Inspecting the Mine Inspector: Why the Discretionary Function Exception Does Not Bar Government Liability for Negligent Mine Inspections

Jay Lapat

James P. Notter

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
INSPECTING THE MINE INSPECTOR: WHY THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT BAR GOVERNMENT LIABILITY FOR NEGLIGENT MINE INSPECTIONS

INTRODUCTION

At the dawn of the twenty-first century, the mining industry is still plagued with accidents that injure and kill mine workers each year. Since the year 2000, there have been several mining accidents which caught national attention. In January 2006, an explosion at the Sago Mine killed 12 miners and seriously injured another.1 This accident garnered national attention to the working conditions and safety of miners.2 Similarly, one of the first cases heard by Chief Justice John Roberts, in October 2005, concerned a lawsuit against the federal government alleging that the miner’s death was a result of a negligent inspection by a federal mine inspector.3 Additionally, on September 23, 2001, an explosion at a Brookwood, Alabama coal mine killed 13 miners.4 While federal workplace safety regulations of mines have dramatically improved the safety and health of all miners, such a continued increase in safety is dependent upon competent inspections by federal safety inspectors.5 With approximately 230 miners injured and at least one death occurring every week in 2003,6 the question remains what a mine worker can do to ensure that government inspectors conduct their annual inspections

---

2. Id.
6. Id.
competently in order to maintain a safe working environment. One of the options available to a miner or his/her estate, in the case of death, is to bring a tort action against the federal government for a federal mine inspector’s negligent inspection which proximately lead to a miner’s injury or death. Currently, the United States courts of appeals are split over whether the discretionary function exception of the Federal Tort Claims Act (“FTCA”) bars such a lawsuit.

This Note argues that the discretionary function exception of the FTCA should not bar an injured miner’s lawsuit against the government for a federal inspector’s negligent inspection of a mine. The federal government is statutorily required to annually inspect all mines in the United States to ensure that each meets certain minimum safety and health standards. When a negligent inspection causes either an injury or death of a mine worker, the government should be liable for its agent, who could have prevented such accident by exercising the required duty of care in performing his/her job.

Section I of this Note explores the history and requirements of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). Section II of this Note explains the purpose and current state of the discretionary function exception of the FTCA. Section III discusses the current circuit split concerning whether the discretionary function exception applies to the actions of Mine Safety and Health Administration (“MSHA”) inspectors while performing their duties under the Mine Act. Using decisions from five different circuit courts, this section analyzes and explains how the circuit courts have applied the discretionary function exception to the inspections of MSHA mine inspectors. Section IV of this Note explores how the discretionary function exception applies to other industries where the government acts as a safety regulator. This section compares the structure of the mine regulations to other industries where the federal government conducts mandatory safety inspections.

Section V presents the Note’s argument that negligent inspections by MSHA inspectors are not grounded in policy, thus courts are empowered with the subject matter jurisdiction to hear such tort actions, provided the plaintiff establishes the necessary elements of the cause of action. The Note presents four policy reasons why the discretion exercised by mine inspectors is not grounded in “social, economic, or political policy” and therefore, is not protected by the exception. Section

8. See infra Section III for a discussion of the circuit split.
VI will address further restrictions placed upon any injured or deceased plaintiff-miner seeking to bring such a tort action. This section concludes that allowing such tort suits to be brought will not "open the floodgates" of litigation. Instead, workers still have requirements to be met in order to successfully recover in tort suits against the federal government.

I. THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

The Federal Mine Safety and Health Act has gone through more than 100 years of extensive legislative development as Congress has tried to improve the safety and health of the American mine worker. The process first began in 1891, when Congress passed the first federal statute designed to govern the safety of mines. By 1910, after fatality rates of mine workers had increased to an astonishing 2,000 deaths annually, Congress acted to improve the working conditions of the miner. In response to the rising fatality rate, Congress created the first agency charged with ensuring the safety of mine workers, the Bureau of Mines, which was established only as a research agency and granted no regulatory powers. Four more major pieces of legislation were passed in 1941, 1952, 1966, and 1969, each progressively granting more regulatory authority to the Bureau, improving enforcement measures, and increasing sanctions. In 1973, the Mining Enforcement and Safety Administration was created as a separate entity from the Bureau of Mines, and this new agency took over the functions of protecting the health and safety of miners previously granted to the Bureau. After nearly 115 years, Congress passed its last legislation, the Federal Mine Safety and Health Act of 1977, which currently governs the mine inspection process. The driving force behind these Congressional actions was a response to the numerous catastrophes and diseases that were prevalent throughout the mining industry. The reduction in the

12. Id.
14. Id.
16. Id.
17. McAteer, supra note 13, at 1111.
The number of fatalities that has occurred over the years is in direct correlation with improved legislation and stronger laws, allowing scholars to conclude that the progressively tougher laws have succeeded.\(^\text{18}\)

One of the first priorities of the Mine Act was to transfer the responsibilities for creating and enforcing the regulations of the Act from the Department of the Interior to the Department of Labor, where the Mine Safety and Health Administration ("MSHA") was created.\(^\text{19}\) The Mine Act is essentially implemented through two separate entities; the MSHA, acting through the Secretary of Labor, and the Federal Mine Safety and Health Review Commission.\(^\text{20}\) The MSHA's main responsibility is "to develop, promulgate, and enforce" the safety and health standards as specified in the Mine Act.\(^\text{21}\) The safety and health standards that are developed by the MSHA are codified in title 30 of the Code of Federal Regulations sections 1 through 104.\(^\text{22}\) The Federal Mine Safety and Health Review Commission, an independent entity of the Department of Labor, serves as the adjudication authority reviewing all disputes arising under the Mine Act.\(^\text{23}\)

The regulations of the Mine Act aim to regulate all aspects of miner's safety and health.\(^\text{24}\) The main purpose of the Mine Act, as declared by Congress, is "the health and safety of its most precious resource—the miner," placing as its primary responsibility the prevention of dangerous and unhealthy practices by mine operators.\(^\text{25}\) The Mine Act grants two chief powers to the MSHA. First, the Mine Act gives the authority to the MSHA, acting through the Secretary of Labor, to promulgate administrative regulations that establish general and mandatory standards for which all mine operators must comply.\(^\text{26}\)

\(^{18}\) Id. at 1107.


