions and Problems

Although this article concerns the possible tort liability of the federal government when its mine inspectors are negligent in carrying out their responsibilities, in reality of course, the safety of the miner depends on a variety of factors (e.g. age of miner, size of mine) and persons other than the federal government’s inspector. The miner himself plays a crucial safety role. The failure of miners to follow required procedures has been blamed for numerous accidents. Labor organizations also play an important part in assuring mine

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22 Id.
23 Id., § 813(i).
24 Id., § 813(g).
27 Id., § 820(a) and (b). Recently, MSHA rules were amended to provide for a $20.00 penalty for violations which involve low gravity and no negligence, as well as for other changes in penalty assessment procedures. See 3 Mine S.H. Rep. (BNA) No. 26, at 484 (May 19, 1982); 4 Mine S.H. Rep. (BNA) No. 1, at 4 (June 2, 1982). Some people have criticized these changes as weakening MSHA’s enforcement activities. See 9 Coal Week (McGraw-Hill) No. 10, at 8 (March 7, 1983).
30 For example according to an investigative report prepared by the Mine Safety and Health Administration, part of the cause of an explosion on December 8, 1981, at the Grundy mine in Whitwell, Tennessee, in which 13 miners were killed was use of an illegal cigarette lighter by one of the victims. 3 Mine S.H. Rep. (BNA) No. 26, at 483 (May 19, 1982).

Under the provisions of 30 U.S.C. § 820(g) (Supp. IV 1980) any miner who violates mandatory safety standards relating to smoking or carrying smoking materials (including lighters) may be fined up to $250. In recent hearings before the House Education and Labor Subcommittee on Health and Safety, Representative Eugene Johnston of North Carolina emphasized that negligent
safety via collective bargaining agreements and other mechanisms. In fact, it has recently been suggested that labor unions should play a greater role in workplace safety generally and that unions can, through the bargaining process, be more effective in assuring safety than the federal government, although a number of factors may be cited to as discouraging increased safety activities by labor unions. Additionally, mine owners and operators play an important role, if not the key role, in mine safety. A recent report prepared by

miners are often responsible for accidents although he said they are seldom fined or held accountable. See 3 MINE S.H. REP. (BNA) No. 21, at 385 (March 10, 1982).

Bacon, Private Bargaining and Public Regulation, in SOCIAL REGULATION: STRATEGIES FOR Reform 201 (E. Bardach & R. Kagan, 1983). This report suggests that while unions will never replace the government in regulating workplace safety, they can often be more effective in assuring workplace safety than the government because unions are closer to members and because safety rules, developed through discussion and negotiation between management and labor, can better meet the diverse needs of each workplace than national standards adopted by the government. Id. at 202-04. However, the report notes that unions often neglect safety issues because there is little political return to the union leadership in safety areas and because improvement in safety conditions is costly to unions. Id. at 206-09.

Another factor that may dissuade unions from active safety participation is the possible liability this may mean for a failure to enforce negotiated agreements or otherwise in carrying out safety measures.

The traditional duty owed by a union to its members is that of fair representation. This duty was defined by the Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967), as requiring that no member may be treated in an arbitrary, discriminatory, or bad faith manner. However, the duty of fair representation is not breached by negligence, Globig v. Johns-Manville Sales Co., 486 F. Supp. 735, 740 (E.D. Wisc. 1980), nor does the duty require a union to search out hazards in order to include safety precautions in a bargaining agreement, Carollo v. Forty-Eight Insulation, Inc., 292 Pa. Super. 422, 431 A.2d 990 (1987). Thus an injured employee attempting to hold his union liable for a failure to provide a safe workplace will rarely be successful if the cause of action is based on the duty of fair representation.

Many collective bargaining agreements, however, contain provisions specifically addressing workplace safety. In several recent cases, injured employees have sued their union claiming a negligent breach by the union of such safety provisions. See Bryant v. UMWA, 437 F.2d 1 (6th Cir. 1972), cert. denied 410 U.S. 930 (1973); House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976); Dunbar v. United Steelworkers of America, 100 Idaho 923, 602 F.2d 21 (1979), cert. denied, 440 U.S. 983 (1980); Helton v. Hake, 584 S.W.2d 313 (Mo. Ct. App. 1978), cert. denied, 439 U.S. 959 (1978). These cases reflect two basic obstacles for an injured employee to overcome if he is to be successful in such a suit against a union. First, the court must be satisfied that the union has clearly assumed a duty outside the normal duty of fair representation. Unions are typically not liable under provisions giving them advisory roles or the mere right to inspect. Second, the plaintiff must avoid a possible claim of preemption which may be advanced to prevent a state from exercising its jurisdiction over areas covered by federal labor laws. For a further discussion of these matters see Davis & Drapkin, Health and Safety Provisions in Union Contracts: Power or Liability, 65 MINN. L. REV. 635 (1981); Segall, The Wrong Pocket: Union Liability for Health and Safety Hazards, 4 INDUS. REL. L.J. 390 (1981); Note, Responsibility for Safe Working Conditions: Expanding the Limits of Union Liability, 32 SYRACUSE L. REV. 361 (1981); Comment, Safety in the Workplace: Employee Remedies and Union Liability, 13 CUMBERLAND L. REV. 365 (1980).

Recently George Cohen, associate general counsel for the AFL-CIO’s Industrial Union Department, in a memorandum addressed to that Department’s committee on health policy and legislation, urged unions to be cautious in assuming safety responsibilities in the workplace because of the potential for union liability to injured workers. 3 MINE S.H. REP. (BNA) No. 19, at 351 (Feb. 10, 1982).
the National Research Council of the National Academy of Science states:

State and federal legislation has contributed to improved safety in underground coal mines over the past several decades, but a company’s compliance with prescribed safety standards will not by itself produce an outstanding safety record. The initiative to achieve and maintain excellent safety must come from the managements of coal companies. They alone have the authority within their companies to establish policies and priorities and communicate them throughout their organizations. They alone have the authority to implement safety programs, commit resources, and reward their managers and employees for achieving the goals of those programs. The goals may not be attainable without the cooperation of employees, but only management has the authority to request of its employees the actions needed to realize those goals.

Even given the foregoing, there is no question that a critical factor in mine safety is the federal government inspector. Despite recent efforts to cut back on federal inspections, a number of factors suggest that such changes would

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53 Toward Safer Mines, supra note 1, at 6 (emphasis in original). This study found that management commitment to safety, reflected in large part by its willingness to invest funds, personnel, time and other resources in effective safety programs, is the prime determinant of mine safety. Unfortunately, statistics indicate that mining industry safety and health spending was expected to drop by 11% in 1982 to $692.7 million. This reduction is reflective of an overall effective decrease in safety expenditures by U.S. businesses. 4 MINS S.H. REP. (BNA) No. 2, at 36 (June 16, 1982).

54 Sec. e.g., H.R. 6548, 97th Cong. 2nd Sess., introduced by Representative Ken Kramer (R. Col.). This bill would have made several significant changes relevant to federal mine inspections under the Federal Mine Safety and Health Act of 1977.

The bill proposed in section 3(2) to exclude from coverage under the 1977 Act coal and other mines in which each individual working in the mine also owns or controls at least 10 percent of the mine’s assets. Further, section 6 of the bill was designed to amend 30 U.S.C. § 813(a) which presently requires frequent federal mine inspections by MSHA, to make such inspection authority permissive only, focusing on problems identified in previous inspections.

H.R. 6548 would also have made a major change in the enforcement provisions of the 1977 Act. Presently, 30 U.S.C. § 814 allows an inspector to issue a citation upon belief of any violation of any mandatory health or safety regulation. Under the Kramer bill, an inspector could only issue a notice of violation upon reasonable belief of such violations. Citations would be issued immediately only if a “significant and substantial violation” existed, that is a violation of any mandatory standard which under the circumstances constitutes a hazardous condition which could reasonably be expected to cause death or serious injury.

If a notice of violation is issued, a new paragraph added by section 7(b)(1) of the bill to 30 U.S.C. § 814(b) would have allowed follow up inspections after a reasonable time had passed to permit corrective action. A citation could then issue where the violation persists. Present provision for the closing of a mine when a violation previously cited still continues were left in force by H.R. 6548, but it should be noted that the shutting down of a mine for safety standard violations would have become a third step (notice, citation, closing) whereas it is presently a second (citation, closing).

Presently, 30 U.S.C. § 814(e) permits the shut down of a mine upon a finding of a pattern of violations which have significantly contributed to the mine safety hazards. Under section 8(e) of the proposed amendment, the notion of a pattern of violations would have been given a three-part definition. Each violation must be a significant and substantial violation; they must occur within a twelve-month period with frequency sufficient to consider them chronic and habitual; and, each violation must involve the same health or safety standard.

Thus, H.R. 6548 was designed to limit the scope of the mines to which the 1977 Act applies.
be problematic—perhaps dangerous. In its report, the National Research Council, while acknowledging the crucial role of the mine owner in mine safety, also stated that "no compromise or dilution of the government’s regulatory role is justified." Further, a series of mining accidents in late 1981 and early 1982, in association with cutbacks by the Reagan administration in the mine safety budget, has highlighted the continuing risks in the mining industry and the important role of the federal government in decreasing these risks. Although a variety of factors certainly contributed to these recent incidents and although denied by the Administration, many observers felt the increase in accidents was in significant measure due to a conscious effort by the government to lessen its inspection and safety related activities, thereby saving money and avoiding regulatory burdens on the mining industry, allegedly at the cost of worker safety. Following these events, President Reagan was

and also raised the standard of issuing citations and withdrawal orders. Where presently a violation of a mandatory regulation could bring a citation, the Kramer proposal would, on the same facts, have called only for the issuance of a notice of violation. If those facts constitute a hazard which could reasonably be expected to cause death or serious physical harm, only then would a citation have followed.

H.R. 6548 was referred to committee and died there. The outlook for re-introduction is questionable. Observers seem to believe the Department of Labor will introduce a bill acceptable, if not wholly supported, by industry and unions alike. See 9 COAL WKR (McGRAW-HILL) No. 2 (Washington Report) at 2 (Jan. 10, 1983).

TOWARD SAFER MINES, supra note 1, at 18. Recent industry literature, however, suggests that statistically mine inspections are counter-productive. See Zabekalis & Zalar, U.S. Coal Mine Safety Performance, AM. MINING CONG. J. at 25, 27 (July 1982).

On December 3, 1981, three miners were killed in a roof collapse in Bergco, West Virginia. On December 7, 1981, eight miners died in a mine in Topmost, Kentucky. Thirteen miners were killed on December 8, 1981, at a Whittwell, Tennessee, mine owned by Tennessee Consolidated Coal Company. See 3 MINE S.H. REP. No. 15, at 271 (Dec. 16, 1981). In January, 1982, seven miners (four of whom were in the same family) were killed at the RPF Coal Co. mine near Craynor, Kentucky, while two additional workers died in Phelps, Kentucky. On January 18, 1982, one miner was killed and four injured at another Tennessee Consolidated mine located in Whitwell.


Ford B. Ford, Assistant Secretary of Labor for Mine Safety and Health, told the Senate Appropriations Subcommittee on Labor, Health and Human Services on April 22, 1982, that there was no relationship between the reduced funding for the Mine Safety and Health Administration and the recent increase in mining accidents. Further, Ford told the Subcommittee that each of the mines involved had received proper, regular and spot inspections. 3 MINE S.H. REP. (BNA) No. 25, at 467 (May 5, 1982).

In hearings held on February 18 and 19, 1982, by the House Government Operations Subcommittee on Manpower and Housing, a number of persons testified that reductions in government spending were weakening enforcement of federal mine safety legislation. Testimony from miners, government mine inspectors, union leaders and others indicated that reducing budgets and laying off inspectors were creating increased safety risks in the mines, harming the morale of inspectors and fostering an attitude of slackened enforcement efforts by the government. 3 MINE S.H. REP. (BNA) No. 20, at 260-61 (February 24, 1982). A report prepared by the General Accounting Office found that nationwide not all the number of legally required coal mine safety inspections had been performed in 1980 or 1981. This was caused in part by a reduction in the
forced to restore funds to MSHA and increase its budget for 1983.46

Because the federal government plays and will continue to play such a crucial role in encouraging safety in the mining industry, there will be increasing pressure on the courts to find federal governmental liability for negligent mine safety inspections. Thus, the fundamental concern of this article is with a review of the present status of federal tort liability for negligent mine safety inspections and with some of the critical analytical problems encountered in examining this area of the law. Given the extent and importance of the federal government’s mine safety activities, there can be little doubt that miners and mine operators have come to depend largely upon the government to carry out such activities reasonably and responsibly. When the government fails in this regard and injury results, the law, and in particular tort law, provides a potential and justifiable basis of liability and a mechanism to help ensure the government properly fulfills its mandated functions.41 What one discovers in examining case law as it has evolved in this area, however, are a variety of divergent views and analytical approaches among the federal courts in their efforts to handle inspection-based tort liability claims, including mine safety inspection claims. In part, the difficulties encountered in this regard have their source in the concept of and policies behind sovereign immunity and in the legal tangle of the statutory basis for federal tort liability, the Federal Tort Claims Act (FTCA).

Beyond examining in some detail the present status of the law in this area and the problems encountered under the FTCA relevant to mine safety inspection liability, the objective of this article is to suggest analytical perspectives which can aid in resolving or avoiding these problems. The analytical approach suggested is based at least in part upon the notion that, given the power and status of the federal government and the extent and importance of its mine

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40 On February 8, 1982, the Reagan Administration announced that the 1983 budget would be amended to add an additional $15 million in funding for the Mine Safety and Health Administration. This revision was in response to the recent increase in coal mine accidents. Further, the Administration decided to restore $2 million of the $4 million in cuts from the 1982 Mine Safety and Health Administration budget. The President announced that the purpose of the restored funding was to enable MSHA to hire additional inspectors and fill other vacancies. 3 Mine S.H. Rep. (BNA) No. 19, at 343 (February 10, 1982). On November 1, 1982, MSHA announced that 208 new inspectors had been added to the agency's underground coal mine inspection force bringing the total number of inspectors to approximately 1000. 4 Mine S.H. Rep. (BNA) No. 12, at 216 (Nov. 3, 1982). Despite these encouraging signs, the Reagan Administration's proposed 1984 budget would reduce spending for MSHA to $148 million, a decrease of about $8.8 million from the estimated fiscal 1983 appropriation. The budget as proposed for 1984 presumes the passage during 1983 of a number of amendments to the Federal Mine Safety and Health Act of 1977 which would reduce MSHA inspection activities along the lines suggested in H.R. 6545, 97th Cong., 2d Sess. See supra note 34. These budget cuts could result in a reduction of safety personnel, including inspectors, although the number is uncertain. See 4 Mine S.H. Rep. (BNA) No. 19, at 409 (Feb. 19, 1983). Several members of Congress have questioned the assumption, in setting 1984 budget figures for MSHA, that Congress will act to reduce MSHA inspection obligations. See 9 Coal. Wkbk. (McGraw-Hill) No. 20, at 8 (March 7, 1983).

inspection activities, judicial hostility to the imposition of liability on the government for injuries resulting from negligent mine safety inspections is in certain circumstances inappropriate. This is the case even when one acknowledges the variety of policy arguments against the imposition of governmental liability and the critical limitations imposed upon such liability under the Federal Tort Claims Act.

Because of its importance in this regard and in order to adequately examine the present federal law relating to mine inspection liability and the specific legal problems associated with it, one needs a basic familiarity with the Federal Tort Claims Act, its history and certain of its provisions particularly relevant to this issue.

II. FEDERAL TORT LIABILITY—A BACKGROUND DISCUSSION

A. Federal Sovereign Immunity

The concept of sovereign immunity, under which a government is immune from legal liability, has its origins in early English law. However, these historical origins and the theoretical basis for this concept have been the subject of much controversy and debate. One leading view was that a claim against the king could be brought only by his consent to a petition because it would be illogical for the king to issue or enforce a writ against himself. Another theory saw the basis of the doctrine in a medieval concept of divine kingship. It was reasoned that the king, deriving his authority from God, could govern as he chose, as reflected in the phrase "The King Can Do No Wrong." Critics of this view asserted that it rested on an erroneous interpretation of this phrase and that its original meaning was that the king was not privileged to do wrong, not that he was incapable of doing wrong. Nonetheless, from these clouded origins developed the basic notion that the king could not be sued without his consent.

Although not articulated in the federal constitution and certainly not based upon any concept of divine or royal power, the concept of sovereign immunity has long been recognized in this country as applying to the federal government. Under this doctrine, no suit may be brought against the United States without its consent. Numerous historical and policy explanations have been offered to justify the recognition of the immunity doctrine in this country. The practical effect of this doctrine in terms of the legal liability of the

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12 Id.
16 Borchard, supra note 44, at 496.
17 Id.
20 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES, § 61
federal government has been summarized as follows:

[Whether its rationale, its effect for over 150 years was to give the United States Government a privileged position of legal irresponsibility for the torts of its employees, and this at the expense of the innocent victims of those torts. Throughout this period, those who suffered damage because of the negligence of an employee of the United States had the dismal choice of a suit against the employer personally—a defendant of doubtful financial resources—or a petition to Congress to grant a private relief measure which was a tortuous and frequently hopeless route to recovery.]