\(^{22}\) Mine Safety and Health Administration, Department of Labor, 30 C.F.R. §§ 1-104 (2005).


\(^{26}\) Id. These regulations are codified in 30 C.F.R §§ 1-104; see also Cooley v. United States, 791 F. Supp. 1294, 1302 (E.D. Tenn. 1992) (providing an overview of the Federal Mine Safety and Health Act in the context of a wrongful death suit brought against the federal government following a methane gas explosion).
Second, the Mine Act empowers the MSHA to both conduct annual inspections and investigations, and to issue citations or orders to mine operators to ensure compliance with the regulations of the Mine Act.27 In performance of these duties, MSHA inspectors have generally been given a considerable degree of discretion.28 Where a plaintiff alleges that a MSHA inspector negligently performed his or her duty as authorized by the Mine Act, this negligence by the inspector does not in itself create a private cause of action, but instead, defines the duty, with liability for breach of duty being founded in the FTCA.29 In this respect, the government relies heavily on the discretionary function exception of the FTCA to bar liability from claims by miners against the government for the negligent actions of a MSHA inspector that results in the injury or death of a miner.

When the Act was first passed, there were 20,000 mines subject to the Mine Act, employing nearly 500,000 miners.30 Although these numbers have decreased in the subsequent years, the latest figures show that there are still approximately 14,000 active mines and 320,000 miners that are currently affected by the Mine Act.31

II. THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT

Prior to the enactment of the Federal Tort Claims Act, the doctrine of sovereign immunity barred tort actions against the federal government.32 In 1946, Congress changed the law, and made the federal government liable for the torts committed by its employees within the scope of their employment.33 This means, for example, that a tort committed by a federal government employee, committed outside the scope of their employment, such as driving to the grocery store, would
not subject the government to liability. Furthermore, the federal government was only liable for such a tort when the action committed by the federal employee would constitute a tort had it been committed by a private citizen in the state in which the action occurred. However, Congress did not completely remove the doctrine of sovereign immunity, but retained a bar to tort liability, when the government exercised certain “discretionary functions.”

The discretionary function exception bars liability and denies subject matter jurisdiction to federal courts for any suit which is based on:

an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of federal agency or an employee of the Government, whether or not the discretion involved be abused.

Congress failed to define, in either the statute or the legislative history, what constitutes a “discretionary function.” The definition of discretionary function, instead, has evolved from several Supreme Court decisions. Often due to the factual nature of the exception, courts have been unable to define the precise contours of the discretionary function exception, which results in leaving ambiguity in its application. While the protection offered by the exception to certain situations has oscillated over the course of its existence, today the Supreme Court uses a two-part test to determine applicability.

Over the course of the last fifty years, the discretionary function exception has been applied, to deny government liability, where the

34. See D. Scott Barash, Comment, The Discretionary Function Exception and Mandatory Regulations, 54 U. Chi. L. Rev. 1300, 1302 (1987) (examining the requirement that a FTCA claim be an analogous private tort in the state in which it is committed).
35. See id.
36. 28 U.S.C. § 2680(a) (emphasis added).
37. See Zillman, supra note 32, at 367.
39. See Varig Airlines, 467 U.S. at 813 (explaining “it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception”); see also Berkovitz, 486 U.S. 531 (1988) (remanding the case to the district court to determine if the alleged conduct was made in the context of a protected policy judgment); Gaubert, 499 U.S. 315 (1991) (holding that the discretion exercised by the federal regulators met the two-prong Berkovitz test and thus was protected discretion).
government is unable to establish the two-part Berkovitz test. 

"[T]he basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability." In analyzing whether the exception bars liability, courts examine: 1) whether the federal employee exercised choice, and assuming that choice was exercised, 2) was that choice the kind that Congress intended to protect. If a court finds that the employee exercised choice and that choice was the kind Congress intended to protect, then the exception bars any federal government liability. If, however, a court finds that either the first or the second prongs are not met, then the government cannot use the exception to bar tort liability.

The first part of the exception’s test is to determine if in committing the questioned action, the federal employee exercised choice. In Berkovitz v. United States, the Supreme Court explained that the first prong of the test derives from the discretionary nature of the exception. Because the exception itself requires some kind of “discretionary function,” the employee must exercise choice in order to be subject to the protections of the exception. The Court went on to explain that when a statute or regulation proscribes a certain kind of action, an employee cannot exercise choice and thus the exception cannot apply. Where a federal employee is compelled to fulfill a mandatory directive, no choice can be inferred from following such required action. In order to move onto the second prong, a court must necessarily find that the employee exercised choice.

Assuming arguendo that an employee did exercise choice, the next part of the test questions whether the discretion exercised was in furtherance of the policy underlying the regulatory scheme. The Supreme Court in Berkovitz explained that the second prong of the test

---

42. Varig Airlines, 467 U.S. at 813.
43. Berkovitz, 486 U.S. at 536; Gaubert, 499 U.S. at 322-23 (quoting Berkovitz, 486 U.S. at 536).
44. Id.
45. See Berkovitz, 486 U.S. at 536.
46. See id.
47. Id.
48. Id.
49. Id.
50. See Berkovitz, 486 U.S. at 536-37; Gaubert, 499 U.S. at 322-23.
HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL

derives from "Congress' desire to 'prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, or political policy through the medium of an action in tort.'" Once it is determined that an employee exercises his/her choice in furtherance of a "social, economic or political policy," then the second prong is met. In United States v. Gaubert, the Supreme Court explained that when a regulation, agency, or governmental policy (either expressed or implied through a statute) allows a federal government employee to exercise discretion, that discretion is presumed to be grounded in policy. This means that a plaintiff must allege facts that demonstrate that a governmental policy was not expressed or implied in an employee’s exercise of discretion. The Court further elaborated that the focus of the investigation should be on the employee’s subjective intent in exercising the discretion given by the statute or regulation. The Court concluded in Gaubert by explaining that when "Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end. .." then such action is protected by the discretionary function exception. In Gaubert, the federal regulator had been given broad latitude in deciding when and how to exert its authority. In order to invoke the protections of the discretionary function exception the federal government must 1) demonstrate that the employee exercised discretion, and 2) that choice was grounded in "social, economic, or political policy."