Thus, for a considerable time the only viable recourse open to an individual injured by the negligence of a federal agent or employee was a private relief bill in Congress. This mechanism, however, proved to be wholly impractical and unjust. The volume of private relief bills presented to Congress became overwhelming, cutting into the time available to consider other legislative matters, resulting in lengthy delays in considering claims, as well as in inconsistent and often unfair results. An initial step to remedy these problems was taken in 1855 when Congress established the Court of Claims. Early on, however, the Court of Claims reasoned that, while it had power to resolve contract claims against the United States, it had no jurisdiction to hear tort claims. The Supreme Court upheld this conclusion. Thereafter, while Congress passed several bills designed to deal with particular sorts of tort claims and despite numerous efforts to enact general tort claim legislation, private bills remained virtually the only available course of relief for tort victims against

at 2:4, 2:5 (1981). It has also been suggested that the “survival in this country after the Revolutionary War” of the doctrine of sovereign immunity “is attributable in all likelihood, to the financial instability of the infant American states rather than to the stability of the doctrine’s theoretical foundations.” Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum. L. Rev. 722, 722 (1947).

1 L. Jayson, supra note 50, § 51 at 2:5, 2:6.

Gellhorn & Schenck, supra note 50, at 722-23.

1 L. Jayson, supra note 50, § 52 at 2:6.

1 L. Jayson, supra note 50, at 723. This court was thus “nothing more than an administrative or advisory body.” Williams v. United States, 289 U.S. 553, 565 (1933). It was thus of little real value in alleviating the burdens of Congress. Richardson, History, Jurisdiction and Practice of the Court of Claims of the United States, 7 So. L. Rev. 781, 787-88 (1882). As a result, in 1863 the Court of Claims was given power to render judgments rather than merely advise Congress on submitted claims. Gellhorn & Schenck, supra note 50, at 729.

See, e.g., Dennis v. United States, 2 Ct. Cl. 210 (1866); Spicer v. United States, 1 Ct. Cl. 318 (1866); Pitcher v. United States, 1 Ct. Cl. 7 (1863).

Morgan v. United States, 81 U.S. (14 Wall) 531 (1871); Gibbons v. United States, 75 U.S. (8 Wall) 269 (1869).

1 L. Jayson, supra note 50, § 55 at 2:13 to 2:45.

See, e.g., the Tucker Act, Act of March 3, 1887, ch. 553, 24 Stat. 505 [codified as amended at 28 U.S.C. §§ 1346(a) and 1491 (1976 & Supp. IV 1980)]. As originally proposed, the Tucker Act was fashioned as a general tort claims act extending the jurisdiction of the Court of Claims beyond contract actions to encompass tort claims as well. As finally passed, however, the Act specifically excluded tort claims. 1 L. Jayson, supra note 50, § 54 at 2:16, 2:17.
the federal government until 1946. The Federal Tort Claims Act (FTCA) passed in that year brought sweeping changes in this area.

B. The Federal Tort Claims Act—Facets Relevant to Mine Inspection Liability

The legislative history of the Federal Tort Claims Act has been fully detailed elsewhere. "The two dominant objectives" of the Act, according to one author, "were, first, to relieve Congress of the overwhelming pressures and burdens of private relief bills, and, second, to do justice to those who had suffered injuries or losses through the wrongs of government employees." To this end, the FTCA, as amended, permits the United States to be sued for the negligent or wrongful acts or omissions of its employees without limitation as to the amount of recovery.

An important boundary to the scope of liability under the FTCA is the "analogous private liability" concept. Under the terms of the Act, federal tort liability arises, if not otherwise excluded, "if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred." Further, the FTCA provides, "[t]he United States shall be liable . . . relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .

The legislative history of the FTCA generally reflects a congressional effort to impose liability on the federal government for "ordinary common law torts," thereby equating the government's liability with that of private parties. While federal law controls the extent of the waiver of governmental immunity, state law is the baseline for determining the circumstances in which liability can arise. The Act has thus been read by the courts as an acceptance of liability on the government's part in situations of recognized private liability rather than as creating new or novel causes of action against the government.

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58 1 L. Jayson, supra note 50, § 58 at 2-51.
60 1 L. Jayson, supra note 50, § 60.
61 Id., § 65.01 at 3.3. According to the Supreme Court in Feres, the reasons for enacting the Federal Tort Claims Act were "[t]he volume of private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results . . ." Feres v. United States, 340 U.S. 135, 140 (1950).
62 23 U.S.C. §§ 1348(b) and 2674 (1978).
63 Id., § 1348(b).
64 Id., § 2674.
66 1 L. Jayson, supra note 50, § 71 at 3-24. For example in Feres v. United States, 340 U.S. 135, 142 (1950) the Court stated that the effect of the FTCA was "to waive immunity from recognized causes of action and . . . not to visit the government with novel and unprecedented liabilities." Similarly in Dalehite v. United States, 346 U.S. 15, 43 (1953), the Court, citing Feres said "[t]he Act did not create new causes of action where none existed before.

Language in Rayonier v. United States, 382 U.S. 315, 319 (1967) that "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability" seems to contradict the
In two early decisions, *Indian Towing Co. v. United States* and *Rayonier v. United States*, the Supreme Court construed the concept of analogous private liability to mean that a plaintiff need not show private liability under *identical* circumstances but rather under *like* circumstances. The Court held that the fact a private individual does not engage in the particular activity involved would not preclude liability. Thus, the Court early on rejected any implicit exemption for activities seen as "uniquely governmental."

In addition to the difficulty in construing the concept of analogous private liability, there arises under the FTCA an initial problem area pertinent to the government's potential tort liability for negligent mine safety inspections—problems associated with the government's "duty" regarding such inspections. In fact, the duty concept in this context has raised several interrelated issues and is a source of conflict for a variety of policy concerns in federal mine inspection liability cases.

Further, the FTCA has, from its enactment, contained a number of explicit exceptions to the government's tort liability. While Congress has revised these exceptions over the years, they remain an important limitation on the potential tort liability of the United States. In terms of the possible liability of the United States for negligent mine safety inspections, two of these exceptions are particularly important and problematic.

The first of these is the so called "discretionary function" exception. Under this exception, no liability attaches in situations where a government

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1 L. Jayson, supra note 50, § 85 at 3-51 (emphasis in original).
2 *350 U.S. 51 (1955).* *Indian Towing* concerned government liability for negligence in connection with the grounding of a vessel as a result of a lighthouse malfunctioning. The claim was that Coast Guard negligence caused the malfunction.

*362 U.S. 315 (1957).* *Rayonier* involved a suit based on the alleged negligence of the U.S. Forest Service in fighting a fire.

*350 U.S. 61, 64 (1950).*

*Id.; 352 U.S. 315, 319.* The *Indian Towing* and *Rayonier* decisions limited language in the earlier *Feres* and *Dalehite* cases. For example, in *Feres*, where the Court rejected government tort liability for injuries to military personnel, part of the Court's justification was that a private party would not be liable in similar circumstances because "no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command." 340 U.S. at 142-43.

Similarly, in *Dalehite*, the Court, in dealing with a claim based upon the Coast Guard's negligence in fighting a fire following an explosion, found that since there was no analogous liability in such a case on a private individual or a local governmental unit, there could be no federal liability.

*28 U.S.C. § 2680 (1976).*

*1 L. Jayson, supra note 50, § 63.*

*28 U.S.C. § 2680(a) (1976).*
employee is exercising or performing a discretionary function or duty, even
where the employee has abused the discretion or acted negligently. Trans-
lated to a situation involving mine safety inspections, a predictable defense
would be that government inspectors are performing a discretionary function
and are exempt from liability.

A second exception under the FTCA important to the issue of mine in-
spection liability is the “misrepresentation” exception. This provision insu-
lates the United States from liability for any claim arising out of a misrepre-
sentation, including a negligent misrepresentation. This exception has seen
considerable use in numerous inspection-related cases where the government
asserts that the basis of the claim is a misrepresentation associated with the
inspection.

Some question has arisen as to whether the exceptions to FTCA liability
are jurisdictional or simply defenses available to the government. The major-
ity view appears to consider the exceptions jurisdictional. However, applica-
tion of an FTCA exception is typically inextricably linked to the merits of the
claim and in most instances a court can only resolve the issue of the applica-

III. FEDERAL MINE INSPECTION LIABILITY—ASPECTS OF ANALYTICAL CONFLICTS
UNDER THE FTCA

In approaching the issue of the federal government’s possible liability for
the negligence of its mine safety inspectors, there appear to be three areas of

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56 See Harris & Schnepper, Federal Tort Claims Act: Discretionary Function Exception Re-
visited, 31 U. MIAMI L. REV. 161 (1976); James, The Federal Tort Claims Act and the "Discretion-
ary Function" Exception: The Sluggish Retreat of an Ancient Immunity, 10 U. FLA. L. REV. 184
(1957); Matthews, Federal Tort Claims Act—The Proper Scope of the Discretionary Function
Exception, 8 AM. U. L. REV. 22 (1957); Peck, The Federal Tort Claims Act—A Proposed Construc-
tion of the Discretionary Function Exception, 31 WASH. L. REV. 227 (1956); Reynolds, The Discre-
tionary Function Exception of the Federal Tort Claims Act, 87 GEO. L.J. 81 (1968); Zillman, The
Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act, 76 MICH. L. REV. 1
(1977); Comment, Federal Tort Claims: A Critique of the Planning Level—Operational Level
Test, 11 U.S.F.L. REV. 170 (1975); Note, The Discretionary-Function Exception to the Federal
Tort Claims Act, 42 MICH. L. REV. 721 (1977); Note, The Discretionary Function Exception to the
Federal Tort Claims Act is Limited Strictly to Policy Formulation, 45 U. CIN. L. REV. 157 (1976);
Comment, Scope of the Discretionary Function Exception Under the Federal Tort Claims Act:
Wright v. United States, 87 GEO. L. J. 879 (1979). See also Annot., 96 A.L.R. FED. 240 (1978) and

57 See infra notes 219-38 and accompanying text.


59 See Comment, Negligent Misrepresentation: A New Trap for the Unwary, 27 LOY. L. REV.

60 See infra notes 284-346 and accompanying text.

61 Barnson v. United States, 531 F. Supp. 614, 619 (D. Utah 1982); Blessing v. United States,


63 Barnson v. United States, 531 F. Supp. 614, 617-18 (D. Utah 1982); Allen v. United States,
concern: A) the duty question (which actually involves several related problems); B) the application of the discretionary function exception; and C) the application of the misrepresentation exception. Consideration begins with the duty issue.

A. Federal Mine Inspections and Duty Questions Under the FTCA

A basic rule in analyzing any negligence claim is that in order for a plaintiff to successfully assert the claim, some “duty of care” owed by the defendant to the plaintiff must be established.\(^{44}\) Of course, the duty element of a negligence claim exists as but one of several factors designed to limit the scope of the defendant’s legal responsibilities.\(^{44}\) In most negligence cases, a duty is pre-

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\(^{44}\) W. Prosser, The Law of Torts § 30 at 143 (4th ed. 1971); Restatement (Second) of Torts § 282 (1965).

The concept of duty as an element of a negligence claim is in reality extremely complex. Simply defined, a duty for negligence purposes is “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” W. Prosser, supra, § 53 at 324. Beyond this, however, to a great extent, efforts to reduce the duty concept to a particular definition or test have proved inadequate. The suggestion then is that the idea of duty in the negligence analysis really represents “a shorthand statement of a conclusion, rather than an aid to analysis in itself.” Id. at 325. Professor Leon Green criticized many of the traditional articulations of the idea of duty as “inexact” and as, in their essence, merely symbolic phrasings “for the judgment required of a judge in giving or denying protection of government to the interest involved . . . .” Green, The Duty Problem in Negligence Cases, 28 Colum. L. Rev. 1014, 1030 (1928). Both Professor Prosser and Green, as well as other commentators and courts, see in the duty determination the point at which the court decides, on the basis of a wide variety of policies and factors, whether legal protections should be afforded the plaintiff by the exercise of governmental power, i.e., the law. Professor Prosser thus states the idea:

The statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct . . . . [I]t should be recognized that ‘duty’ is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

. . . . [A]s our ideas of human relations change the law as to duties has changed with them. Various factors undoubtedly have been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others. Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that courts will find a duty where, in general, reasonable men would recognize it and agree that it exists.

W. Prosser, supra § 53 at 325-27. See also Prosser, Palgraf Revisited, 52 Mich. L. Rev. 1, 15 (1953).

Several courts have recently echoed similar views—that the role of the duty concept in tort law is in part to serve as the focal point for policy considerations, the point where the court must decide whether society calls for the intervention of official power to protect or recompense the plaintiff. See, e.g., Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979).

The duty concept in tort law thus is multifaceted. It is a concept that looks to the foreseeability of harm or risk, to the relationship of the parties, to the type of conduct involved, to the economic and social benefits and burdens flowing from imposing liability, to the impact on future conduct and litigation by establishing such liability, to the moral blame attached to the conduct, and to a host of other considerations.

\(^{44}\) See 2 F. Harper & F. James, The Law of Torts § 18.1 at 1015 (1966); Reynolds, Limits on Negligence Liability: Palgraf at 50, 32 Okla. L. Rev. 63 (1979). In conjunction with the duty of
sumed and the controversy focuses on other elements needed to establish the plaintiff's claim. However, in the context of federal tort liability in connection with statutory inspection activities, including mine inspections, the government's duty to the injured party has played an important analytical role.

1. The Source of the Duty—Federal or State Law?

The initial issue to confront regarding the duty problem is the source of the government's tort duty, if any, in connection with mine safety inspections. In reviewing the cases, two general tracks of analysis can be traced to establish a duty in this context. One approach is to use the particular federal statute or regulation calling for the inspection as the basis for a duty for purposes of a cause of action under the FTCA. Under this approach, state law is relevant for purposes of imposing liability under a negligence per se theory. An alternative track is to begin the duty analysis under the FTCA with the applicable state law. The question for the court is then whether, under local law, in similar circumstances, a private party would owe the plaintiff a duty of care and thus, furnish a basis for tort liability. There are cases that have adopted the first alternative which may be labeled a "federal duty" approach. However, the great majority of courts, including most courts which have considered the issue in regards to mine inspection claims, have taken the view that under the FTCA the appropriate duty analysis looks to state law and that the federal provision does not in itself establish a tort duty or create any cause of action. Under this approach, however, the particular federal statute or regulation still remains relevant to the analysis of the cause of action.

da. Mine Inspections—The Federal Duty Approach. A leading case which is often cited as following a "federal duty" approach in analyzing an inspection-related claim against the United States under the FTCA is Griffin v. United States. In Griffin, suit was brought by a plaintiff who was injured by taking oral live polio vaccine. She claimed that the government, through the Division of Biological Standards of the Department of Health, Education and Welfare, had released a lot of the vaccine in violation of federal regulations requiring certain testing procedures. The district court found and the Third Circuit agreed, that the relevant federal statute and regulations imposed a duty on the United States running to the benefit of the plaintiff. Further, the courts agreed that, given the government's failure to follow the regulations, liability would be imposed under the state's (Pennsylvania) negligence per se.

care there exists factors such as foreseeability, actual and proximate causation, contributory or comparative negligence and assumption of the risk which limit the scope of defendant's liability.


** See infra notes 89-112 and accompanying text.

** See infra notes 121-142 and accompanying text.

** See infra notes 113-129 and accompanying text.


** 351 F. Supp. at 34.

** 500 F.2d at 1069-70.
doctrine.\textsuperscript{93}

A similar approach can be seen in Betesh \textit{v.} United States.\textsuperscript{93} Here a Selective Service physician failed to advise an examinee, as required by federal regulations, of the need to seek private medical attention for a tumor discovered during the exam. The court found that the federal regulations created a duty owed to the examinee and that a violation of the regulation established a presumption of a breach of that duty.\textsuperscript{94}

This type of federal duty analysis has recently been advanced by the plaintiff in a federal mine inspection case, Raymer \textit{v.} United States.\textsuperscript{95} This action against the government arose out of the death of two miners killed when a front-loader in which they were riding turned over. Allegedly, the front-loader was not properly equipped with safety devices. A federal mine inspector had discovered the violation some five months before the accident and had issued a citation. However, the inspector had continually granted the mine operator extensions to comply with his order. In an ambiguous opinion, the federal district court stated that the Federal Coal Mine Health and Safety Act of 1969 "imposes a duty on the [United States] to see that mine safety regulations are vigorously and meticulously enforced."\textsuperscript{96} The trial court then went on to say, "the affirmative act of perpetuating obviously hazardous conditions by granting unwarranted extensions to Peabody [Coal Company] in the absence of any acceptable evidence that Peabody could not comply with the regulations amounts to actionable negligence for which the [United States] is liable."\textsuperscript{97}

The Sixth Circuit, which reversed on appeal,\textsuperscript{98} apparently rejected the idea of liability imposed on the basis of a federally created duty and state negligence \textit{per se} concepts. The plaintiffs in their petition for certiorari argued that these concepts served, in part, as the basis of the trial court's decision and that such an approach was appropriate regardless of whether the federal legislation created a private cause of action.\textsuperscript{99} Plaintiffs argued that, as in \textit{Griffin}, federal mine safety legislation and regulations created a federal duty to a particular class of persons—the miners—of which plaintiffs were members and that under concepts of negligence \textit{per se} recognized by the appropriate state (Kentucky) courts, liability could properly be imposed for violation of such legislative provisions.\textsuperscript{100} Further, in their petition plaintiffs asserted that federal mine legislation, under the standards of \textit{Cort v. Ash},\textsuperscript{101} created an implied pri-

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\textsuperscript{93} 351 F. Supp. at 34; 500 F.2d at 1063, 1069-70.
\textsuperscript{95} Id. at 245.
\textsuperscript{97} 482 F. Supp. at 436.
\textsuperscript{98} Id. at 437.
\textsuperscript{100} Petition for Writ of Certiorari at 11-12, Raymer \textit{v.} United States, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 102 S. Ct. 2009 (1982).
\textsuperscript{101} Id. at 12-14.
\textsuperscript{101} 422 U.S. 65 (1975). In \textit{Cort} the Court set out four factors to be considered in determining whether a statute implicitly created a private cause of action for its breach.
\end{flushleft}
vate cause of action.\textsuperscript{102}

Several courts and commentators have been critical of the federal duty-negligence \textit{per se} analysis.\textsuperscript{103} Critics reason that this approach is inconsistent with the provisions of the FTCA and with the approach taken by the Supreme Court in cases such as \textit{Indian Towing} and \textit{Rayonier}.\textsuperscript{104} Further, it has been argued that such an approach imposes "automatic liability" on the government for the failure of its employees to follow government safety statutes and regulations with the possible negative consequence of discouraging the government from undertaking such programs.\textsuperscript{105}

There is some logic in the federal duty-negligence \textit{per se} analysis. If the plaintiff is a member of the class of persons meant to be protected by the relevant safety statute or regulation (for example, miners) and the injury sustained is one which the statute or regulation was designed to prevent, negligence \textit{per se} concepts, recognized by the common law of many states, may appropriately allow for a cause of action if the federal employee violates the statute or regulation.\textsuperscript{106} One may argue that such an analysis does not do violence to the FTCA’s analogous private liability requirement because a similar approach is used to determine if a cause of action arises from a private party’s violation of a statute or regulation.\textsuperscript{107} Additionally, this approach does not impose automatic liability on the government. As Professor Prosser has observed regarding the negligence \textit{per se} concept:

\begin{quote}
The effect of such a rule is to stamp the defendant's conduct as negligence [sic], with all of the effects of common law negligence, but with no greater effect. There will still remain open such questions as the causal relation between the violation and the harm to the plaintiff, and, in the ordinary case, the defenses of contributory negligence, and assumption of the risk.\textsuperscript{108}
\end{quote}

\textit{Id.} at 78 (emphasis in original).