III. THE DISCRETIONARY FUNCTION EXCEPTION APPLIED TO AN MSHA INSPECTOR'S NEGLIGENT INSPECTION

Applying the discretionary function exception test to the negligent actions of MSHA inspectors has resulted in a split among the circuit courts of appeals concerning whether the exception bars suits brought against the federal government. Analyzing the actions of the MSHA

52. See Gaubert, 499 U.S. at 324-25.
53. Id.
54. Id. at 325.
55. Id. at 323.
56. See Gaubert, 499 U.S. 315.
57. See Bermudes v. United States, 81 F.3d 428 (4th Cir. 1996) (holding that the claim was barred by the discretionary function exception of the FTCA); Myers v. United States, 17 F.3d 890 (6th Cir. 1994) (noting that the discretionary function exception did not apply to the negligence of the mine inspectors).
inspectors in the context of the test, all circuit courts agree that the actions exercised by mine inspectors require discretion.\textsuperscript{58} Thus, courts on both sides of the issue argue that the first prong of the \textit{Berkovitz/Gaubert} test as applied to MSHA mine inspectors is met.\textsuperscript{59} The disagreement among the circuits concerns the second prong of the \textit{Berkovitz/Gaubert} test; that being whether the discretion exercised by the inspector is grounded in public policy. In \textit{Gaubert}, the Supreme Court elaborated on a presumption that if it is found that a federal agent exercises discretion in carrying out the statute or regulation, then that discretion is grounded in public policy.\textsuperscript{60} If a reviewing court determines that the discretion exercised by an MSHA inspector is grounded in "social, economic or political policy," then the inspectors' negligent actions do not create liability for the federal government, and the claim would be dismissed.\textsuperscript{61} However, if the court determines that the MSHA inspector made a decision that is not grounded in "social, economic, or political policy," then the discretionary function exception would not apply, and the claimant would be able to bring a claim against the federal government, subject to establishing a state tort law duty.\textsuperscript{62}

\textit{A. Circuit Courts Holding that the Discretionary Function Exception Bars Liability for MSHA Inspectors Negligent Inspection of a Mine}

In determining whether the discretionary function exception precludes liability against the federal government, the Fourth and Seventh Circuits have held that the government cannot be held liable for the negligent inspection by a MSHA inspector that results in a miner's injury or death.\textsuperscript{63} The Fourth Circuit employed the two-part discretionary function exception test as formulated in \textit{Berkovitz}, and

\begin{itemize}
  \item \textsuperscript{58} \textit{Bernaldes}, 81 F.3d at 429 (explaining that mine inspectors have the discretion to determine if a mine is in compliance with the regulations); \textit{Myers}, 17 F.3d at 895 (arguing "even the most cursory glance at the plaintiff's wording of these duties shows that they are replete with choice and, thus, discretion").
  \item \textsuperscript{59} \textit{Id.} (finding that the choice in the mine inspectors regulations is sufficient to meet the first part of the \textit{Berkovitz/Gaubert} test); \textit{Bernaldes}, 81 F.3d at 429 (holding that mine inspectors have discretion to determine if mine is in compliance with the regulation).
  \item \textsuperscript{60} \textit{Gaubert}, 499 U.S. at 324-25.
  \item \textsuperscript{61} \textit{Id.}
  \item \textsuperscript{62} \textit{Id.}
  \item \textsuperscript{63} \textit{Bernaldes v. United States}, 877 F. Supp. 301, 308 (4th Cir. 1995); \textit{Hylin v. United States}, 755 F.2d 551, 553-54 (7th Cir. 1985).
\end{itemize}
refined in *Gaubert*. The Seventh Circuit, in a pre-*Berkovitz/Gaubert* opinion, relied on the decision of *Varig Airlines* in its analysis of the discretionary function exception.\(^6\)

1. Fourth Circuit: *Bernaldes v. United States*

In *Bernaldes v. United States*,\(^6\) the estate of Denny Bernaldes brought a wrongful death action against the United States, alleging that three MSHA inspectors had negligently inspected a mine in Virginia.\(^6\) The plaintiff claimed that had it not been for the MSHA inspectors’ negligence, Bernaldes would not have fallen through a coal chute where he was buried alive by eight tons of coal.\(^6\) Specifically, the estate alleged that the mine inspectors failed to cite the mine operator for deficiencies in railings, grates or safety harness by the coal chute and inadequate communication of workers inside and outside of the coal shed.\(^6\) Following Bernaldes’ accident at the mine, a MSHA inspector cited the mine operator for many of the same violations that Bernaldes alleged in his lawsuit.\(^7\) The magistrate judge issued a “Report and Recommendation” arguing that the district court judge reject the government’s motion to dismiss.\(^7\) The government argued that the district court lacked jurisdiction to hear the case because the discretionary function exception barred the plaintiff from bringing the suit.\(^7\) The plaintiff argued that the discretionary function exception did not apply.\(^7\) The district court rejected the magistrate’s findings and dismissed the case.\(^7\) The Fourth Circuit affirmed the district court’s opinion using the same reasoning.\(^7\)

The court applied the two-part *Berkovitz/Gaubert* test in concluding that the discretionary function exception barred the suit. First, the court determined that the structure of the regulations promulgated by MSHA

---

64. *Bernaldes*, 877 F. Supp. at 305-06.
66. 877 F. Supp. 301 (4th Cir. 1995).
67. *Id.* at 303.
68. *Id.* at 303-04.
69. *Id.* at 304.
70. *Id.*
71. *Id.* at 303.
72. *Id.*
73. *Id.*
74. *Id.*
75. 81 F.3d 428, 429. The Fourth Circuit fully endorsed the reasoning of the district court and referred readers to the district court’s opinion for elaboration. *Id.*
were fundamentally discretionary.\textsuperscript{76} The court cited the example of the discretion a mine inspector used to determine whether there was a violation significant enough to use safety belts.\textsuperscript{77} The court reasoned that "the inspectors must exercise a considerable degree of choice and judgment when determining if an operation is in compliance with the agency's safety policies."\textsuperscript{78} Further, the court explained: "the regulations do not 'specifically prescribe a course of action,' that the inspectors must follow."\textsuperscript{79} The district court concluded that in several areas of the inspection, the inspectors must determine whether the conditions warrant a violation.\textsuperscript{80} The court argued that the inspection process itself was discretionary by its very nature.\textsuperscript{81} Citing a decision of the Seventh Circuit, the district court found that even in areas with objective non-discretionary regulations, the inspection process itself represented a discretionary process protected by the exception.\textsuperscript{82} The \textit{Bernaldes} court determined that the first prong of the \textit{Berkovitz/Gaubert} test was satisfied.\textsuperscript{83}

Next, the court analyzed the policy prong of the \textit{Berkovitz/Gaubert} test. The court explained that in consideration of the exception, "courts must be concerned not only with second-guessing policy decisions of the federal agencies and agents, but also with disrupting the regulatory efforts of the federal government by exposing the government to tort liability for negligence in the course of carrying out the policies of a regulatory regime."\textsuperscript{84} The plaintiff argued that the court should follow the decisions of the Sixth Circuit, that MSHA inspectors are not authorized to weigh the policy implications of the various safety regulations and statutes on a case-by-case basis.\textsuperscript{85} Instead, the inspectors have an objective obligation to determine whether the mine operator is complying with the regulations of the Mine Act, and if not, to issue a citation for non-compliance.\textsuperscript{86} The Fourth Circuit ultimately concluded that policy considerations do not always come into play when a MSHA inspector makes a compliance determination. The \textit{Bernaldes} court

\textsuperscript{76} \textit{Bernaldes}, 877 F. Supp. at 305.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 306 (internal citations omitted).
\textsuperscript{80} \textit{Id.} at 305-06.
\textsuperscript{81} \textit{Id.} at 306.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Bernaldes}, 877 F. Supp. at 307.
\textsuperscript{86} \textit{Id.}
rejected the argument put forth by the plaintiff.87 The court concluded that the Sixth Circuit incorrectly interpreted the tests laid down in Berkovitz and Gaubert.88 The court held for the government, accepting the argument that the discretionary function exception applies because there is a presumption that the inspector's action was done on the basis of policy reasons, to protect the health and safety of miners.89 In upholding the government's motion to dismiss, the court reiterated that the "plaintiff has failed to allege facts to support the conclusion that the inspectors engaged in activities beyond the scope of their policy based responsibilities and thus beyond 'the purview of the policies behind the statutes.'"90

2. Seventh Circuit: Hylin v. United States

The Seventh Circuit reached a similar conclusion to the Bernaldes court in a per curiam opinion in Hylin v. United States.91 The plaintiff's husband was electrocuted and killed when he walked passed an electrical junction box.92 Mining Enforcement and Safety Administration ("MESA") inspectors that recently inspected the mine noticed the dangers of the electric box, but failed to investigate or inspect it.93 The plaintiff alleged that the MESA inspectors negligently failed to inspect the box, proximately causing the plaintiff's husband's death.94 The government alleged that the discretionary function exception barred any lawsuit.95 The district court found for the plaintiff, rejecting the government's argument that the discretionary function exception barred the claim.96 The Seventh Circuit reversed the district court's decision in favor of the government.97

Using Varig Airlines as its guideline, the Seventh Circuit began its analysis by focusing not on the actor, but on the "nature of the

87. Id.
88. Id.
89. Id. at 308.
90. Id.
91. 755 F.2d 551, 554 (7th Cir. 1985) (at the time this action was first filed, the controlling statute was the Federal Metal and Nonmetallic Mine Safety Act of 1966, which authorized the Mine Enforcement and Safety Administration to conduct inspections).
92. Id. at 552.
93. Id.
94. Id.
95. Id.
96. Id.
97. Id at 551.
challenged governmental activity." Thus, the fact that a MESA inspector was negligent has no impact on whether the discretionary function exception applies; what is crucial, though, is whether the administrative agency has been statutorily given discretion when exercising its duties under the Federal Metal and Nonmetallic Mine Safety Act of 1966. The court concluded that in "fulfilling their inspection and enforcement duties" under the Act, "MESA inspectors are required to exercise discretion." Relying on the rulings of Varig Airlines, the court held that the discretionary function exception barred the plaintiff’s tort claim because the actions of the MESA inspectors required discretion in carrying out the regulations of the Federal Metal and Nonmetallic Mine Safety Act of 1966.

Both the Fourth Circuit and Seventh Circuit held that the discretionary function exception barred injured miners from bringing claims against the government for the negligent inspection by a federal mine inspector. Both circuits found that the necessary element of discretion was present in mine inspectors’ actions when carrying out their duties. Furthermore, the Fourth Circuit, using the Berkovitz/Gaubert test, held that the discretion authorized to the MSHA inspectors was grounded in policy considerations. The opinion reads:

Congress stated that protecting the health and safety of the nation’s coal miners is one of the purposes of the Act. When applying the regulations promulgated pursuant to the statute, MSHA inspectors must base their inspections on the policy of promoting the health and safety of the nation’s coal miners, since enforcement of health and safety standards is the purpose of the inspections.