\textsuperscript{102} Petition for Certiorari, \textit{supra} note 89, at 14-27. Recently, in \textit{Patentas v. United States}, 687 F.2d 707 (3d Cir. 1982), similar arguments were made by plaintiffs in connection with allegedly negligent Coast Guard inspections under the Ports and Waterways Safety Act of 1972. In part, the plaintiffs argued that the Coast Guard’s duty and their cause of action arose by implication under this statute. Referring to \textit{Cort}, the Third Circuit rejected this argument. \textit{Id.} at 710-12.

\textsuperscript{103} See, e.g., \textit{United Scottish Ins. Co. v. United States}, 614 F.2d 188, 197-98 (9th Cir. 1979); \textit{Tompkins, supra} note 3, at 391; \textit{Note, supra} note 85, at 806-07.

\textsuperscript{104} \textit{Tompkins, supra} note 3, at 391; \textit{Note, supra} note 85, at 807.

\textsuperscript{105} \textit{Note, supra} note 85, at 807.

\textsuperscript{106} \textit{W. Prosser, supra} note 83, at 190-204. See also \textit{57 Am. Jur. Negligence} § 272 (1971).

\textsuperscript{107} \textit{See supra} notes 64-71 and accompanying text.

\textsuperscript{108} \textit{W. Prosser, supra} note 83, at 200-01. Further, there is the notion of an excused or justifiable violation of a statute. In most jurisdictions that recognize the negligence \textit{per se} concept it is administered so as to permit consideration of certain factors to excuse the violation. What qualifies
Finally, when other factors are considered, the negative impact on government safety inspections in mines and in other contexts resulting from such an approach may not materialize.\textsuperscript{109}

Approaching the duty issue from the federal duty-negligence \textit{per se} perspective does seem to conflict with the policies behind the FTCA. In reality, under this form of analysis the duty question is answered in a circular fashion by pointing to the relevant federal statute or regulation as creating the duty. The purpose and intent of the FTCA was, however, not directed toward creating new or novel duties but rather toward bringing federal tort duties into line with those imposed by state law.\textsuperscript{110} The use of the federal duty-negligence \textit{per se} approach skirts such limitations and broadly imposes actionable duties in all areas of federal regulation.\textsuperscript{111} This appears inconsistent with the design of the FTCA which seems to require for purposes of finding an actionable duty "a more substantial nexus with state law than negligence \textit{per se} theory."\textsuperscript{112}

In light of these arguments, the federal courts have almost uniformly held that federal mine safety statutes and regulations do not, in themselves, impose a tort duty on the federal officials administering the statutes or create a private cause of action for their breach.\textsuperscript{113} Two recent district court decisions, \textit{Carroll v. United States}\textsuperscript{114} and \textit{McCreary v. United States},\textsuperscript{115} serve to illustrate this view.

In \textit{Carroll}, the plaintiff worked in an underground noncoal mine and was injured when machinery he was using malfunctioned. Claiming that federal inspectors had negligently failed to inspect the machinery or, in the alternative, as an excuse or justification varies. Some jurisdictions take a narrow view of the permitted exceptions, limiting them to factors such as impossibility, emergency and so on. Other jurisdictions take a broader view and permit the fact finder to consider whether the actor used due care in complying with the statute. 2 F. Harper & F. James, supra note 84, § 17.6 at 1007-11.

If the negligence \textit{per se} rule is tempered by the doctrine of justifiable violation ..., it means that violation of a statutory standard is negligence \textit{per se} in a civil case only in the absence of evidence tending to establish some excuse which the court will recognize. If there is such evidence the reasonableness of the actor's conduct is for the jury in the light of all the circumstances including the statute, and the justifiable reliance that others may usually place on its observance.

\textit{Id. at 1010.}

\textsuperscript{109} See infra notes 215-18 and accompanying text.

\textsuperscript{110} See supra notes 64-71 and accompanying text.

\textsuperscript{111} Tompkins, supra note 3, at 391. See also Brief in Opposition to Petition for Writ of Certiorari at 7, Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 102 S. Ct. 2009 (1982).

\textsuperscript{112} Note, supra note 85, at 807.


\textsuperscript{114} 488 F. Supp. 757 (D. Idaho 1980).

had inspected it negligently, plaintiff sued the United States. The government moved for dismissal or summary judgment on the ground that no actionable tort duty existed which could serve as the basis for the plaintiff’s claim. The court agreed with the government’s position. Of particular relevance was the court’s discussion of the federal mining law as imposing a duty on the government. The court said simply that “no private right of action arises under the Mine Safety Act,” referring to the Metal and Nonmetallic Mine Safety Act. Further, the court said:

An action against the United States under the Federal Tort Claims Act cannot be predicated solely on the basis that federal employees failed to enforce or comply with a federal statute or regulation, absent the violation of some common law duty under applicable state law . . . . Thus . . . . the United States owed no federal duty of care to plaintiff solely because it sought to enforce federal health and safety regulations at his workplace.

A similar appraisal of the federal duty analysis can be found in McCreary. The plaintiff in this suit was injured on a strip coal mine allegedly due to the negligence of federal inspectors in conducting inspections of the tipples and conveyor belt on which plaintiff worked. As in Carroll, the government sought to have the suit dismissed on the grounds that it owed no duty to the plaintiff. The court clearly rejected any suggestion that the Coal Mine Health and Safety Act of 1969 created a private cause of action or imposed any tort duty.

The view expressed in Carroll and McCreary, as well as in other mine inspection cases, as to federal law failing to impose an actionable duty on the government, is consistent with numerous other cases dealing with federal inspection liability claims. In most instances, the federal courts have concluded that the relevant federal statute or regulation does not provide a private cause of action or impose a tort duty on the United States under the

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116 488 F. Supp. at 758.
117 Id. at 758-59.
118 488 F. Supp. at 539.
119 See, e.g., United States v. Neustadt, 366 U.S. 696 (1961) (Federal Housing Administration statute and regulations create no duty to borrowers on the part of federal officials in connection with home inspections); Ortiz v. United States, 861 F.2d 826 (10th Cir. 1981) (Farmers Home Administration statute and regulations create no duty to borrowers in terms of home inspections); Galley v. Astra Pharmaceutical Products, Inc., 610 F.2d 558 (8th Cir. 1979) (Federal Food Drug and Cosmetic Act imposes no actionable duty on federal officials regarding enforcement of drug statutes and regulations); United Scottish Ins. Co. v. United States, 514 F.2d 188 (9th Cir. 1979) (Federal Aviation Act does not create a legal duty on the part of FAA to protect passengers in connection with aircraft inspections); Clemente v. United States, 587 F.2d 1140 (1st Cir. 1977), cert. denied, 433 U.S. 1006 (1978) (Federal Aviation Act does not create a duty on FAA’s part in terms of aircraft inspections); Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978) (Occupational Safety and Health Act does not give a private right of action against the United States). See also Schindler v. United States, 661 F.2d 552 (6th Cir. 1981). But see General Pub. Utilities Corp. v. United States, 551 F. Supp. 521 (E.D. Pa. 1982), involving a claim of liability against the United States arising out of the Three Mile Island incident. The court took the view that the government’s duty arose from the provisions of the Energy Reorganization Act of 1974. Id. at 525-26.
FTCA. Most courts suggest that the appropriate duty analysis under the FTCA begins with state law. If, under similar circumstances, state law would impose a duty and allow for liability, the government may be held liable. Under this approach, once the court finds an actionable duty under state law, the federal statute or regulation is utilized in part to determine the scope of the duty and the reasonableness of the government's conduct.120 However, even among the courts which accept this approach to the duty issue, one finds considerable dispute as to the proper analysis to follow.

b. Mine Inspections—Duty Arising Under State Law. The provisions of the FTCA specify that the United States is to be held liable for its actions in those situations where a private person under local law would likewise be held liable.121 As a result, the majority of courts have looked to local law to determine if the United States has a duty and can be held liable for negligent mine safety and other types of inspections. Unfortunately, the federal courts have not been consistent in their views. In determining whether statutory mine safety inspections can give rise to negligence liability, some federal courts have focused on whether, under state law, a private party could be held liable for such federal inspections. Other courts have looked to whether similar state or local government inspections would give rise under state law to tort liability on the part of the state or local government.

The first of these views is reflected in Mosley v. United States.122 In Mosley, the plaintiff brought an action alleging that her husband's death was caused by the negligence of government mine inspectors in inspecting certain equipment and failing to require proper compliance with federal safety regulations. The government asserted it owed no duty to the decedent. In sustaining the government's summary judgment motion, the federal court considered whether a private person in such circumstances would have any duty under relevant local law. The court found:

The inspection provisions of the Mine Safety Act and its regulations apply only to federal officers and employees. The obligations thereunder are imposed

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121 28 U.S.C. §§ 1346(b) and 2674 (1976).
122 456 F. Supp. 671 (E.D. Tenn. 1978). A leading case cited in Mosley and other opinions supporting the analysis is Davis v. United States, 395 F. Supp. 793 (D. Neb. 1975), aff'd, 536 F.2d 758 (8th Cir. 1976) (per curiam). In Davis suit was brought for the death of a worker killed when a trench in which he was working collapsed. The plaintiff claimed the federal Occupational Safety and Health Administration (OSHA) inspector had negligently failed to properly follow up a previous safety violation citation regarding the trench. The federal district court considered whether a private person would have any duty in such circumstances under the relevant local law. In finding no duty, the judge stated:

I find no indication that any law permits Nebraska to place upon private persons the duties cast upon federal officers by OSHA. The Act's thrust is to require designated federal officers to investigate, issue citations, and apply for enforcement orders by a federal court. Nothing resembling those duties devolves on a private person under OSHA.

395 F. Supp. at 795. See also Mudlo v. United States, 423 F. Supp. 1373 (W.D. Pa. 1976); Hatfield, supra note 5, at 606-08. The decision in Davis was based in large part upon Baker v. F & F Investment Co., 439 F.2d 899 (7th Cir. 1971); Devlin Lumber & Supply Co. v. United States, 458 F.2d 88 (4th Cir. 1972); and United States v. Smith, 324 F.2d 622 (5th Cir. 1963).
upon such federal officers and employees, and a private person has no duty thereunder to inspect or cause the inspection of mines. These federal inspection provisions can have no counterpart in private activity and give rise to no liability under the common law . . . So, an action cannot be maintained against the government under the Tort Claims Act for an alleged negligent inspection by federal mine inspectors, since such conduct does not constitute a duty, the breach of which would give rise to a private civil remedy.\footnote{122}

The court in Carroll v. United States\footnote{124} took a different approach. In finding no duty on the part of the federal government for mine safety inspections, the focus of the court's analysis was, in part, on whether under local (Idaho) law the state would be liable for negligence in conducting similar statutory safety inspections. Finding no such liability imposed on the state under local law, the court concluded there could be no analogous federal liability.\footnote{128}

Mercer v. United States\footnote{126} reveals a similar analytical approach to the duty issue. Regarding once again a claim arising out of a mine inspection, the court determined that under the law of Ohio the state was not liable for negligence in performing statutorily mandated safety inspections. As in Carroll, the Mercer court concluded that because the state could not be held liable, the federal government would not be responsible in similar circumstances.\footnote{127}

This sort of duty analysis under the FTCA, looking to state law to impose a duty on private persons for federal mine inspections or requiring an analogous tort duty on the part of the state or local government to perform its safety inspections properly, appears mistaken. The first approach runs counter to the view articulated in cases such as Indian Towing and Rayonier that the FTCA requires private liability under local law in similar, not identical, circumstances.\footnote{129} To require a finding that local law imposes a duty on a private individual, for example, to inspect mines as Mosley suggested, in order to establish liability under the FTCA seems to directly contradict this position.\footnote{128}

\footnote{122} 456 F. Supp. at 674. See also Mercer v. United States, 469 F. Supp. 329 (S.D. Ohio 1978), where the court appeared to follow, at least in part, a similar reasoning pattern stating that, "[n]o Ohio case has been cited by the parties which would subject a private person to liability for negligent performance of an inspection authorized by federal statute." Id. at 331. A similar position was apparently taken by the court in Krajnik v. J.F. Melander Engineers, Inc., No. 74-10071 (E.D. Mich. March 17, 1976).


\footnote{126} Id. at 759 (citing Dunbar v. United Steelworkers of America, 100 Idaho 573, 602 P.2d 21 (1979)), cert. denied, 446 U.S. 933 (1980).


\footnote{127} Id. at 331 (citing Shelton v. Industrial Commission, 51 Ohio App. 2d 125, 367 N.E.2d 51 (1978)).

\footnote{129} See supra notes 68-71 and accompanying text.

\footnote{130} In apparent response to the sort of reasoning found in Mosley, the Sixth Circuit Court of Appeals stated in Rayner v. United States, 660 F.2d 1136, 1140 (6th Cir. 1981), cert. denied, 102 S. Ct. 2009 (1982), that for purposes of FTCA liability in connection with mine safety inspections: [I]t is not determinative that private individuals do not engage in regulatory inspections and enforcement activities. If there are similar activities whose negligent performance by a private individual under like circumstances results in liability under applicable state law, a cause of action exists under the Federal Tort Claims Act.


\footnote{128} Id. at 674.
The second view, that federal liability can attach only if the state would be liable under local law likewise seems to contradict the language of the FTCA as construed by the Supreme Court. The Act makes reference to the liability of a "private individual under like circumstances"—not to that of either the state or local government. Indeed, several recent federal cases have made this point in questioning the courts that have espoused this view.

An alternative approach to the duty issue is evidenced in cases such as Blessing v. United States and Raymer v. United States. In these cases, the courts have, in their duty analysis, focused on whether under state law one who undertakes to render service to another in the form of safety or other inspection activities, can be held liable for negligence. The basis for liability under this alternative approach is the so-called "Good Samaritan" rule relied on by the Court in Indian Towing.

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1296 See supra note 68-71 and accompanying text.
[D]ecisions denying recovery against states and their political subdivisions on grounds of sovereign immunity are not germane to FTCA cases. The pertinent inquiry is whether state law makes a private individual, not the state or other political entity, liable for an employer's failure to exercise due care under like circumstances. 660 F.2d at 1140.
1301 The Good Samaritan doctrine is set out in the Restatement (Second) of Torts, §§ 323 and 324A (1965) as follows:
§ 323. Negligent Performance of Undertaking to Render Services
One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other's reliance upon the undertaking.