In Gaubert, the court held that once a reviewing court finds that a federal agent exercises discretion in carrying out a statute or regulation, then it is presumed that the discretion is grounded in public policy. Following the precedent set in Gaubert, the Fourth Circuit held that the MSHA inspector exercised discretion in carrying out his duties as prescribed in the Mine Act; therefore, it was presumed that the MSHA inspector made determinations based upon furthering the ultimate policy

98. Id. at 553.
99. Id.
100. Id. at 554.
101. Id. at 553-54.
102. See Berlandes, 877 F. Supp. at 301; Hylin, 755 F.2d at 551.
103. See Berlandes, 877 F. Supp. at 306; Hylin, 755 F.2d at 554.
104. See Berlandes, 877 F. Supp. at 308.
105. See id. (internal citations omitted).
behind the Mine Act, to protect the health and safety of miners. The court declared, "[c]learly, a MSHA inspector's safety compliance determination is 'based on the purposes that the regulatory regime seeks to accomplish.'" Even if the compliance determination made by the MSHA inspector were negligent, the Fourth Circuit would not find the government liable because the discretionary function exception would still apply.

The Seventh Circuit came up with the same result while applying a different test. The Seventh Circuit did not have to analyze policy considerations because the court relied on the pre-\textit{Berkovitz/Gaubert} decision of \textit{Varig Airline} opinion, which only required the element of discretion in order for the discretionary function exception to apply. Currently, the Seventh Circuit has not heard a case regarding the negligent inspection by a MSHA inspector.

\textbf{B. Circuit Courts Holding that the Discretionary Function Exception Does Not Bar Liability for MSHA Inspectors Negligently Inspecting a Mine}

The Tenth, Sixth and Fifth Circuits have all held that the discretionary function exception does not immunize the government from liability when a negligent inspection by a MSHA inspector results in the injury or death of a miner. The Tenth and Sixth Circuits used the \textit{Berkovitz/Gaubert} two-part test to analyze if the discretionary function exception applied to the actions of MSHA inspectors, while the Fifth Circuit used \textit{Varig Airlines} and \textit{Dalehite v. United States} in its analysis.

\begin{itemize}
\item 107. \textit{Bernaldes}, 877 F. Supp. at 308.
\item 108. \textit{Id.} at 307.
\item 109. \textit{See generally Ayala v. U.S.}, 980 F.2d 1342 (10th Cir. 1992); \textit{Myers v. U.S.}, 17 F.3d 890 (6th Cir. 1994); \textit{Collins v. U.S.}, 783 F.2d 1225 (5th Cir. 1986) (holding that the discretionary function exception does not bar liability against the government for a negligent inspection by a mine inspector).
\item 110. \textit{See Ayala}, 980 F.2d at 1347-48; \textit{Myers}, 17 F.3d at 895.
\item 111. 346 U.S. 15 (1953).
\item 112. \textit{Collins v. United States}, 783 F.2d 1225, 1227-28 (5th Cir. 1986).
\end{itemize}
1. Sixth Circuit: *Myers v. United States*

In *Myers v. United States*, 113 a methane gas explosion killed the plaintiff and seven other miners in the area. 114 The plaintiffs alleged that the failure of the MSHA inspector to perform seven duties arising under the Mine Act and regulations gave rise to government liability. 115 The plaintiffs’ complaint relied on the inspector’s negligence, specifically, that the MSHA inspector failed to find a number of safety violations during a previous inspection, which ultimately would have prevented the explosion. 116 The district court granted the government’s motion to dismiss holding that the discretionary function exception of the FTCA barred the plaintiffs’ claims. 117 The Court of Appeals for the Sixth Circuit reversed, finding that the discretionary function exception does not bar the plaintiffs from bringing a claim against the government; however, the court still dismissed the suit because the plaintiffs’ claim would not be actionable under state tort law. 118

In determining whether the discretionary function exception applies to bar liability, the Sixth Circuit used the two-prong test formulated in Berkovitz and Gaubert. 119 The first part of the test asks whether “the authority under which the action was taken allows the actor discretion to choose from among alternative courses of action.” 120 The court found that all of the duties alleged in the complaint involve an “if/then” structure, 121 and this conditional assessment is a decision that the MSHA inspector has to make before being bound to take any action. 122 This choice on the part of the MSHA inspector satisfies the first part of the Berkovitz/Gaubert analysis. 123

The second part of the Berkovitz/Gaubert test asks whether “the actor is authorized to make those choices on the basis of ‘social,
economic, or political policy.'"\(^{124}\) The overall goal of the Mine Act is to protect the health and safety of miners by preventing mine operators from operating hazardous mines.\(^{125}\) In doing this, it must balance the interest of the mine operator by having regulations that are economically feasible and physically appropriate, and also use MSHA resources in their most cost-effective manner.\(^{126}\) The court began its analysis by explaining that the above policy considerations have already been promulgated, by both Congress and the Secretary of Labor, in the statutes and regulations that authorize how MSHA inspectors are supposed go about inspecting mines.\(^{127}\) Additionally, the Sixth Circuit added that MSHA inspectors make their choices and assessments based only on "their own observations, informed by professional judgment and knowledge of the industry" and are not statutorily authorized to make any of their decisions based on "social, economic, or political policy."\(^{128}\) Since no "policy" decision played a part in the choices made by MSHA inspectors, the court held that inspectors are not protected by the discretionary function exception.\(^{129}\)

2. Tenth Circuit: Ayala v. United States

In Ayala v. United States,\(^{130}\) the plaintiffs alleged that the MSHA inspector who inspected the mine offered faulty technical assistance that contributed to an explosion in the coal mine, killing fifteen miners.\(^{131}\) The advice allegedly offered by the MSHA inspector was based on the requirements of lighting fixtures that are attached to mining equipment.\(^{132}\) One of the plaintiffs' major claims was that the MSHA inspector whom inspected the mine offered incorrect technical advice concerning how to resolve the lighting situation, which eventually lead

---

\(^{124}\) *Id.* at 895. Specifically, is the MSHA inspector statutorily authorized to make his decision on the basis of public policy? *See id.*

\(^{125}\) *See 30 U.S.C. § 801(a), (g).*

\(^{126}\) *See Myers,* 17 F.3d at 898.