§ 324A. Liability to Third Person for Negligent Performance of Undertaking
One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or
(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.
1302 350 U.S. 61 (1955). In holding the United States liable for the negligence of the Coast Guard in maintaining a lighthouse the Court stated:
The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act. Id. at 69.
In Blessing, the court dealt with a claim of liability against the United States arising out of negligent OSHA inspections. In characterizing the plaintiff's claim, the district court emphasized that the source of an actionable breach of duty under the FTCA was not the Occupational Health and Safety Act or its implementing regulations.126

Rather, plaintiffs' claims center on principles of common law tort, made applicable to claims against the United States by the FTCA, whereby one is rendered liable to another for breach of a duty voluntarily assumed by affirmative conduct, even when that assumption of duty is gratuitous . . . . Succinctly put, it is their contention that, having undertaken to make particular inspections pursuant to the Occupational Safety and Health Act, the government assumed a duty to plaintiffs not to conduct those inspections negligently. Plaintiffs further contend that the government breached its duty to them by its allegedly negligent inspections and that it therefore became liable for the injuries that they subsequently suffered.127

Thereafter, the concern of the court's analysis was whether the plaintiffs had properly alleged a cause of action under Pennsylvania's "Good Samaritan" rule. Recently, the federal court in Irving v. United States,128 citing Blessing, followed the same approach regarding a claim for negligent OSHA inspections.129

The Sixth Circuit Court of Appeals has also followed a similar analytical approach in Raymer.130 In Raymer, a case involving mine safety inspections, the court looked to state Good Samaritan rules relating to undertakings by private individuals to assess whether a duty arose on the part of the federal government.131 The court, echoing Blessing, said that the source of any duty must be state law and not the directives of the federal statute and regulations as to mine inspections.132

Assuming that the federal duty-negligence per se concept is properly rejected, cases such as Blessing and Raymer and others adopting a similar analysis133 seem to reflect the appropriate approach to the duty issue for statutory mine safety inspection. While such a methodology does not necessarily result in the finding of a duty on the part of the federal government, it frames the questions properly. The source of any duty imposed on the government is local law, as applied to private parties in similar, not identical situations. The fact that local law may not impose a duty on private parties under federal statutes or the fact that state and local governmental entities are immune from similar liability should not be relevant to this inquiry. This does not mean that the federal statute or regulation mandating the mine inspection is irrelevant. The

126 447 F. Supp. at 1166.
127 Id. The court further discussed the appropriate approach to the duty analysis focusing its attention on state law, not federal law, as the source of any tort duty. Id. at 1166 n.37.
129 Id. at 844-45.
131 Id. at 1140-44.
132 Id. at 1140.
133 See, e.g., United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979).
statute or regulation involved, as well as other factors relevant to a Good Samaritan rule analysis, may well be important in determining the scope of the undertaking by the government.\textsuperscript{144}

Because a plaintiff is successful in avoiding the problem posed by cases such as Mosley and Carroll, does not mean the court will in fact find a duty arising from government mine inspections. The common law Good Samaritan rule, as embodied in Restatement (Second) of Torts sections 323 and 324A, is not of a single cloth. It is a complex set of factors concerning which differing views have evolved. Further, the limitations of relying on the Restatement as a source for legal rules must be kept in mind. In contrast to statutes which reflect authoritative legislative directives, the Restatement is simply an effort to describe, succinctly, rules derived from decided cases. As one court has recently observed: “Even where a particular Restatement section has received specific judicial endorsement, cases where that section is invoked must be decided by reference to the policies and precedents underlying the rule restated. Textual analysis of the Restatement is useful only to the extent that it illuminates these fundamental considerations.”\textsuperscript{145} Thus, when confronted with a claim against the United States for negligent statutory inspections, while state law should direct the analysis, the complexity of the Good Samaritan doctrine under state law allows for considerable judicial maneuvering often involving broad policy choices. In applying this doctrine many federal courts have expressed a distinctly cautious view, fearing that a broad reading of the doctrine will adversely affect government inspections.

2. The Government as Good Samaritan—The Need to Show an Undertaking to Render Services

Under the Good Samaritan rule as formulated in the Restatement, liability typically requires a finding that the defendant, through his actions, has undertaken to render services to another either for consideration or gratuitously.\textsuperscript{146} Many federal courts in mine inspection cases have taken the view that by conducting such inspections the government has not undertaken to render services to another. These courts reason that the purpose of federal inspections is simply to protect various federal interests. To find liability, it is asserted, the government must not be carrying out its own purposes in conducting inspections, but must have directly undertaken to provide services thereby to another person.\textsuperscript{147}

The recent decision in Taylor \textit{v. United States} presents an example of this sort of reasoning.\textsuperscript{148} The court, in dealing with a mine safety inspection claim, noted that under the Restatement’s formulation of the Good Samaritan

\textsuperscript{144} Schindler \textit{v. United States}, 661 F.2d 552, 560-61 (6th Cir. 1981).
\textsuperscript{146} See \textit{RESTATEMENT (SECOND) OF TORTS} §§ 323 and 324A (1965). For text of Restatement sections see \textit{supra} note 134.
\textsuperscript{147} See Dombroff, \textit{supra} note 3, at 241-44; Hatfield, \textit{supra} note 3, at 610-12.
rule there must be an undertaking to render services to another person.\textsuperscript{148} The court, relying on similar views in \textit{Mercer v. United States}\textsuperscript{149} and \textit{Kilpatrick v. United States},\textsuperscript{150} found that federal mine safety legislation and inspections pursuant to it did not constitute such an undertaking in that inspections on behalf of the government are for the government's benefit and purposes and not for the direct benefit of the miners.\textsuperscript{151} According to the court, the fact that primary responsibility for mine safety, by the express terms of federal law, is placed on mine operators and not on the government was consistent with the court's position that mine inspectors further federal interests.\textsuperscript{152} This rationale has also been adopted by the Federal District Court for the Western District of Pennsylvania in \textit{McCreary v. United States}.

Other courts have been less willing to conclude that the government has not undertaken to render services to others simply because the government may have its own purposes for conducting mine inspections. \textit{Raymer v. United States} is an example of such a case.\textsuperscript{153} In \textit{Raymer}, the court found that federal mine safety and health legislation and the inspections conducted pursuant to it did constitute an undertaking by the government to render services to others sufficient to invoke the state's Good Samaritan doctrine.\textsuperscript{154} In doing so, the

\begin{itemize}
  \item \textsuperscript{148} Id. at 188.
  \item \textsuperscript{149} 460 F. Supp. 329 (S.D. Ohio 1978).
  \item \textsuperscript{150} No. 79-P-1106-J (N.D. Ala. March 19, 1980).
  \item \textsuperscript{151} 521 F. Supp. at 188. In \textit{Kilpatrick} the court stated:
    \begin{quote}
      In order for the good samaritan doctrine to apply, there must be an undertaking to
      render services. Therefore, the two applicable Restatement sections must be viewed in
      the context of the Federal Coal Mine Health and Safety Act. This Act is a regulatory act
      designed to establish and enforce health and safety standards in mines. 30 U.S.C. §
      801(g). Restatement § 321 calls for a direct rendering of services to the person who is
      injured. Under the Federal Coal Mine Act, however, there is no such direct rendering of
      services by the mine inspectors to the miners, even though the miners may indirectly
      benefit from the inspections.
    \end{quote}
  \item \textsuperscript{152} Restatement 324A deals with situations in which there is a rendering of services to
    one person for the protection of another. Although arguably miners are third persons
    who are protected by the inspections, nevertheless there is no rendering of services to the
    mine employers by the mining inspectors. Moreover, the cases in which the Alabama
    court has recognized liability to third persons for negligent inspections, such as when
    workmen's compensation carriers undertake to make inspections, are not applicable to
    the present case. In those cases there is a direct pecuniary benefit received by the one
    making the inspections (by reducing the risk of injury and thus its losses), and likewise
    by the employer (in reducing his losses and lowering his premiums). Here, however, there
    is no direct benefit received by the government agency, nor is there a direct rendering of
    services to the employer. Therefore, no duty arises here under Restatement § 324A upon
    which tort liability can be premised. Furthermore, no Alabama cases have been cited to
    this court in which a duty has been recognized when a government regulatory official
    undertakes to enforce a regulatory statute.
  \item \textsuperscript{153} Kilpatrick v. United States, No. 79-P-1106-J, slip. op. at 2-3 (N.D. Ala. March 19, 1980) (citations
    omitted).
  \item \textsuperscript{154} 521 F. Supp. at 188.
  \item \textsuperscript{155} 488 F. Supp. 538, 540 (W.D. Pa. 1980).
  \item \textsuperscript{156} 860 F.2d 1136 (6th Cir. 1981), cert. denied, 102 S. Ct. 2009 (1982).
  \item \textsuperscript{157} Id. at 1144.
\end{itemize}
court expressly rejected the analysis of the Taylor and Kilpatrick cases.\textsuperscript{157} Other cases, including Barnson \textit{v. United States},\textsuperscript{158} which involved claims by persons injured in uranium mines, have recognized that statutorily authorized inspections can constitute an undertaking by the government to render services to others despite the fact that other governmental objectives may also be served.

These latter cases reflect the better analysis on the undertaking issue. To conclude that government inspections do not constitute an undertaking to render services to others because the government may serve some of its own purposes in conducting mine inspections or because statutes such as the Mine Health and Safety Act place the primary responsibility for safety on the employer, seems to ignore reality and the stated purposes of such statutes.\textsuperscript{159} Certainly mine inspections can and do have more than one purpose. Just as certainly, one of these purposes—in reality the primary purpose—is to assure specific interests of particular, identifiable members of the public—miners.\textsuperscript{160} The same risks that motivate the government to inspect to satisfy its own purposes (e.g., compliance with federal safety regulations) are the risks that produce injuries to the miners. Further, to focus solely on the government’s own stated intent in imposing a duty “is inconsistent with the conceptual underpinnings of tort law, which, for reasons of policy, often imposes a duty regardless of a defendant’s intent.”\textsuperscript{161} Finally, it seems unreasonable simply to absolve the government from tort liability on the basis that its mine inspections are intended in part for its own benefit. Realistically, if the injury-causing element comes within the orbit of the government’s inspections, such that an inspector acting reasonably did or should have discovered the risk and should have acted to eliminate the danger, the fact that the government had other purposes in inspecting should not matter.

A finding of governmental undertaking to render services to others does not mean negligence liability necessarily follows. In order to recover damages, the plaintiff must still meet a host of other requirements imposed by common law principles in most states. The scope and purpose of the government’s inspections are relevant to this further inquiry. The plaintiff must show that the scope and purpose of the government’s inspections included the injury-causing risk and that the failure to discover the risk or act upon its discovery was unreasonable. If the danger was wholly outside the scope of the government’s inspection, such that the risk was not reasonably discoverable or foreseeable,

\begin{itemize}
\item \textsuperscript{157} Id.
\item \textsuperscript{158} 531 F. Supp. 614 (D. Utah 1982).
\item \textsuperscript{159} The Federal Mine Health and Safety Act states that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner . . . .” 30 U.S.C. § 801(a) (Supp. IV 1980). Therefore, one of the stated purposes of the Act is to develop mechanisms “to protect the health and safety of the Nation’s coal or other miners . . . .” 30 U.S.C. 801(g)(1) (Supp. IV 1980).
\item \textsuperscript{160} Dunbar \textit{v. United Steelworkers}, 100 Idaho 523, 548, 602 P.2d 21, 46 (1979) (Bistline, J., concurring and dissenting), cert. denied, 446 U.S. 983 (1980).
\end{itemize}
the imposition of liability is inappropriate. Still, in terms of an initial finding of an undertaking sufficient to invoke the Good Samaritan doctrine, the cases dismissing plaintiffs' claims on the basis of no such undertaking by the government are clearly in error.

3. The Government as Good Samaritan—The Need to Show Reliance or An Increased Risk of Harm

The Restatement's Good Samaritan provisions incorporate a series of alternative requirements which the plaintiff must satisfy in order to establish liability on the part of the defendant under the doctrine. For example, under section 323 of the Restatement, the plaintiff must show that the defendant's failure to exercise reasonable care in performing his undertaking either increased the risk of harm for the plaintiff or resulted in injury because of the plaintiff's reliance on the undertaking. Similarly, under section 324A the plaintiff has several possible avenues to follow to establish a defendant's duty. He may assert that the defendant, in negligently rendering services to a third party, increased the risk of harm to the plaintiff. Alternatively, he may argue that the defendant undertook the performance of a duty owed to the plaintiff by another person. Finally, he may claim that the defendant caused the plaintiff's harm because of the plaintiff's or the other party's reliance on the defendant's undertaking.

The appropriate conceptualization of these elements is subject to some disagreement. Some courts have construed the provisions of section 323 and section 324A to state the requirements of proximate or legal cause with the undertaking itself creating the duty. However, some courts view these elements as necessary prerequisites to a finding of duty. In reality, it matters little which characterization is used since the underlying issues are the same.

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160a See Patentas v. United States, 687 F.2d 707, 716 (3d Cir. 1982).
161 For text of RESTATEMENT (SECOND) of TORTS §§ 323 and 324A see supra note 154.
164 In discussing the relationship of proximate cause and duty in the negligence analysis, Professor Prosser observes:

Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for what he has caused. Unlike the fact of causation, with which it is often hopelessly confused, this is essentially a problem of law . . . . Quite often this has been stated, and properly so, as an issue of whether the defendant is under any duty to the plaintiff, or whether his duty includes protection against such consequences. This is not a question of causation, or even a question of fact, but quite far removed from both; and the attempt to deal with it in such terms has led and can lead only to utter confusion.

The term "proximate cause" is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established. . . . The word means nothing more than near or immediate and when it was first taken up by the courts it had connotations of proximity in time and space which have
These requirements have produced considerable controversy among the courts in a variety of settings. In the context of federal inspection liability, including mine inspections, many courts have looked to these requirements as an embodiment of the common law position of most states. In doing so, many federal courts have read them in a strict and narrow fashion, thereby tightly compassing the scope of possible government liability. A variety of logical arguments and policy justifications have been offered by these courts for their analyses. Blessing v. United States is a leading example in this area.106

Blessing involved a suit for injuries allegedly suffered by factory workers due to the negligence on the part of OSHA officials in failing to inspect and discover safety hazards in the equipment utilized by the plaintiffs. The government moved to dismiss, in part asserting that the plaintiffs had failed to state a cause of action under the Good Samaritan rules of Pennsylvania. To determine whether the plaintiffs had stated a cause of action, the court looked to the requirements of sections 323 and 324A of the Restatement.

The court first addressed the argument under Section 324A(b) that the government by its inspections had attempted to fulfill the employer's duty to

long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason "legal cause" or perhaps even "responsible cause" would be a more appropriate term.

It is quite possible, and often helpful, to state every question which arises in connection with "proximate cause" in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur? Such a form of statement does not, of course, provide any answer to the question, or solve anything whatever; but it does serve to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact. The question becomes particularly helpful in cases where the only issue is in reality one of whether the defendant is under any duty to the plaintiff at all—which is to say, whether he stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for his benefit. Or, reverting again to the starting point, whether the interests of the plaintiff are entitled to legal protection at the defendant's hands against the invasion which has in fact occurred. Or, again reverting, whether the conduct is the "proximate cause" of the result. The circumlocution is unavoidable, since all of these questions are, in reality, one and the same.

The ordinary usage of the courts has been to confine the word "duty" to questions of the existence of some relation between the defendant and the plaintiff which gives rise to the obligation of conduct in the first instance, and to deal with the connection between that obligation, once it has arisen, and the consequences which have followed in the language of "proximate cause." The usage is no doubt well enough, so long as it is not allowed to obscure the fact that identical questions are often still involved, and buried under the two terms, sometimes so deeply that a good deal of digging is called for to uncover them.

W. Prosser, supra note 83, § 42, at 244-45.

106 Perhaps the most noteworthy is that of claims against various sorts of insurers, for example workers' compensation insurers, for negligence in conducting insurance related safety and other inspections. In this regard see Bardenwerper & Schmalz, Insurer's Liability for Safety Inspections, 20 For The Defense 81 (1979).

maintain a safe workplace. The court rejected this argument as a basis of liability. Reasoning from the Restatement’s illustrations and from cases in other contexts, the court found “the United States would be liable to plaintiffs only if by undertaking to make inspections . . . OSHA actually undertook not merely to supplement the employer’s own safety inspections, but rather to supplant those inspections. . . .” Given the express language of the federal law, the court concluded “the United States has not, through OSHA, undertaken to perform any duties of the employer, but rather has undertaken to make inspections that are supplemental to, but independent of, inspections required of employers by their common law duties to their employees.”

As to the other alternatives, reliance or an increased risk of harm, the court found the plaintiff’s simple allegation that the accidents were the result of negligence on the part of OSHA officials insufficient to state a claim. Unless the harm was caused by increased risk or reliance, the fact that the injuries complained of resulted from the defendant’s undertaking was viewed as inadequate under the Restatement. The plaintiffs were given leave to amend their complaint in this regard.