\(^{127}\) *See id.*

\(^{128}\) *Id.*

\(^{129}\) *Id.*

\(^{130}\) *Id.* at 898.

\(^{131}\) *Id.* at 1346-47. Although the plaintiffs alleged a second claim, that the MSHA inspector failed to enforce detected violations of MSHA safety regulations, the plaintiffs failed to show that the MSHA inspector was negligent and the court of appeals did not have to rule on the district courts further finding that the discretionary function exception would have barred the plaintiffs' claim anyways. *See id.* at 1347, 1353.

\(^{132}\) *Ayala,* 980 F.2d at 1346.
The district court held that the claim was barred by the discretionary function exception of the FTCA. The court used the Berkovitz/Gaubert test to analyze whether the discretionary function exception applies to the plaintiffs’ claim, the same two-part test as was used in Myers. The plaintiffs conceded that the MSHA inspector had discretion in offering the technical advice, thus satisfying the first part of the test. The plaintiffs shrewdly argued, however, that the decision being challenged is not that the inspector gave the technical advice, but that the said advice did not follow the objective criteria as specified in the MSHA regulations. The Tenth Circuit explained that the advice given by the MSHA inspector was “governed solely by technical consideration” found in the MSHA regulations. No policy decision played a role in the specific advice offered by the MSHA inspector, and accordingly, the Tenth Circuit reversed the district court’s holding that the discretionary function exception barred the government from being held liable for the MSHA inspector’s negligence.

3. Fifth Circuit: Collins v. United States

In Collins v. United States, the plaintiffs alleged that the MSHA inspector’s termination of an “Imminent Danger Order” and failure to reclassify the mine as “gassy” led to an explosion that killed five miners. The Fifth Circuit, rejecting the defendant’s argument that the holding in Varig Airlines extends to all conduct that is regulatory in nature, correctly interpreted Varig Airlines and Dalehite to mean that discretion occurs not only if there is a choice that the official has to make, but if that choice is grounded in policy concerns. In holding that the MSHA inspector’s decision to terminate the “Imminent Danger Order” did not fall under the discretionary function exception, the court.

133. Id. at 1346-47.
134. Id. at 1347.
135. See id. at 1347-48.
136. Id. at 1348.
137. See id. at 1349. The district court did not rule on the specific advice given, but on the inspector’s decision to offer the advice. Id. The ruling made by the district court, in this sense, might not have been wrong since an inspector’s decision to offer the assistance might be based on policy decisions. See id. at 1350.
138. Id. at 1349.
139. See id. at 1350.
140. 783 F.2d 1225 (5th Cir. 1986).
141. Id. at 1230.
142. See id. at 1229-30.
was hesitant to base its holding on the regulation considerations. The court made clear that the decision to terminate the “Imminent Danger Order” may be related to “social, economic or political policy,” but since the government did not address how the decision was based on policy, the discretionary function exception did not apply. The court’s reasoning as to why the discretionary function exception did not apply is different than in similar cases analyzing the discretionary function exception, since this case was decided before Berkovitz and Gaubert. Conversely, courts after the decisions in Berkovitz and Gaubert have interpreted the policy decision prong on whether the statute itself authorizes the actor to make a decision on the basis on “social, economic or political policy.”

In comparing the circuits which held that the discretionary function exception does not apply to MSHA inspectors, allowing the government to be found liable in such lawsuits, the Sixth Circuit has the broadest view, holding that MSHA inspectors can never make determinations based on “social, economic or political policy.” The Sixth Circuit noted that MSHA inspectors are unable to make policy decisions since the policies behind the regulations and the Mine Act have already been promulgated, by both Congress and the Secretary of Labor.

The Tenth Circuit, on the other hand, explains that MSHA inspectors might have choices that could be based on policy decisions depending on the regulation involved. When a regulation is purely “technical,” as was the case in Ayala, then the government would not be able to use the discretionary function exception as a defense to bar liability to a MSHA inspector negligently adhering to that “technical” regulation, since no policy decision would have played a part in the MSHA inspector’s decision. If, though, the regulation is not technical in nature, but gives discretion to the mine inspector in allowing the inspector to make his/her decision for a policy reason, then the mine inspector’s decision might be protected by the discretionary function

---

143. See id. at 1230.
144. Id.
145. Berkovitz, 486 U.S. at 537.
146. See, e.g., Myers, 17 F.3d at 897.
147. Id. at 898.
148. See Ayala, 980 F.2d at 1350.
149. Id. at 1350 (explaining that “[t]he wiring of the lights had to conform to the mandatory MSHA regulation requiring that the lights be de-energized by the methane monitor.”).
150. See id.
exception. For example, the statute dealing with erecting an emergency shelter might be a statute that the Tenth Circuit holds is protected by the discretionary function exception, since the statute is not purely technical, but authorizes the inspector the ability to select a “suitable location” for an emergency shelter, thus granting the inspector discretion in his or her decision.

The Fifth Circuit did not focus on the statutes or regulations in determining whether they involve a policy decision; rather, the focus was on whether the government could offer a policy reason for the action taken by the MSHA inspector. The Fifth Circuit offers an example of how policy considerations might come into play to allow the discretionary function exception to bar the government from liability: “the attempted rescue of a trapped miner might well justify entry into a ‘gassy’ mine even though required safety equipment was inoperable, so that an order forbidding entry in such circumstances might properly be annulled.” The Fifth Circuit, though, has not analyzed this issue since Berkovitz and Gaubert, and thus focuses not on whether the statutes and regulations direct the mine inspector to make his/her decision based on “social, economic or political policy,” but on whether the government can affirmatively argue that the inspector made his/her decision on a policy basis.

IV. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN OTHER INDUSTRIES

The discretionary function exception of the FTCA has not only been litigated throughout the mining industry, but has also been applied to bar liability against the government in other industries, where the government has been statutorily granted regulatory power to enforce safety standards.