As to the reliance element, the Blessing court never explicitly stated what must be alleged and shown to establish reliance. The thrust of the opinion, however, seems to be towards requiring plaintiffs to show a choice by them (or their employer) to look to federal inspectors for protection. In particular, plaintiffs must prove that as a result of the government’s inducements they (or their employers) had purposely come to rely specifically and principally on the government for their safety. The plaintiffs argued that a showing of reliance

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167 Id. at 1193.
168 Id. at 1194.
169 The court cited 29 U.S.C. § 654(a)(1) which provides that “[e]ach employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees . . . .” 447 F. Supp. at 1195. The court also referred to 29 U.S.C. § 659(4). Id. at 1196.
170 447 F. Supp. at 1196. See also Hatfield, supra note 3, at 613.
172 Id. at 1197. As to the increased risk of harm alternative, the general view taken is that the defendant’s actions must actually worsen the situation for the injured party. See Paternas v. United States, 687 F.2d 707, 716-17 (3rd Cir. 1982); United States v. DeVane, 806 F.2d 182 (5th Cir. 1986). See also Hatfield, supra note 3, at 612.
173 447 F. Supp. at 1197-1200. In Paternas v. United States, 687 F.2d at 717, the court dismissed the plaintiffs’ claim of reliance on Coast Guard inspections because there was no showing that the plaintiffs knew the Coast Guard was conducting safety inspections or that they were thereby induced to forego their own safety efforts. See also Hatfield, supra note 3, at 612-14, where the author states:

In order to establish the requisite reliance under Section 324A(c), which would give rise to a good Samaritan duty, a plaintiff must establish that the person sustaining the injury or damage relied on the inspection . . . to their detriment. In Gelley v. Astra Pharmaceutical Prod., Inc., [610 F.2d 558 (8th Cir. 1979)] the Eighth Circuit commented on the indicia needed for the requisite reliance to impose liability for governmental regulatory functions. “Reliance on the inspection in general is not sufficient. Instead, the reasonable reliance must be based on specific actions or representations which caused the person to forego other alternatives of protecting themselves.”
was not necessary.\textsuperscript{174} The court disagreed.\textsuperscript{175} In deciding to require a strict showing of reliance or increased risk of harm, the court concluded that it would thereby ensure that before the government can be held liable for negligence in conducting inspections it does something positive to contribute to the injury.\textsuperscript{176} The court reasoned that to dispense with requirements of specific reliance or an increase in the risk of harm would expose the government to too broad a potential liability in conducting inspections. This in turn would dissuade the government from undertaking such inspections.\textsuperscript{177} Asserting that in most instances government inspections are beneficial and rejecting the proposition that “no inspection at all is better than a negligent one,” the court chose to adhere to a narrow reading of the Restatement’s requirements.\textsuperscript{178}

A similar emphasis on a strict reading of the Restatement requirements can be seen in a number of coal mine inspection cases. In Raymer v. United States, the Sixth Circuit, in reversing a decision for the plaintiffs arising from the failure of federal mine inspectors to require prompt correction of safety violations, emphasized that the evidence did not establish that the negligence of the inspectors had increased the risk of harm or that the miners or mine owners had justifiably relied on the federal inspectors to assure safety.\textsuperscript{179} The court reasoned that the safety problems involved were known to the miners and mine operator and that continued use of the equipment without correction was not in reliance on any safety assurances made by federal inspectors.\textsuperscript{180} Further, the court noted that by federal law primary responsibility for mine safety is placed on mine operators so that there could be no justification in relying on federal inspectors whose responsibilities are “strictly secondary.”\textsuperscript{181} This same view—that there is no basis for miners to rely on federal safety inspectors because safety is the operator’s responsibility—is taken in Mercer v. United States.\textsuperscript{182}

\textsuperscript{174} 447 F. Supp. at 1197-98.
\textsuperscript{175} Id. at 1198.
\textsuperscript{176} Id. at 1199.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id. The court referred to 30 U.S.C. § 801(s) (Supp. IV 1990) which provides that “the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such [unsafe and unhealthful] conditions and practices in such mines . . . .”
\textsuperscript{182} 460 F. Supp. 329 (S.D. Ohio 1978). The court in Mercer, in dealing with a wrongful death claim arising out of an allegedly negligent mine inspection under the Federal Metal and Nonmetallic Safety Act said:

The Federal Metal and Nonmetallic Safety Act, 30 U.S.C. §§ 721-46, which authorizes the inspections at issue in this case, expressly imposes the sole responsibility for maintaining safe mining conditions directly upon the mine operators. The Secretary of the Interior is directed by the statute to promulgate standards “and the operators of mines to which such standards are applicable shall comply with such mandatory standards.” 30 U.S.C. § 725(a) and (b) (emphasis supplied). The Secretary is authorized to make such inspections “as he shall deem necessary” for determining whether the mine operators are in compliance with these standards. 30 U.S.C. § 723. Upon discovering a violation, the inspector may issue an order requiring the mine operator to withdraw all persons from the dangerous area. A federal inspector assumes no responsibility to maintain compli-
Even given the narrow-based approach to the Good Samaritan doctrine taken in these decisions, federal courts in several cases have found sufficient evidence of reliance to support imposition of liability on the government. These cases, including several air traffic controller cases, reflect the types of situations plaintiffs often must establish before the courts will recognize any liability on the part of the government under the doctrine.

In mine inspection and other similar cases, the courts in declining to find any Good Samaritan liability on the part of the government have contrasted their situations with cases where liability has been imposed on the United States for the negligence of its air traffic controllers. In such cases, the courts have observed, the reliance element necessary to establish Good Samaritan liability is evident. The situation is "imbued with reliance" in that pilots and others necessarily depend specifically on air traffic controllers. Further, the government alone directs air traffic. It has in effect preempted the field. Under these circumstances, as in others referred to by the courts, where the government has fully supplanted private responsibilities, the public necessarily must rely on the government to properly fulfill its undertaking. As observed by several courts, these cases seem to easily fall within one of the other Restatement alternatives, namely that of section 324(A)(b) involving the assumption of another's duty. However, they are often cited as cases establishing the sort of reliance necessary under the Restatement alternatives discussed previously in this article. Mine inspections are quite different. The government's safety operations are not exclusive; others retain significant safety responsibilities and this sort of necessary reliance is not evident.

In other inspection cases the courts have found specific reliance and the sort of relationship necessary to establish a Good Samaritan liability even though the government has not, as in the air traffic controllers' cases, fully preempted the field. For example, in Park v. United States, suit was brought against the government for the negligence of federal officials inspecting a new home financed through the Farmers Home Administration (FmHA). Following a trial on the merits, the district court found that the plaintiffs had specifically relied on the FmHA supervision to oversee construc-

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tion of their home and that given the representations and actions of government officials, the reliance was justified. The court characterized the relationship between the home buyers and the government officials as one of "privity, trust and reliance."188

The government's position in Park is quite different from that in the air traffic controllers cases where it has fully preempted the field creating a situation of necessary and complete dependence. Certainly, the primary responsibility for assuring proper construction falls upon the builder, not the government. Further, the purchaser, at least in theory, is not prevented from acting to protect his own interests. Yet the court in Park did not see this as precluding specific reliance sufficient to impose a duty on the government. In turn, the circumstances in Park can easily be distinguished from those in Blessing or Raymer. In those cases, the injured parties remained simply faceless and nameless members of the public who had no direct contact with federal officials. The parties could not establish the sort of relationship, as in Park, required to find reliance and thus justify under this narrow approach imposing liability on the government. In contrast, the government officials in Park came into direct contact with particular individuals—individuals who could testify that they had talked with these officials and had, because of what was said and done, specifically relied on these officials to protect them.

These cases evince a distinctly conservative approach in the application of the Good Samaritan doctrine. In order for the plaintiff to establish the requisite duty (or proximate cause), he must show specific and direct reliance on government inspections—in effect a direct relationship or privity—affirmative actions on the part of federal inspectors which actually increase the risk of harm or a situation in which the government's inspections have totally supplanted the responsibilities of others, creating a situation of necessary reliance. The justification for this conservative approach in most cases, including mine inspection cases, is rooted fundamentally in a concern that to impose any additional legal duty on the government will dissuade the government from undertaking inspections at all. Thus, the courts balance the overall benefits of inspection activities by the government against the costs of government negligence to conclude that any findings of duty should be strictly limited to narrow and largely uncommon situations. Further, given that at least in theory others bear primary responsibility for protecting the interests at stake in most inspection related cases, these courts justify declining to impose any duty on the government beyond tightly restricted boundaries.

A survey of cases involving state law in other factual contexts, for example the potential liability of insurers for negligent inspections, indicates that the conservative analysis of the federal courts is consistent with the approach in these cases.189 Thus, in dealing with efforts to impose liability on workers' compensation and other insurers for injuries resulting from negligent inspections, many state courts have applied a narrow concept of specific reliance, required

188 517 F. Supp. at 979.
189 Bardenwerper & Schmutz, supra note 168.
a showing of affirmative actions creating new or heightened risks of harm and have required that the insurer's inspections totally supplant those of the insured in order to establish a duty arising out of the insurer's undertaking to inspect.¹⁰⁰

Given the generally restrictive analysis utilized by many state courts in applying the Good Samaritan doctrine in inspection liability situations and given the FTCA requirement that the federal courts look to local law to determine government tort liability, plaintiffs seeking to establish government mine inspection liability generally face a difficult time. To the extent that state law has restricted the scope of Good Samaritan duty, the federal courts will likewise be restricted at least in theory in its analysis. However, a number of arguments can be made against a narrow analytical approach to the Good Samaritan concept. An alternative viewpoint can be advanced as to each of the Restatement's requirements to justify a broader imposition of duty on the part of the government in mine inspection cases than recognized presently. While the support among the courts and commentators for this is limited, there remains cogent support. Further, there are several policy considerations which can be advanced to support a broadened scope of duty on the part of the federal government when it undertakes mine inspections.

Beginning with the alternative of an increased risk of harm, found in both sections 323 and 324A¹¹¹ of the Restatement, one can argue that negligence on the part of the government in conducting mine inspections and thereby failing to discover or abate hazards, increases the risks to which the miner is exposed. To limit the government's potential liability under this alternative to instances where it has affirmatively created new risks, although apparently consistent with the widely held view,¹¹² is unduly restrictive. Given the scope and importance of federal inspections to the miners' health and safety, a failure on the government's part to carry out its assumed responsibilities in a reasonably prudent fashion exposes the miner to a heightened risk of injury. Cases in a number of other inspection contexts evidence a more liberal approach to this alternative. For example, in a recent case involving negligence on the part of the federal government in licensing and testing polio vaccine, Loge v. United States,¹¹³ the appellate court rejected a narrow analysis of the increased risk of harm alternative. The lower court ruled that the plaintiff could not rely on this alternative to establish a duty because any negligence on the part of the government in testing or licensing the vaccine had not increased the risk inherent in the drug, but had merely allowed it to continue. In response the Eighth Circuit stated:

It can be said that the government increased the risk of harm . . . by licensing an allegedly untested product . . . and by releasing to the public an allegedly untested or negligently tested lot of that vaccine; if either the product itself or

¹¹¹ For the text of Restatement (Second) of Torts §§ 323 and 324(A) see supra note 134.
¹¹² See supra note 172.
a particular lot of that product failed to conform to standards established by
the regulations, then proper testing or proof of testing would have revealed the
nonconformity and the vaccine never would have been disseminated. . . . 144

A similar argument could be made as to negligent federal mine inspections. The negligence of a federal mine inspector in failing to discover a mine
safety violation or require its correction means that miners are exposed to a
risk which should, but for the negligence of the inspectors, be eliminated. The
Rayner case is a good example of this sort of situation. 145 By repeatedly
and—in the trial court's view—unreasonably granting extensions to the mine
operator to correct safety violations, the government inspector in a very real
sense increased the risk of harm to miners. Each extension perpetuated the
risk which should properly have been abated and encouraged the operator to
continue to operate with the violation unchanged.

Another approach available to plaintiffs in mine inspection cases is to as-
sert, under Restatement section 324A(b), that the government has undertaken
to perform the mine owner's duty to assure the miner's safety. Again, the diffi-
culty here is that most courts have rejected this alternative as to government
inspections on the grounds that to satisfy this alternative the government must
totaly preempt the owner's safety inspection responsibilities. 146 Still, there is
authority supporting a broader reading of this alternative. The Loge opinion
suggests that the government by its testing activities did undertake a duty
owed by the drug manufacturer to the public even though the manufacturer
bears primary responsibility for the safety of the drugs. 147 Further, a number
of courts dealing with inspection liability actions in other factual settings have
explicitly rejected the view that to establish a duty under this alternative the
defendant must fully supplant the other party's inspection efforts. For exam-
ple, in United States Fidelity & Guaranty Co. v. Jones, the Alabama Supreme
Court in imposing liability on an insurer for negligent workplace inspections
reasoned that this restricted view of section 324A(b) overlooked the estab-
lished concept of joint tortfeasors and was not justified. 148

A final avenue open to plaintiffs is to argue that the federal courts' general
approach to the reliance requirement is simply too restrictive. The role of reli-
ance within the Good Samaritan concept has been debated by the courts in
various factual settings. 149 As noted, the approach to the reliance issue taken in
many inspection cases, including those involving government mine inspections,
is to require that the plaintiff (or the mine owner) specifically and purposefully
rely on the defendant's inspections as a result of the defendant's explicit or
implicit inducements to do so, such that the plaintiff (or the other party) re-
frains from taking otherwise appropriate precautions. 150

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144 Id. at 1274.
145 See supra text accompanying notes 95-97.
146 See supra text accompanying notes 167-70.
147 662 F.2d at 1274.
148 366 So. 2d 596, 598 (Ala. 1977).
149 See, e.g., Bardeauwerper & Schmals, supra note 165, at 95-96.
150 See supra text accompanying notes 173-82.
Although this restrictive concept of reliance may represent the predominant view, there is authority rejecting the need for the plaintiff to establish specific reliance under the Good Samaritan doctrine. Most often cited in this regard as the leading case is *Nelson v. Union Wire Rope Corp.* where a number of workers injured on a jobsite sued their employer's workers compensation and public liability carrier for negligence in making worksite inspections.\(^\text{301}\) The court rejected the argument that reliance, either by the insured or its employees, was a necessary element of a Good Samaritan claim:

> We think it clear under the law that defendant’s liability for the negligent performance of its undertaking, as distinguished from a failure to perform, is not limited to such persons as might have relied upon it to act but extends instead to such persons as defendant could reasonably have foreseen would be endangered as the result of negligent performance. It is axiomatic that every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act, and that such duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons.\(^\text{302}\)

The court went on to say, "[p]laintiffs, as workmen on the project, were the chief beneficiaries of the safety inspections and safety engineering services rendered by defendant... [so] that defendant could reasonably have expected and foreseen that they would be endangered by its failure to use due care."\(^\text{303}\) The *Nelson* opinion reflects a minority position. It has been the subject of much debate—and considerable criticism regarding the reliance element.\(^\text{304}\) The perspective represented in *Nelson* is that one who undertakes to render a service to others owes a duty to all persons foreseeably injured as a result of negligence in performing the undertaking. Clearly this moves the duty boundary out from the narrow confines of specific reliance, which imposes a relational limit, essentially in the nature of a privity requirement, in order to establish a Good Samaritan duty. The limits of duty in this context then become more consistent with the broader duty concept in negligence law that says one’s duty runs to all persons, known and unknown, foreseeably injured by a failure to exercise due care. The focus in determining the defendant’s duty thus shifts away from what the plaintiff did (his reliance) to the defendant and what was foreseeable under the circumstances.

Several recent federal aircraft inspection cases have evidenced a more liberal attitude regarding the reliance element. The Ninth Circuit in its recent decision in *S.A. Empresa De Viaco Aerea Rio Grandense (Varig Airlines) v. United States*\(^\text{305}\) reversed the trial court’s determination that summary judg-

\(^{301}\) 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

\(^{302}\) Id. at 86, 199 N.E.2d at 779.

\(^{303}\) Id., 199 N.E.2d at 773-80.


\(^{305}\) 692 F.2d 1206 (9th Cir. 1982); The trial court had ruled, on the authority of Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978), that although FAA regulations establish safety standards and provide for inspection to assure compliance with such
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ment should be granted the government in a personal injury claim arising out of an allegedly negligent FAA aircraft inspection and certification. In part, the United States argued it could not be held liable under these circumstances because it could not be shown that any one, including the passengers on the airplane, had relied on the government’s inspections. The court disagreed and stated:

The United States, through the F.A.A., has voluntarily undertaken the inspection and certification of all civilian aircraft. The Federal Aviation Act of 1958, 49 U.S.C. § 1301, et seq., requires the F.A.A. 'to promote safety of flight of civil aircraft in air commerce' and to perform its duties 'in such manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation . . . .' 49 U.S.C. § 1421. The Act provides for a mandatory certification procedure, 49 U.S.C. § 1423, and the F.A.A. has established design criteria that every aircraft must meet before being certified for flight.

Members of the flying public may not know the specific contents of F.A.A. regulations. There is general knowledge, however, that regulations designed to insure optimum safety exist and that the United States inspects each aircraft for compliance. The public knows that the government 'grounds' aircraft until questions about safety are resolved. The United States should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify.106

On the same day in which the Ninth Circuit decided the S.A. Empresa case, it also affirmed a district court finding of liability on the part of the federal government on remand in United Scottish Insurance Co. v. United States.107 Again, among the government’s arguments was a lack of sufficient reliance by the public on government aircraft inspections. The court again rejected this view and upheld the trial court’s determination that the public generally depends on the government to properly inspect aircraft and that this is sufficient to justify a finding of liability.108

Arguably, cases such as these are similar to the air traffic controllers’ cases where the government has fully supplanted private responsibility thereby creating a situation of necessary reliance. However, the courts and commentators have consistently distinguished aircraft inspection cases from controller cases on the basis that the government has not preempted the field and consequently forced the public to rely on it.109 Thus, one can reason from these cases that a broadened view of reliance is appropriate in the duty analysis, focusing

106 Id. at 1206.
107 692 F.2d 1309 (9th Cir. 1982).
108 Id. at 1211. The court also cited In re Air Crash Disaster Near Silver Plume, Colo., 446 F. Supp. 384 (D. Kan. 1977).
on a concept of general dependence and foreseeable harm to others rather than on narrow relational elements such as privity and specific reliance.

A plaintiff seeking to establish governmental duty in a mine inspection case, regardless of the approach taken to establish such duty, is faced not simply with the generally restrictive analysis of the Good Samaritan concept, but with the policy arguments and justifications advanced to rationalize the position as well. In particular, the courts have asserted that to broaden the scope of the government's duty would adversely effect the government's willingness to undertake mine inspections.210 The reasoning is usually that it is better to permit the government to act negligently in some instances and not be held liable since in most instances its mine inspections are beneficial. Further, the courts have justified a narrow conceptualization of the government's duty by noting that in most instances other parties, specifically the mine owner, bear the primary responsibility for protecting the interests involved.

Despite the persuasiveness of these arguments, certain additional considerations must be factored in that call for a broader duty concept. In drawing the duty boundary so narrowly, these courts seem to ignore the reality of the miner's dependence upon government inspections. While the miner may not specifically rely on the words of the government inspector, and while others (including the miner himself) play a crucial safety role, in a broader sense he has become dependent on the government, with its expertise and authority, to act reasonably for his protection in settings where his ability to protect himself is severely restricted.211 Further, there is no doubt that the government knows

210 See supra notes 173-178 and accompanying text.
211 In expressing his dissenting views in Durbin v. United Steelworkers, 100 Idaho 623, 602 P.2d 21 (1979), cert. denied, 466 U.S. 983 (1980), in which the court rejected claims against the state of Idaho for negligent mine safety activities and inspections, Justice Bistline emphasized the dependence of miners on government inspectors for their safety and the practical inability of the individual miner to protect effectively his own safety interest. Id. at 547, 602 P.2d at 46 (Bistline, J., concurring and dissenting). One limited way that a miner has to protect his own interests is to refuse to work in unsafe or hazardous conditions. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), provides that:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Chapter.

This provision, in light of its legislative history, has been interpreted as recognizing the right of a miner to stop or refuse work because of unsafe or unhealthful conditions provided that the stoppage is reasonable and is motivated by a genuine belief that it is necessary to protect safety or health and that, where feasible, the condition must be promptly reported to the employer. See Miller v. Federal Mine Safety and Health Review Comm'n, 687 F.2d 194 (7th Cir. 1982). Whether
that the miner may be injured if it fails in its undertaking. Thus, a duty can be justified based upon the miner's overall dependence upon government inspections to protect him (even if there is no specific direct or particularized reliance), from his expectation that the government will act reasonably in carrying out its inspections and from the power and expertise of the government in the regulatory and enforcement process.213

It is also erroneous to reason that the government should not be held liable because the mine owner bears primary responsibility for mine safety. Legitimate questions may be raised as to whether the mine owner, although bearing the primary legal obligation to assure the safety interests involved, will in fact faithfully fulfill that obligation given the mine operator's other interests.213 The fact that the government chooses to inspect and examine mines to assure the protection of the miner is evidence of this reality. Recent events in the mining industry further reflect the fact that, although in theory mine operators may be primarily responsible for the health and safety of the miners, absent active governmental involvement this responsibility may not be met.214

As to the argument that to impose a broader duty on the government will dissuade the government from undertaking mine inspections, a number of alternative factors need to be considered. First, finding a duty in such a context does not equate with finding liability. One must still look to the scope of the government's inspections in relation to the cause of the injury. A plaintiff must still show that the federal inspector, acting reasonably within the scope of his authorized inspections, knew or should have known of the risks and failed to

in fact miners will as a practical matter exercise such rights is open to question however. Commenting in Dunbar on the ability of the miner to refuse to work in unsafe conditions, Justice Bristline in his dissent stated, "[t]hese miners, with dependants to support, were not exactly free spirits who could simply leave a job, the conditions of which may have appeared unsafe." 100 Idaho at 547, 602 P.2d at 45 (Bristline, J., concurring and dissenting).

One may also argue that the miner does have available other self-protective mechanisms which should reduce any responsibility the government has for its inspection activities. In particular, through labor agreements, unions can assume a variety of safety activities including inspections. See supra note 32. Thus, collectively miners are, at least in theory, in a position to protect themselves regardless of any government involvement. Unions have however been reluctant to assume the role and may not occupy the position of authority and expertise of the government. Thus, the miner may, in practical terms, be significantly, if not solely, dependent upon government inspections to assure his safety. Id.

213 See M. SHARQ, supra note 41, at 96, where the author states:
When government enters the field of inspection, a number of elements merge to impose obligations—the legislative expression of concern, the agency's occupation of the field, and both the reliance and the dependence of the citizen. I distinguish here between reliance and dependence, because it is possible for a person to be generally dependent without being specifically reliant. . . . It is a situation in which the government's possession of both expertise and information combines with its monopoly and the attendant force of compulsion to confer a power to save people from danger and expense. It is also an occasion on which it knows that if it defaults in the use of that power the peril against which inspection is conducted is likely to materialize. These factual elements are at once the basis of dependence and substantially the measure of obligation.

See also Tompkins, supra note 3, at 412-13.

214 See supra note 33 and accompanying text.

214 See supra notes 36-40 and accompanying text.
act accordingly. Further, factors such as joint liability, contributory negligence and superseding cause must be considered.\textsuperscript{216}

Second, as a corollary to the argument that to impose a duty will dissuade the government from inspecting, is the argument that to not impose a duty encourages the government to be less careful in its mine inspection activities. Clothed with immunity—for that is what it functionally is—constructed through a limited duty analysis, the government knows that in most inspection situations it can safely ignore the interests which it ostensibly is protecting. The potential of government liability for inspection negligence should in turn encourage greater care in conducting inspections and thus increase safety.

Third, one can argue that the imposition of a duty simply will not in reality have the effect of deterring the government from undertaking mine safety inspections. In a recent case dealing with a state’s liability for negligence in conducting fire inspections, \textit{Adams v. State},\textsuperscript{217} the state argued that to impose liability for any form of negligent fire inspection would deter the state and other governmental units from undertaking a program of fire inspections.\textsuperscript{217} The Alaska Supreme Court rejected this argument:

\begin{quote}
We think it unlikely that limited liability for negligence in an inspection will force the state from the field of fire inspection. Fire prevention is a recognized government function, not an experimental program. The cost of fire prevention, including the risk of liability ... is still less than the cost to the state of disastrous fires, in terms of fire-fighting effort, lost taxes, and the impact on the economy.\textsuperscript{218}
\end{quote}

A similar argument could be made as to federal mine inspections. Such inspections have become a recognized function of the government. The costs to the government in carrying out these programs, including the costs of liability for negligence in carrying them out, is arguably less than the economic, political and social costs incurred when “disaster strikes.” Justifying limiting the government’s tort duty in connection with negligent mine inspections on the assumption that increasing liability will discourage inspections simply ignores the complex reality of the situation.

Even if such adverse consequences occur, Congress can take this into account and legislatively immunize the government from liability in inspection cases or otherwise limit liability. Placing the decision in Congress, as the political voice of the public, however, would perhaps more accurately gauge the pub-

\textsuperscript{216} S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1205, 1208 (9th Cir. 1982). In Holland v. United States, 464 F. Supp. 117 (W.D. Ky. 1978), the court found that, even if there was a duty owed by the government in connection with mine inspection, there was no showing of negligence on the part of the government inspectors or that any government negligence was the cause-in-fact or proximate cause of the complained-of injuries. In Collins v. United States, 621 F.2d 832 (6th Cir. 1980), the court found that unforeseeable superseding and intervening negligence on the part of mine operators absolved the federal government from any mine inspection liability.

\textsuperscript{217} 555 P.2d 235 (Alaska 1976).

\textsuperscript{218} \textit{Id.} at 244.

\textsuperscript{219} \textit{Id.}
lic's willingness to incur or not incur the added costs of liability for negligent mine inspections. This approach seems to put the decision on this point in the logical place since it is for the public (or at least its elected representatives) to decide if the costs of potential liability outweigh the benefits of increased care and safety in the mines.

B. Federal Mine Inspections and the Discretionary Function Exception of the FTCA

Under the FTCA, the government's tort liability initially is determined in conformity with that of a private person, in similar circumstances, under local law.219 However, Congress in limiting the protection of sovereign immunity did not eliminate all of the barriers to suits against the government. Congress has provided in the FTCA a number of specific exceptions to the government's liability.220 One exception is the "discretionary function" exception.221 In analyzing the potential liability of the United States for negligent mine safety inspection activities, the impact of this exception is crucial.222

The discretionary function exception in reality consists of two distinct parts. First, claims are excluded which are "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation."223 Additionally, this provision excludes claims "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."224 The first of these clauses is designed to exclude claims arising out of the conduct of government employees, acting with due care, in carrying out statutes and regulations regardless of the validity of the particular statute or regulation.225 On the other hand, the second clause exempts from coverage claims, even those involving government employee negligence, if the claims arise out of the performance of a so-called discretionary function.226

Historically, the legal concept of discretionary governmental functions and a judicial reluctance to entertain actions dealing with them are not new. In the words of one authority:

[T]he concept expressed by the words 'discretionary function or duty' was not invented at the time of, or for the purposes of the Tort Claims Act. The words and the concept were known to our law as far back as Marbury v. Madison,

222 For discussion of the discretionary function exception see generally articles cited supra note 75. See also Note, supra note 3, at 944-46; Hatfield, supra note 3, at 615-23; Tompkins, supra note 3, at 392-404.
224 Id.
225 2 L. JAYSON, supra note 50, § 247 at 12-11. This portion of the statute has not been involved in much litigation. See Zillman, supra note 75, at 2.
226 2 L. JAYSON, supra note 50, § 248.01 at 12-15.
and before that, in the English common law.297 Congress, in explicitly engrafting this exception into the FTCA, sought to draw upon the history of this established concept.298 The concept has been so long recognized that during hearings regarding the FTCA one witness for the Justice Department suggested that even without an explicit exception, courts would likely construe the FTCA as excluding liability for discretionary acts.299

Despite the deep historical roots of the discretionary function concept, the scope and meaning of the exception within the context of the FTCA has been debated.300 The result has been, in the words of one court, a "quagmire" of litigation.301 Much of the controversy has focused on the determination of whether any given governmental activity falls within the coverage of the exception and the appropriate analytical approach for determining this.

Apparently a primary source for the exception to the FTCA, and an initial guide to its scope and meaning, is the principle of the separation of powers long established in our legal tradition.302 Simply stated, this exception recognized that the judiciary should not interfere with or "second guess" public activities of coordinate branches of the government involving the exercise of judgment or discretion.303

The legislative history of the discretionary function exception section of the FTCA provides some further guidance as to the sorts of claims Congress sought to bar by explicitly incorporating this section into the FTCA.304 Congressional reports regarding this provision consistently state that it was designed to prevent liability for an injury caused by authorized governmental

297 Id., § 248.02 at 12-18.
298 Coates v. United States, 181 F.2d 816 (8th Cir. 1950). For a discussion of the legislative history of § 2880(a) see 2 L. JAYSON, supra note 50, at § 246; Harris & Schneppe, supra, note 75, at 164-67; Reynolds, supra note 75, at 81-82.
299 Hearings on H.R. 5375 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 29 (1942). Specifically, the statement was made during the hearings by Assistant Attorney General Francis Shea regarding a prior bill that had not contained the discretionary function exception that "the cases embraced within [the new] subsection would have been exempted from [the prior bill] by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but [the new bill] makes this specific." Id.
300 See articles cited supra note 75. In particular see Harris & Schneppe, supra note 75, at 167-72.
301 Baird v. United States, 653 F.2d 437, 440 (10th Cir. 1981), cert. denied, 454 U.S. 1144 (1982); Irving v. United States, 532 F. Supp. 840, 844 (D.N.H. 1982). One court, more charitably, characterized the law in this area as a "patchwork quilt." Blessing v. United States, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978). It has been suggested however that a more or less uniform interpretation of the exception has evolved in recent years albeit with some variations. See Harris & Schneper, supra note 75, at 169-72 and 189-90.
304 2 L. JAYSON, supra note 80, § 246. See also Hatfield, supra note 3, at 616.
or public projects. These reports go on to state that the exception was intended to foreclose liability for discretionary regulatory activities against federal agencies when exercising their authority. Finally, the history of this exception reveals an intent to avoid the use of a damage suit to test the validity, legality or constitutionality of a statute or regulation.

Additional guidance as to the scope and meaning of the exception comes from Dalehite v. United States, the leading Supreme Court opinion construing the discretionary function exception. This case arose out of a devastating explosion and fire in Texas City, Texas. The explosion occurred during the loading of ammonium nitrate fertilizer in connection with a federally planned and controlled program to aid foreign countries ravaged during the Second World War. The plaintiffs asserted that the accident was the result of negligence on the part of the government in the manufacture, bagging and handling of the explosive fertilizer and on the part of the U.S. Coast Guard in overseeing the loading process and fighting the fire following the explosion. In rejecting the district court's finding of liability and affirming the Fifth Circuit's reversal, the Supreme Court in a split (4-3) decision focused on the discretionary function exception. The majority reviewed at length the legislative history of the exception. The Court noted that under the two clauses of the provision the government could not be held liable either for injuries arising out of acts in carrying out statutes or regulations with due care or for acts of discretion in the performance of governmental functions even when done negligently. From this the Court observed that this exception "was intended to cover more than the administration of a statute or regulation. . . . The 'discretion' protected by this section . . . is the discretion of the executive or administrator to act according to one's judgment of the best course. . . ."

The Court went on to state that immunized discretion "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." With this definition in mind the majority concluded, "[t]he acts found to have been negligent were . . . performed under the direction of a plan developed at a high-level under a direct delegation of plan-making authority from the apex of the Executive Department. The establishment of this Plan . . . clearly required the exercise of expert judgment." Therefore

289 Id.
290 Id.
292 Id. at 23-24.
293 Id. at 42-43.
294 197 F.2d 771 (5th Cir. 1952), aff'd, 346 U.S. 15 (1953).
295 346 U.S. at 24-30.
296 Id. at 29.
297 Id. at 34.
298 Id. a 25-36.
299 Id. at 39-40.
given that all the decisions involved "were . . . made at a planning rather than operational level"\(^{247}\) each claimed act of negligence was covered in the majority's view by the discretionary function exception. The majority reached this decision despite a vigorous dissent by Justice Jackson, joined by Justices Black and Frankfurter.\(^{248}\)

In subsequent decisions, namely *Indian Towing Co. v. United States*\(^{249}\) and *Rayonier, Inc. v. United States*,\(^{250}\) the position taken by the Dalehite majority seemed to be tempered, limiting the apparently broad reading of the discretionary function exception set out in that case.\(^{251}\) However, the status and meaning of the exception after *Indian Towing* and *Rayonier* remained uncertain.\(^{252}\) Further efforts to define and limit the scope of the discretionary function exception emerged from lower court decisions construing this provision. Some conflicting analyses and several distinct approaches among the courts regarding the exception became evident.\(^{253}\) Many courts have utilized what has been characterized as the "planning-operational" mode of analysis.\(^{254}\) These courts, relying on language in *Dalehite* and other Supreme Court opinions\(^{255}\) have taken the view that in applying the discretionary function exception, a distinction must be drawn between activities at the planning as opposed to the operational level of government, thus focusing on the status of the official or employee making the judgment. Under this analysis, acts of officials at the planning level are within the discretionary function exception, while acts of operational level employees are outside the exception.\(^{256}\)

Other courts, as well as commentators, disagree with this position, at least to the extent that the official's status is the determinative fact rather than one factor among many to consider.\(^{257}\) These courts believe that with respect to the

\(^{247}\) *Id.* at 42.

\(^{248}\) *Id.* at 57-60 (Jackson, J., dissenting). In addressing the application of the discretionary function exception, the dissent rejected any suggestion in the majority opinion that the level at which a decision was made should control application of the exception or that "high level" decisions should necessarily be exempt from liability. Rather, the dissent said, the nature of the discretion involved in the decisionmaking should control application of the exception. More "housekeeping" activities of government officials, regardless of their level, should not be absolved of responsibility by this exception. *Id.* at 57-60 (Jackson, J., dissenting).


\(^{250}\) 352 U.S. 316 (1957).


\(^{252}\) Comment, *supra* note 75, U.S.F.L. Rev. at 179.

\(^{253}\) 2 L. JAYSON, *supra* note 50, § 249.07.


\(^{255}\) Dalehite v. United States, 346 U.S. at 42, Indian Towing Co. v. United States, 350 U.S. at 64. See also 2 L. JAYSON, *supra* note 50, at § 249.07.


\(^{257}\) See, e.g., Downs v. United States, 522 F.2d 890, 986-87 (6th Cir. 1975); Griffin v. United
application of this exception, while the official's status may be considered, it must be clear that the governmental undertaking involved is of the nature and quality which Congress intended to put beyond the scope of judicial review for fear of unwarranted interference. They conclude that, regardless of the particular official's status, activities within the scope of the exception are only those that involve the formulation of and decisions regarding matters of government policy rather than those activities simply following statutory or regulatory directives, established professional standards or general standards of reasonableness.

In considering the role of this exception in mine inspection-related cases, the leading case of Blessing v. United States provides considerable guidance. The liability of the United States for negligent OSHA inspections was at issue in Blessing. The government contended that there would be no liability because the discretionary function exception excluded claims arising out of the government's regulatory activities such as OSHA inspections. The court, on the authority of Griffin v. United States rejected the government's broad reading of the exception. The relevant inquiry, the court said, is whether or not the activity in issue involved policy considerations and judgments, such that judicial review would be inappropriate. Conceding that decisions as to the adoption of inspection regulations and standards by government agencies or as to the scope of inspection activities may appropriately be considered discre-


The court in Hendry suggested a number of factors to consider in applying the discretionary function exception. Among the factors were: (1) whether the complaint attacks the rules formulated by the government agency or the way in which the rules were applied; (2) whether the person whose judgment is questioned occupies a high- or low-level government position; (3) whether the relevant statute or regulation emphasizes the discretion of the decision-making official or agency; and (4) whether, in making a decision, the official must look to considerations of public policy and not simply to established professional standards or standards of general reasonableness. Hendry v. United States, 418 F.2d at 782-83.

Similar criteria are suggested in Comment, supra note 75, U.S.F.L. Rev. at 191, including: (1) did the injury occur as a result of a decision to undertake a government activity or as a result of the conduct of that activity; (2) was the actionable decision made by a planning level official after deliberation upon public policy considerations; and (3) did the actionable decision necessitate an evaluation of political and social factors or simply technical and professional considerations. See also Harris & Schnepper, supra note 75, at 188-90, for a discussion of factors appropriate for implementing the discretionary function exception.


500 F.2d 1069 (3rd Cir. 1974).

447 F. Supp. at 1178-85.
tionary functions, the Blessing court rejected the idea that in all instances government inspection activities involve a discretionary function. Where, for example, the issue is whether the inspection required by law was carried out in a proper and reasonable manner, meeting the requisite professional standards, the court concluded the discretionary function exception would not apply because "judicial review and a judgment of liability, were negligence actually demonstrated, would not intrude on policy judgments made by the political branches." Given the lack of a factual record at the pretrial stage, the court in Blessing found it could not assess whether the case before it involved discretionary policy decisions or simply non-policy professional judgments. The court therefore denied the government's motion to dismiss at this stage on the basis of the discretionary function exception.