151. See e.g., id. (30 U.S.C. § 952(b) leaves it up to the MSHA investigator to offer, if any, technical advice, and if the MSHA investigator decides to limit, or not offer, any advice, this limitation might be based on a policy decision “reflecting a need to balance the ultimate goal of safety with the reality of finite agency resources.”).
152. Id. The decision to erect or not erect an emergency shelter, or about where the emergency shelter should be, might be based on balancing out the monetary costs of building such a shelter and the safety of the miners.
153. See Collins, 783 F.2d at 1230.
154. Id. at 1231.
155. See Berkovitz, 486 U.S. at 537.
In *Fisher Brothers Sales v. United States*, the plaintiffs sued the Food and Drug Administration ("FDA") claiming that the FDA improperly banned the importation of Chilean fruit and improperly destroyed the Chilean fruit already in the United States.

Plaintiffs' complaint was based upon the theory that the FDA violated its own regulatory procedural manual, which led to the commissioner issuing the order that resulted in the banning and destruction of Chilean fruit.

The Federal Food, Drug, and Cosmetic Act gives the FDA the ability to "recall" food in the food distribution chain whenever such food poses a risk to consumers and a recall is needed to protect the health of the consumers in the US. The initiation of the recall is a judgment to be made by FDA officials based on "the degree of seriousness of the health hazard" and "the likelihood of occurrence of the hazard." In *Fisher Brothers*, the government argued that the decision made by the FDA was discretionary and thus protected by the discretionary function exception.

The district court granted the government's motion to dismiss, and the Third Circuit affirmed the lower court's decision. Both the district court and the Third Circuit turned to the leading cases on the discretionary function exception in analyzing the plaintiffs' claim. In finding that the discretionary function exception applied, the district court concluded that the FDA made a choice, and that that choice was grounded in "policy" concerns:

Under [the FFDCA], the FDA had the discretion to act during the Chilean grape crisis. The FDA acted to protect the public from the risk of exposure to poisonous fruit which it learned could be coming from Chile. It had the discretion to test the fruit and determine whether the fruit was adulterated. It also had the discretion to refuse entry into the United States. The actions taken were not violative of any regulatory or statutory provisions. The acts taken were in accordance with the FDA's authority to determine whether or not a specific product should be allowed entrance into the United States. This conduct is grounded in the policy of protecting the public health. The actions were clearly in furtherance of the FDA's statutory mission to protect the American public.

156. 46 F.3d 279.
157. *Id.* at 283.
158. *Id.*
159. *Id.* at 285 (internal citations omitted).
161. See *Fisher Bros. Sales*, 46 F.3d at 283.
162. *Id.* at 283, 288.
163. See *id.* at 285-86 (applying *Varig Airlines*, *Berkovitz*, and *Gaubert* in deciding whether the discretionary function exception of the FTCA shields the government from liability).
public from adulterated food. All the acts involved judgment and choice and were grounded in policy.\footnote{164}

The Third Circuit agreed with the district court's conclusion, explaining that the decision made by the FDA, in light of the surrounding circumstances, was a decision grounded in "social, economic, and political policy."\footnote{165}

In \textit{Irving v. United States},\footnote{166} the plaintiff claimed that compliance officers from the Occupational Health and Safety Administration ("OSHA") had acted negligently in their duty to inspect a manufacturing plant, proximately causing the plaintiff's injuries.\footnote{167} In holding that liability is barred by the discretionary function exception, the court used the two-part test as developed in \textit{Berkovitz} and \textit{Gaubert}.\footnote{168} In its opinion, the court distinguished OSHA from the Mine Act by emphasizing that Congress "mandated comprehensive inspections" in the statute while, Congress left the "scope and detail" of OSHA inspections mainly up to the Secretary's discretion.\footnote{169} The flexibility of the statute's framework gives OSHA inspectors a less rigid regime to follow when carrying out the obligations of the statute and the regulations.\footnote{170} The overall policy of the statute, followed by all OSHA compliance officers, is to ensure "adequate safety in workplaces with a view toward efficient and effective use of limited enforcement resources."\footnote{171} In this sense, OSHA compliance officers must make day-to-day decisions regarding what risks and safety issues require their most urgent attention, and then make their inspections based on these perceived risks and hazards.\footnote{172} The court goes on to explain that "[t]he OSH Act . . . places primary responsibility for workplace safety on employers, not on the federal government."\footnote{173}

\footnote{165. \textit{Fisher Bros. Sales}, 46 F.3d at 285. The court goes on to explain that allowing such a claim as the one plaintiffs bring would create huge social costs due to tremendous liability issues that would arise throughout the FDA and restrict and impair the FDA commissioner in his decision making process. \textit{id.} at 286-87.}
\footnote{166. 162 F.3d 154 (1st Cir. 1998)}
\footnote{167. \textit{id.} at 158.}
\footnote{168. \textit{id.} at 163-64, 68 (finding that the OSHA compliance officers had discretion, and that that discretion was grounded in policy).}
\footnote{169. \textit{id.} at 163.}
\footnote{170. \textit{id.}}
\footnote{171. \textit{id.} at 169.}
\footnote{172. \textit{id.} at 168-69.}
\footnote{173. \textit{id.} at 169 (citing 29 U.S.C § 654(a); Reich v. Simpson, Gumpertz & Heger, Inc., 3 F.3d 1, 4 (1st Cir. 1993)).}
The discretionary function exception is not limited only to the mining industry; it is used throughout any industry where the government has been statutorily granted power to regulate workplace safety. The discretionary function exception is a powerful statute that gives the government an increased ability to avoid liability from issues that might arise when the negligent acts of an agent of the government proximately causes a harm to another.