In another recent OSHA inspection case, Irving v. United States, the federal court followed essentially the same analytical approach to the discretionary function exception. The court noted that discretionary duties involve planning and policy decisions and that activities such as OSHA inspections, which simply involve professional judgment, may not be discretionary. Because of the need for further factual analysis, the court denied the government's motion to dismiss.

A number of mining inspection cases have considered the discretionary function exception. One of the most recent is Barnson v. United States. The plaintiffs in Barnson suffered radiation injuries while working in uranium mines in Utah. Many of the plaintiffs contracted cancer and died allegedly as a result of their exposure in the mines. Among the plaintiffs' allegations was the claim that government employees had undertaken to inspect the mines, issue warnings and monitor the health of the workers and that in performing these functions the federal employees failed to exercise reasonable care. The government included in its efforts to avoid the claim a motion to dismiss for lack of jurisdiction based on the discretionary function exception. As in Blessing and Irving, the court denied the motion on the basis that prior to trial it could not determine if the activities at issue involved "high-level... decision makers." The Barnson court relied heavily on the opinion in Allen v. United States, involving government liability for open-air testing of nuclear weapons, which extensively reviewed the discretionary function exception. Citing

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263 Id.
264 Id. at 1135.
265 Id. at 1186.
267 Id. at 844. Two recent cases involving aircraft inspection and certification likewise reflect the view that liability for professional negligence in carrying out authorized safety inspections cannot be avoided via the discretionary function exception. See United Scottah Ins. Co. v. United States, 692 F.2d 1209 (9th Cir. 1982); S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1206 (9th Cir. 1982).
269 Id. at 624.
270 Id.
271 Id.
Blessing, the court in Allen found the exception’s scope limited to those sorts of judgments that involve important social, economic or political policies inappropriate for judicial review or interference. According to the Allen court, the exception should not encompass decisions made in implementing policies where such decisions involve simply the exercise of general reasonable care or judgment pursuant to professional standards rather than policy determinations.

An additional mine safety case where the discretionary function exception was discussed is Raymer v. United States. Here two miners were killed in a mining accident allegedly as a result of a safety violation which government inspectors had discovered but failed to require to be corrected promptly. The trial court indicated in two separate opinions that the government’s liability for allegedly negligent enforcement of specific regulatory provisions was not barred by the discretionary function exception. Referring to the distinction between decisions involving policy making issues and those focusing on policy implementation, the court found that the inspections here did not involve discretionary functions. Specific policy decisions had, the court suggested, already been made in adopting the relevant mine safety legislation and regulations. There was no discretion involved at the inspection level; the inspectors’ duties involved implementing and following the policy decision with reasonable care.

One recent case, however, suggests that mine inspectors in the process of inspecting mines for safety violations are in fact engaged in a discretionary function, at least so long as they follow pertinent regulatory directions and act within their authority. In Roberts v. United States, a federal mine inspector in inspecting a rock quarry determined that the overburden along a wall of the quarry presented a dangerous condition in violation of specific federal regulations. The inspector verbally told the quarry owner to correct the situation, but did not, as required by statute, issue any written citation or order for the removal of the overburden. The court found that the inspector’s failure to follow established statutory procedures, once he had determined that a violation did exist, precluded the protection of the discretionary function exception. In dictum, however, the court suggested that the inspector might have stayed within the scope of the discretionary exception had he followed proper procedures and issued a written citation. Of course this is merely dictum—and not particularly strong dictum. Still, the court’s suggestion seems inconsistent with the position taken in most other cases regarding this exception. To the

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274 Id. at 479-80, 483-84.
275 Id. at 485-86.
278 Id. See also Durhar v. United Steelworkers, 100 Idaho 523, 549, 602 P.2d 21, 47 (Bistline, J., concurring and dissenting).
280 Id. at 378.
extent a mine inspector must make certain judgments as to whether a particular condition violates a regulation and presents a safety hazard warranting issuance of a citation, it is evident there is discretion involved in making such a judgment. However, this is not the appropriate factor upon which to focus. The proper issue to address is whether the discretion involved is of the nature and quality meant to be encompassed within the discretionary function exception, i.e., a policy making decision. The judgments involved in assessing whether an overburden is in violation of regulatory requirements and a safety hazard are not of this nature, but rather involve issues of professional judgment and standards readily susceptible to traditional judicial review as in any tort case. If anything, the dictum in Roberts serves as a good example of why dictum does not carry the force of law.281

Given the stance taken in the cases discussed here, as well as in other cases involving federal inspection and related activities, it seems the discretionary function exception properly interpreted should not present a barrier to imposition of tort liability for negligent mine safety inspections. The exception would appear to bar a claim, for example, for a failure to regulate a certain activity, or to hire sufficient inspectors, as such decisions might well fall within the scope of policy judgments.282 In contrast, the negligence of the inspector in conducting the inspection or implementing the enforcement mechanisms seems to fall outside the discretionary exception. What is involved in this context is a review of operational decisions, not unlike those made in day-to-day situations by a variety of skilled, professional persons. While such decisions are often complex and involve significant elements of judgment, they are of a nature susceptible to traditional judicial review to determine if they meet acceptable standards of reasonable, albeit professional, care. The underlying justifications for the discretionary function exception simply do not come into play in these situations, and thus, such a claim should not be barred by this exception.283

C. Federal Mine Inspections and the Misrepresentation Exception to FTCA Liability

An additional exception to federal tort liability of relevance in an action for negligent federal mine safety inspections is the provision excluding from coverage tort claims arising out of misrepresentation or deceit.284 Typically, the government, in addition to challenging any claim that it owed plaintiff a duty

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282 See Tompkins, supra note 3, at 395, where the author states:
   Cases following Dalehite clearly held that the adoption and promulgation of regulations and standards governing particular spheres of activity are immune activities. The courts are in agreement that decisions as to the scope and the degree of regulation and the proper regulatory enforcement procedures involve administrative judgments of the best way to achieve government policy objectives. The nature of these judgments demands the balancing of public policy considerations. The courts are unwilling to evaluate the reasonableness of such judgments through the application of discernible objective standards of law.
283 Id. at 403-04 and 412.
in the context of its various inspection activities, will argue that the essence of a claim for negligent inspection is misrepresentation and that the claim is therefore barred by the FTCA's exclusion regardless of whether in similar circumstances a private party would owe plaintiff a duty and be held liable. Although very few mine inspection cases have even mentioned this exception, given experience in other inspection-related cases, one can anticipate that the government will assert this exception as a bar to liability for such claims.

The misrepresentation exception is included in a section of the FTCA which also precludes claims for many other common law tort actions. Despite the breadth and import of the exclusions in this section of the Act, its "legislative history . . . is scant and, to some at least unconvincing as to justification." The traditional rationale offered for the misrepresentation and deceit exception has been that to hold the government liable for injuries sustained as a result of inaccurate information or advice furnished by government officials to private citizens would inhibit the government from engaging in many important activities. With this in mind courts have said that the exception should be broadly construed.

Courts have held that the meaning of the terms misrepresentation and deceit within this section is to be determined by general federal law, reflecting congressional intent, rather than by state law. The federal courts have generally been consistent in recognizing this approach in construing this, as well as the other exceptions to liability in this section, on the grounds that to do otherwise would make the meaning of the exceptions vary from state to state depending upon the content of state law.

In applying the misrepresentation exception, the federal courts have, at least in theory, sought to follow the traditional and commonly accepted legal definition of this term. As it has evolved in this country, the concept of misrepresentation is broader than the common law action for deceit and has come

265 See Note, supra note 3, at 946-48. The exception is often invoked in aircraft certification cases. See also Dombrow, supra note 3; Harrison & Kolczynski, supra note 3; Hatfield, supra note 3; Tompkins, supra note 3.
266 One mine inspection case which has dealt with this exception is Roberts v. United States, No. 79-49 (D. Wt. May 6, 1980).
267 Section 2680(h) of Title 28 of the U.S.C. also excludes claims for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contract rights.
268 2 L. Jayson, supra note 50, § 260.01 at 13-36.
269 Ramirez v. United States, 567 F.2d 854, 856 (9th Cir. 1977).
270 See, e.g., Ortiz v. United States, 661 F.2d 826, 829-30 (10th Cir. 1981); Reynolds v. United States, 643 F.2d 707, 712 (10th Cir. 1981).
to include a negligent as well as an intentional misrepresentation. The Restatement (Second) of Torts sets forth commonly accepted articulations of tort law relating to negligent misrepresentations. Section 511 deals with misrepresentation involving risk of physical harm. Negligent misrepresentation involving pecuniary loss in a business setting is dealt with in section 552 of the Restatement.

A crucial case construing the FTCA’s misrepresentation exception in terms of federal inspection activities is United States v. Neustadt. The Court, in Neustadt, explicitly held that the exception was meant to incorporate negligent misrepresentations. An action was brought against the government for an allegedly negligent home inspection and appraisal by a Federal Housing Administration appraiser in connection with FHA mortgage insurance. The plaintiffs, purchasers of the house, asserted that they had relied on the FHA appraisal in buying the house and had therefore paid an excessive amount for it given its defective condition. The Supreme Court, however, found that the claim was barred by the FTCA’s misrepresentation exception. The Court followed the reasoning of the Second Circuit in Jones v. United

324 W. Prosser, supra note 83, § 107 at 699, 704. See also Bohlen, Misrepresentation as Deceit, Negligence or Warranty, 42 Harv. L. Rev. 733 (1929).

325 RESTATEMENT (SECOND) OF TORTS § 311 (1965) reads as follows:


(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
(a) to the other, or
(b) to such third persons as the actor should expect to be put in peril by the action taken.
(2) Such negligence may consist of failure to exercise reasonable care
(a) in ascertaining the accuracy of the information, or
(b) in the manner in which it is communicated.

See Comment, supra note 78, at 1188.

326 RESTATEMENT (SECOND) OF TORTS § 552 (1977) reads as follows:

§ 552. Information Negligently Supplied for the Guidance of Others.

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

See Comment, supra note 78, at 1186-87.


328 Id. at 711.
that, unless the term misrepresentation as used in section 2860(h) was read to include negligent misrepresentation, the use by Congress of the terms misrepresentation and deceit in this section would be duplicative.

The Neustadt decision involved a number of aspects of the misrepresentation exception that have been a continuing source of controversy in federal inspection liability cases including those involving mine inspection. First, the plaintiffs in Neustadt attempted to avoid the misrepresentation exclusion by arguing that the essence of the claim was for negligence in making the inaccurate inspection and appraisal and that any misrepresentation was "merely incidental" to the underlying negligent act. The Supreme Court in rejecting the argument stated that it was "nothing more than an attempt to circumvent [the misrepresentation exception] by denying that it applies to negligent misrepresentations."

Subsequent to Neustadt many courts followed its lead in rejecting a plaintiff's argument that the essence of his claim was for the underlying negligent inspection and not for misrepresentation. Other courts, however, accepted the distinction in inspection-related claims and avoided the misrepresentation exception by finding in the inspection the negligent performance of an operational task. The Supreme Court in its recent decision in Block v. Neal joined this latter group of cases.

In Block, the Court upheld a plaintiff's claim against the federal government for allegedly negligent inspection and supervision of the construction of a home by the Farmers' Home Administration. The government claimed that under Neustadt the action was barred by the FTCA's misrepresentation exception. In rejecting this argument, the Court endorsed an analysis of the misrepresentation exception which differentiates actions based on misrepresentation or misinformation from those founded on the negligent performance of some underlying government task. Justice Marshall distinguished Neustadt on the grounds that "[t]he gravamen of the action . . . in Neustadt was that the plaintiff was misled by a 'Statement of FHA Appraisal' prepared by the Government" whereas in Block the plaintiff's claim arose from negligence on the part of the FmHA officials in performing their supervisory and inspection activities.

The nature of the claims to which the misrepresentation exception applies was a second factor dealt with in Neustadt. At the close of his opinion in Neustadt, in a footnote, Justice Whittaker sought to distinguish the Court's earlier decision in Indian Towing Co. v. United States where the government was

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298 207 F.2d 563, 564 (2d Cir. 1953), cert. denied, 347 U.S. 921 (1954).
299 366 U.S. at 702-03.
300 Id. at 704.
301 Id. at 703.
302 See infra notes 315-21 and accompanying text.
303 See infra notes 322-26 and accompanying text.
305 Id. at 1103.
306 Id. at 1094.
held liable for the Coast Guard's negligent failure to maintain the beacon in a lighthouse.\footnote{366 U.S. at 711, n.28.} Although the misrepresentation exception had not been at issue in that case, Justice Whittaker sought to rebut the argument that Indian Towing likewise involved a misrepresentation. Thus, he noted that many negligence claims have within them an element of misrepresentation in the "generic sense" but that this does not mean all such claims arise from misrepresentation.\footnote{Id.} Justice Whittaker went on to state that typically misrepresentation actions have involved injuries in commercial or business transactions.\footnote{Id.} This footnote, beyond suggesting that some distinction may properly be drawn between actions involving a misrepresentation and those where the misrepresentation is only incidental, has served as a basis for the argument that the misrepresentation exception applies only to economic injuries in a business or commercial setting and not to noncommercial personal injury or property damage cases.\footnote{See, e.g., Note, supra note 3, at 947; Comment, supra note 78 at 1189, 1192-94.} On this point, the federal courts are likewise in sharp conflict. A review of recent cases dealing with the government's inspection liabilities, as well as other actions under the FTCA, indicates that this aspect of the misrepresentation exception remains unsettled.\footnote{See infra notes 332-45 and accompanying text.}

1. FTCA Inspection Liability—Misrepresentation or Negligent Performance of Operational Task

In inspection-related cases, the government will typically assert that the claim is based on a misrepresentation and is excluded. Plaintiffs normally respond that the claim is not based upon a misrepresentation, but rather on the official's negligence in performing the inspection.\footnote{Supra note 50.} The success of such arguments naturally depends in large part on the facts of each case and their presentation by counsel. However, the courts have failed to adopt a consensus as to the appropriate approach and standards to apply to the facts in determining whether the plaintiff's claim is barred by the misrepresentation exclusion. The conflict among the courts can best be seen by looking at how the misrepresentation exception has been analyzed and applied in cases involving alleged negligent aircraft inspection and certification by federal officials. A leading case in this regard is Mabrial, Inc. v. Planes, Inc.\footnote{1 L. Jayson, supra note 50, § 214.02[3].}

In Marival, the plaintiff purchased from the defendant an airplane which turned out to be defective. Subsequently, the plaintiff brought suit. The defendant, in turn, filed a third-party action against the United States alleging that in representing the condition of the airplane to plaintiff, it had relied upon an FAA certification of airworthiness and that if the airplane was defective, the government's inspection and certification were negligent. The government ar-
gueed that the misrepresentation exception precluded this claim. The court agreed. The crucial issue according to the court was whether the claim against the government was founded upon negligent inspection or negligent misrepresentation through the airworthiness certificate of the condition of the craft. In resolving this issue, the court citing Neustadt stated:

The line between negligent conduct and negligent misrepresentation is often difficult to draw with precision. An element of misrepresentation runs through many forms of negligent conduct. Indeed, negligent misrepresentation involves underlying negligent action. But more is needed to come within the misrepresentation exemption of § 2680(h) than merely an element of misrepresentation.

The distinction, the court said, depended upon whether the misrepresentation was of the essence of the claim or merely incidental to the negligent conduct. "An examination of the leading cases of negligent misrepresentation indicates that in each the cause of action arose directly from reliance on the communication of certain erroneous facts arrived at through negligent means." The court then went on to analyze the facts of the case before it:

In the instant action, the third-party plaintiff does not complain of a direct injury to person or property as a result of the alleged negligent inspection by the FAA mechanic. Rather, Planes, Inc. contends that its statements to the plaintiff concerning the condition of the aircraft were made in reliance upon the certification of airworthiness made by the FAA inspector. The negligence of the inspection is purely secondary, for it is the misrepresentation of the aircraft's condition upon which defendants relied in their commercial transaction with the plaintiff.

. . . . The instant case presents a classic example of detrimental reliance upon an allegedly negligent misrepresentation in a commercial transaction. It was precisely this type of action, involving direct reliance on governmental communication of facts, rather than direct injury from negligent conduct, which § 2680(h) was designed to meet.

A number of subsequent cases involving allegedly negligent FAA inspection and certification have cited Marival with approval for the proposition that the misrepresentation exception bars claims against the government arising out of aircraft inspections. Given the factual distinctions from Marival, however, the analysis in these cases seems questionable.

In Summers v. United States, the pilot and passengers on an airplane were injured when the pilot was forced to make an emergency landing due to an exhaust valve problem. In suing the United States, the plaintiffs alleged the FAA was negligent in certifying the engine, in failing to order correction of the exhaust valve problem and in testing the engine. The court accepted the gov-

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311 306 F. Supp. at 858.
312 Id.
313 Id. (citation omitted).
314 Id. at 859-60.
ernment's argument that the misrepresentation exception barred the claim. The court went on to say that the essence of the claim was misrepresentation, or in other words, reliance on the government's certification of the engine. "The alleged negligence of the inspection and testing of the engine" the court found, was "merely secondary. . . ."314 The court broadly concluded that in no case had the government been found liable for negligent inspection or testing pursuant to government regulations.317 In factually similar cases, including Knudsen v. United States318 and Lloyd v. Cessna Aircraft Co.,319 the court likewise relied on the misrepresentation exception in finding no viable claim against the government for negligent inspection and certification of aircraft.320

Factualy, Summers, Knudsen and Lloyd are distinguishable from Neustadt and Marival. In these latter cases the focus of the plaintiffs' claims could legitimately be characterized as involving direct reliance on specific misinformation provided by government officials. In contrast, a proper characterization of cases such as Summers would reject the idea that the plaintiffs had directly and specifically relied on the certification by the government of airworthiness. For example, it is unlikely the passengers on the airplanes in these cases could establish the sort of direct reliance on representations made by government employees evidenced in Neustadt and Marival. Indeed, as seen in the earlier discussion of the duty issue, in most instances plaintiffs have had difficulty

314 Id. at 349.
317 Id. at 350.
318 500 F. Supp. 90 (S.D.N.Y. 1980). In Knudsen the plaintiff pilot was injured while operating an airplane. He asserted that the FAA was negligent in certifying the plane and inspecting the plane just prior to the accident. The government sought, and the court granted summary judgment on the grounds the claim was barred by the misrepresentation exception in that the claim was for the government employee's failure to discover and report operational defects in the airplane. Id. at 85.
319 429 F. Supp. 181 (E.D. Tenn. 1977). Here a plane crashed killing the pilot-owner. The plaintiff spouse sued Cessna, the maker of the plane, which in turn sued the federal government for negligence in inspecting the airplane and in issuing a type-certificate and an airworthiness certificate. The court rejected the plaintiff's claims as precluded by the misrepresentation exception.
320 The misrepresentation exception has also been the focus of attention in other recent cases where the plaintiff has sought to avoid it by characterizing the claim as one involving other than a misrepresentation. For example, courts in a number of housing inspection cases have rejected plaintiffs' arguments that the government is liable for negligent inspection because of the applicability of the misrepresentation exception. The exception has been utilized by these courts despite efforts to assert alternative theories of liability. See, e.g., Ortiz v. United States, 661 F.2d 826 (10th Cir. 1981); Reynolds v. United States, 643 F.2d 707 (10th Cir.), cert. denied, 454 U.S. 817 (1981); Irick v. United States, No. 75-1824 (4th Cir. Mar. 2, 1976); Kipf v. United States, 504 F. Supp. 110 (D. Mont. 1980); Cason v. United States, 381 F. Supp. 1362 (W.D. Mo. 1974), aff'd, 510 F.2d 123 (8th Cir.), cert. denied, 423 U.S. 861 (1976); but see Block v. Neal, 103 S. Ct. 1089 (1983), aff'd, 646 F.2d 1178 (6th Cir. 1981). See also Preston v. United States, 596 F.2d 232 (7th Cir. 1979) (claim by farmers against federal government for allegedly negligent approval of grain storage facility barred by misrepresentation exception), cert. denied, 444 U.S. 915 (1979); Green v. United States, 629 F.2d 531 (9th Cir. 1980) (claim by cattleowners against government for losses caused by use of DDT in fields precluded by misrepresentation exception); Cross Bros. Meat Packers v. United States, 533 F. Supp. 1319 (E.D. Pa. 1982) (claim by meatpacker for erroneous grading of meat by federal inspector avoided by misrepresentation exception), rev'd, No. 82-1219 (3d Cir. April 30, 1983).
establishing the type of direct and specific reliance often found necessary to establish a Good Samaritan claim. By ignoring these factual distinctions, cases such as Summers have blurred the differentiation articulated in Neustadt and Marival between claims for negligence and those for negligent misrepresentation.

Alternatively, in cases such as Summers, one could argue that the essence of the claim is for negligent performance of the inspection and certification process and that while there may be an element of misrepresentation involved, the injury sustained was the result not of direct reliance on any misrepresentation or inaccuracy in providing information, but of the failure of government officials to properly perform their inspection, testing and certification tasks upon which the public depends for its safety. Several cases, involving fact patterns similar to those of Summers, Knudsen and Lloyd have used precisely this analytical approach.

In Fireman's Fund Insurance Co. v. United States, an airplane crashed allegedly because of the design of or a defect in its reverse thrust system. Suit was brought against the government for negligent certification and testing of the thrust reverse system and for negligent failure to warn. The government's contention that the FTCA's misrepresentation exception barred this claim was rejected.

At no point do plaintiffs plead reliance or any other aspect of the tort of negligent misrepresentation. Therefore defendant's attempt to characterize plaintiff's cause of action as one under § 2680(h) of the Statute is not well taken. It is clear that plaintiffs seek to recover for the active negligence of the defendant, which is alleged to have caused the accident, and for defendant's failure to follow its own regulations with regard to the certification of the thrust reverse system on the aircraft in question. Therefore, the § 2680(h) exception is not applicable.

Similarly, the court in In re Air Crash Disaster Near Silver Plume, Colorado rejected the government's efforts to avoid liability for negligent aircraft inspections on the basis of the misrepresentation exception in connection with the crash of a chartered airplane in which the Wichita State University football team was killed. The court examined numerous precedents, including Neustadt and Marival, and concluded that application of the misrepresentation exception was inappropriate.

The present case alleges a negligent failure on the part of a government employee to perform an operational duty undertaken to protect the safety of air travelers. The United States, through the FAA, has preempted and assumed the duty of inspecting aircraft in order to detect and require repair of potentially dangerous conditions before such aircraft can thereafter be utilized. If a negligently performed inspection does not reveal a defect which reasonably should have been detected, and if, in reliance thereof, such defect is thereafter

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321 See supra notes 183-190 and accompanying text.
323 Id. at 330.
allowed to remain in such aircraft and if such defect ultimately causes the crash of the aircraft and injury to passengers, then the negligence of the inspector in allowing such defect to go unremedied is a proximate cause of passengers’ injuries. It is the inspection undertaken to protect air travelers from certain dangers which is relied upon by such travelers and which, if negligently performed, gives rise to the very dangers the inspection was intended to prevent. The certification is a reporting of results of such inspection but was not in itself relied upon by plaintiffs in any economic affairs.246

The analysis in this line of cases is clearly sounder than that of *Summers, Knudsen and Lloyd*. The Supreme Court’s decision in *Block v. Neal* dealing with federal liability in connection with supervision of federally-funded housing construction clearly sanctions this view. *Block* would seem to put to rest an analysis which broadly reads the FTCA’s misrepresentation exception as a bar to inspection-based claims.246a If, in the inspection context, the misrepresentation exception is not to swallow-up the basic FTCA waiver of immunity, courts must carefully distinguish between claims that can properly be legally categorized as arising from a misrepresentation and those which are legitimately founded on the underlying negligent performance of the inspection process. The distinction is admittedly a difficult one—difficult at times, it seems, to the point of hair splitting. However, a court must be cautious, particularly after *Block*, in avoiding giving a meaning to the misrepresentation exception which goes beyond the traditional concepts of that term; negligently providing misinformation to another upon which he relies to his detriment.246

Apparently, *Roberts v. United States* is the only federal mine inspection case dealing directly with the misrepresentation exception.247 The court, in discussing the misrepresentation exception, focused on the distinction at issue here, the distinction between negligent inspection and negligent misrepresentation. *Roberts* involved a claim by a quarry owner against the United States arising out of the destruction of his quarry. Following an inspection, the plaintiff alleged that the federal mine inspector negligently directed the plaintiff to

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246 Id. at 409.
247 Justice Marshall in his opinion in *Block v. Neal* seemed to highlight the importance of reading the FTCA’s misrepresentation exception within proper limits so as not to broaden the exception to bar otherwise appropriate claims against the government.

Section 2680(h) . . . relieves the Government of tort liability for pecuniary injuries which are wholly attributable to reliance on the Government’s negligent misstatements. As a result, the statutory exception undoubtedly preserves sovereign immunity with respect to a broad range of government actions. But it does not bar negligence actions which focus not on the Government’s failure to use due care in communicating information, but rather on the Government’s breach of a different duty.

103 S. Ct. 1089, 1093-94. In two recent decisions, the Ninth Circuit Court of Appeals has adopted a similar analysis regarding the misrepresentation exception and aircraft inspection; United Scottish Ins. Co. v. United States, 692 F.2d 1209 (9th Cir. 1982) and S.A. Empressa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1205 (9th Cir. 1982). See also Ware v. United States, 628 F.2d 1278 (5th Cir. 1980), where the court held the misrepresentation exception did not apply to a claim by a dairy farmer against the United States for destruction of his cattle after they had been negligently diagnosed as tubercular by government agency.

247 No. 79-49 (D. Mt. May 6, 1980).
take certain actions, including blasting a certain area in the quarry to eliminate an allegedly dangerous condition. The claim was that plaintiff obeyed the order and, following the inspector's specific instructions, detonated explosives which destroyed the entire quarry. The United States moved to dismiss the action on two grounds: (1) that the claim was barred by the misrepresentation exception; and, (2) that the complaint failed to state a cause of action.

The court agreed that the plaintiff's claim was barred by the misrepresentation exception to the extent that it arose from the plaintiff's reliance upon representations made by the inspector concerning the appropriate method or location of blasting. However, the court went on to explain that the claim would not be barred by this exception to the extent that it alleged that the federal inspector undertook to supervise and direct the detonation of explosives on plaintiff's premises and that he performed this undertaking negligently. In so ruling, the court relied on section 323 of the Restatement (Second) of Torts.

The distinction made in the Roberts case is crucial in analyzing any case involving injuries allegedly caused by negligent mine safety inspections. To the extent the claim arises from negligent performance of the inspection task, for example failing to discover a safety violation, where any misrepresentation is only incidental, an appropriate analysis would not apply the misrepresentation exception to bar the claim. In contrast, if the injury results from reliance on misinformation, such as an erroneous directive to undertake certain safety measures, the claim may properly be barred by the exception.

Here, as in the aircraft inspection cases, the risk is that a failure to read the exception with any meaningful discrimination leads to the exception being read so broadly as to destroy any basis for negligence liability. A court faced with a claim based on negligent mine safety inspections must be cautious in reading a complaint to assure itself that a plaintiff, by artful characterization, does not convert a claim for misrepresentation into one for simple negligence in performing an operational task. However, if the distinctions made in cases such as Block, Neustadt and Marival are to mean anything at all, the court must avoid simply rejecting a claim because it involves government inspection activities as cases like Summers seem to suggest.

In this same vein, a plaintiff in seeking to avoid the misrepresentation exception must be careful in presenting his case. The focus of the claim must be on the negligent performance of the mine inspection. While it may well be necessary to plead and prove reliance in order to establish a tort duty, the plaintiff's claim will likely be barred unless he can show that his reliance was on the government's performance of the inspection rather than on information later furnished as a result of such inspection. Case law suggests that this analytical approach can be successfully used where the court is receptive to recognizing some limitation on the scope of the misrepresentation exception in the

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328 Id. at 2-3.
330 Id. at 3.
332 Id. at 9-10.
2. FTCA Inspection Liability—Application of the Exception to Economic and Personal Injury Claims

The type of claims to which the misrepresentation exception is to be applied is a second aspect of the exclusion relevant to mine safety inspection liability. This aspect has created considerable controversy among the federal courts. This conflict, which in part has its source in a footnote in Neustadt, centers on whether the exception is restricted in scope to injuries of an economic or financial nature in a commercial setting such that non-commercial claims, involving personal injury or property damage, are outside the scope of the exception, even if they involve a misrepresentation. Many cases, some regarding inspection-based claims, others involving different forms of tort actions, illustrate the conflicts in this area.

In several instances the courts have apparently restricted the exception to injuries of a financial nature occurring in a commercial or business setting. For example, in Green v. United States, a case involving losses sustained by cattle owners as a result of applying DDT to grazing lands pursuant to government direction, the court said the "applicability of the exception depends upon the commercial setting within which the economic loss arose." The court went on to explain: "the misrepresentation exception precludes liability where the plaintiff suffers economic loss as a result of a commercial decision which was based on a misrepresentation by government consisting either of false statements or a failure to provide information which it had a duty to provide." Where the injuries are non-commercial personal injury claims, the court explained that the exception generally has not been held to apply.

A similar view restricting the application of the exception to economic injuries in a commercial setting was adopted by the court in Allen v. United States, where suit was brought by nearly 1,000 persons for injuries allegedly sustained in open-air testing of nuclear weapons by the government. Among the claims was one for giving false assurances as to the safety of exposure to radioactive fallout. In response to the government's assertion that the claim was barred by the misrepresentation exception, the court stated:

The exception reaches actions for misrepresentations or deceits in the classic sense . . . in which the plaintiff's asserted interest is pecuniary or ec-

\[331\] See, e.g., United Scottish Ins. Co. v. United States, 692 F.2d 1209 (9th Cir. 1982) and S.A. Empresa De Viação Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1208 (9th Cir. 1982).

\[332\] See supra notes 304-06 and accompanying text.

\[333\] See Hatfield, supra note 3, at 623-24; Tompkins, supra note 3, at 408; Comment, supra note 78, at 1139-1201.

\[344\] 629 F.2d 581 (9th Cir. 1980).

\[346\] Id. at 584.

\[346\] Id. at 584-85.

\[347\] Id. at 585.

nomic. . . . Where plaintiffs have asserted injuries to interests which are not pecuniary or commercial, courts have held that § 2680(h) does not preclude their claims. . . . Where a plaintiff’s physical well-being has been injured by, in part, false assurances given by the Government regarding the safety of its activities, the courts have readily found liability.339

Despite the strong position taken in these and similar cases, there is considerable authority rejecting any such limitation on the FTCA’s misrepresentation provisions. In Díaz Castro v. United States,340 the plaintiff alleged that he was shot by an arrestee after being informed by federal officials that the arrestee was sedated and not dangerous. The plaintiff argued the misrepresentation exception should not apply because the claim involved personal injury. The court rejected this, citing numerous cases in which personal injury claims had been barred by the misrepresentation exception, concluding that “the exception is just as applicable to actions involving personal injury and wrongful death as it is to those involving only financial or commercial loss, absent any indication that Congress intended such exception to apply only to that latter type of lawsuits.”341

In support of its position, the Díaz Castro court cited Vaughn v. United States,342 where a dragline operator was injured when, utilizing for guidance a location map prepared by the U.S. Soil Conservation Service, the bucket of his dragline struck a natural gas pipeline. The government’s defense was that the claim was barred by the misrepresentation exception. The court rejected the plaintiff’s contention that the exception is limited to transactions of a commercial or financial nature and does not encompass personal injury claims.343 The court found no basis in precedent to so read the exception.

Thus, despite the fact that many courts and several commentators have urged that an appropriate reading of the misrepresentation exception limits it to commercial financial injuries,344 other courts simply have rejected this argument. Further, to the extent that the federal courts read congressional intent so as to have this exception reach claims commonly recognized under the misrepresentation heading, the general law of negligence does not limit the scope of negligent misrepresentation to economic injuries in a commercial setting but extends the action to non-commercial, personal injury claims.345 Some courts and commentators have asserted that despite this, the Supreme Court in Neustadt intended to limit the misrepresentation exception to economic-commer-
cial claims. Again, however, the conflicting authority rejects this view.

Perhaps the courts, in situations where there has been personal injury due to negligent safety inspections, may be more willing not to apply the misrepresentation exception than in situations involving financial injury, particularly where plaintiff can make a strong argument that the action is one for negligent performance of an operational task. Conversely, where economic injury in a business or commercial situation is involved, as for example in Roberts, the courts seem quite willing to apply the exception and the plaintiff’s chances of avoiding it are diminished.

IV. CONCLUSION

Mining remains one of the most important and most dangerous industries in our nation. The safety of those who labor in this country’s mines depends upon the interplay of a variety of parties and factors including individual miners, management and unions. The federal government, through its mine safety inspections and other programs, is a major catalyst for encouraging mine safety, as well as an essential factor in assuring that safety. Miners have come to look to the federal government, with its expertise and regulatory authority, for their safety and protection in the mines. Given miners’ overall dependence upon federal inspections and given the government’s expertise and power in this regard, when the government inspector acts negligently, thereby causing injury to miners, it is entirely appropriate to impose tort liability on the government.

Analytically, in order to establish the federal government’s liability for the negligence of its mine safety inspectors under the Federal Tort Claims Act, three factors must be considered: A) the duty question; B) the application of the FTCA’s discretionary function exception; and C) the application of the FTCA’s misrepresentation exception. With appropriate examination and careful reasoning there is no justification for a blanket denial of federal liability for negligent mine safety inspections under the FTCA. While recognizing the limits of sovereign immunity as affected by the FTCA, the fact remains that the government, in many instances, can be found to have assumed a duty with respect to the safety of miners through its inspection activities and that its liability for negligence in conducting such inspections should not be barred by either the discretionary function exception or the misrepresentation exception.

A refusal to recognize a basis for the federal government’s liability under the FTCA, justifying that refusal on the “parade of horrors” that may follow (including the fear that the government will discontinue its mine inspection activities), is unacceptable. The federal courts should recognize that the FTCA construed in light of appropriate state law does furnish a basis upon which to hold the federal government liable for negligent mine safety inspections. The result will hopefully be better inspections and thus safer mines. Of course, other facets of traditional negligence analysis, such as the need to establish

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444 Comment, supra note 78, at 1193.
lack of reasonable care and causation, as well as such limiting factors as contributory negligence and assumption of the risk, may serve to impede a plaintiff's claims against the government for its inspection activities. Ultimately it remains for Congress to determine if the potential of federal inspection liability when balanced against attendant benefits calls for any sort of legislative adjustments. Still, the cost to the federal government in carrying out its mine safety programs, including the costs of its liability for negligence in doing so, is arguably far less than the economic, political and social costs incurred when workers are killed or injured while laboring in our country's mines.