V. REASONS WHY THE FEDERAL GOVERNMENT SHOULD BE LIABLE FOR NEGLIGENT INSPECTIONS BY A MSHA INSPECTOR

There are four reasons why negligent actions by MSHA inspectors should not be protected by the discretionary function exception, therefore, allowing the federal government to be liable in tort for the harms MSHA inspectors proximately cause to miners. First, allowing the inspectors protection under the discretionary function exception would give the regulators the sweeping protection from liability that the Supreme Court explicitly rejected in *Berkovitz*. Second, mine inspectors do not use policy considerations in making decisions since the Secretary of Labor and Congress, acting through the MSHA, has already promulgated those policy considerations into the regulations of the Mine Act. Further, allowing MSHA inspectors to make case-by-case decisions would not only circumvent the power of Congress, but also the power that the Mine Act authorizes to the MSHA representatives that develop and promulgate the regulations. Third, miners depend on the federal government to compel mine operators to maintain minimum federal safety and health standards in the mines since workers compensation laws usually bar the miners from directly suing their employers.174 By allowing injured miners to bring claims against the federal government for negligent inspections by MSHA inspectors, the inspectors are more likely to perform their inspections with a greater degree of care. Fourth, the inspectors do not exercise the kind of discretion that Congress intended to exempt from tort liability in the discretionary function exception.

First, if the federal mine inspectors’ negligence was protected by the discretionary function exception, this would create the kind of broad

---

protection for regulators that Berkovitz explicitly rejected.\textsuperscript{175} The Supreme Court wrote, "[i]n restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument . . . that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies."\textsuperscript{176} Citing both the language of the statute and the legislative history, the Supreme Court concluded that Congress had not intended to bar liability for all regulatory functions.\textsuperscript{177} If the mine inspectors' negligence in performing an inspection fulfilled the second Berkovitz prong, then this would create a wholesale regulatory bar to liability that the Supreme Court had specifically rejected. This bar to liability would have such an effect, because a mine worker would be unable to attack the process of creating the regulations, and the same mine worker would be unable to compel competent compliance by the inspector with the regulations through an action in tort. By enabling an injured worker to bring an action in tort against the government for the negligent inspections by MSHA inspectors, this would allow the MSHA to retain the discretion of the policy underlying the regulations, while encouraging competent inspections by MSHA inspectors.

Second, mine inspectors do not make their decisions on any "social, economic or political policy" basis since Congress and the Secretary of Labor, acting through the MSHA, have already considered both the interest of the miners and the mine operators when promulgating and revising the regulations and the Mine Act for the inspectors to enforce.\textsuperscript{178} Further, affording the government protection against MSHA inspectors who are negligent in carrying out the provisions of the regulations would give mine inspectors the ability to make their decisions on a case-by-case analysis, ultimately diluting the power of both Congress and the MSHA. The discretionary function exception should not apply to the inspector's actions because the Mine Act and

\textsuperscript{175} See Berkovitz, 486 U.S. at 538.

\textsuperscript{176} Berkovitz, 486 U.S. at 538; see also Gaubert, 499 U.S. at 322 (holding the plaintiff could not attack in tort the claim of the plaintiff that the broad latitude granted the federal agency was negligent).

\textsuperscript{177} See Berkovitz, 486 U.S. at 538-39 (explaining that the language Congress chose was discretionary not regulatory). The Court also explained in a footnote that the legislative history while calling for a bar to liability for some regulatory agencies specifically rejected the kind of broad bar to liability that the government supported. \textit{Id. at n.4} ("However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies").

\textsuperscript{178} See Myers, 17 F.3d at 898.
regulations do not authorize the mine inspectors to consider his/her decision on the basis of "social, economic, or political policy."\textsuperscript{179}

The overall public policy of protecting the miners from health and safety concerns by preventing mine operators from operating dangerous mines is objectively codified by both Congress and the Secretary of Labor in the regulations and Mine Act that they developed concerning mine inspections. The Secretary is specifically authorized to "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines."\textsuperscript{180} These standards are developed by the appointed representative of the Secretary, who is required to have either practical experience in mining, experience as a mining engineer, or by education.\textsuperscript{181} In this respect, the mine inspector's job is to determine whether the mine operator has complied with the standard, and if not, to issue the citations and orders as specified by the statute or regulation.\textsuperscript{182} When the specific statute or regulation authorizes the inspector to make a choice,\textsuperscript{183} this decision is to be made not on grounds of "social, economic or political policy" in furtherance of the statute or regulation, but on the inspector's professional opinion and inherent knowledge in the field.\textsuperscript{184} In \textit{Gaubert}, the court explained the policy judgment that played a role in the Federal Home Loan Bank Board decisions to "advise about and oversee certain aspects of the operation"\textsuperscript{185} of the Independent American Savings Association (IASA):

The federal regulators here had two discrete purposes in mind as they commenced day-to-day operations at IASA. First, they sought to protect the solvency of the savings and loan industry at large, and maintain the public's confidence in that industry. Second, they sought to preserve the assets of IASA for the benefit of depositors and shareholders, of which Gaubert was one.\textsuperscript{186}

\textsuperscript{179} Berkovitz, 486 U.S. at 536-37.
\textsuperscript{180} 30 U.S.C. § 811.
\textsuperscript{181} 30 U.S.C. § 954.
\textsuperscript{182} In Justice Scalia's concurring opinion in \textit{Gaubert}, he explained that "the higher the actor stands in a particularly agency, the stronger the presumption that he is afforded discretion to devise public policy. Conversely, the lower the status of the actor, the less likely it is that he is authorized to set policy and the more likely he is to merely implement the policy choices of others." \textit{Myers}, 17 F.3d at 896 n.6 (internal citations omitted).
\textsuperscript{183} See, e.g., 30 U.S.C. 814(d)(1) (making the decision that an "imminent danger" exists); \textit{see also}, e.g., 30 U.S.C. § 875 (making the decision where to erect a "rescue chamber").
\textsuperscript{184} \textit{See} \textit{Myers}, 17 F.3d 898.
\textsuperscript{185} \textit{Gaubert}, 499 U.S. at 318.
\textsuperscript{186} \textit{Id.} at 352-53 (internal citations omitted).
In *Varig Airlines*, the court explained how FAA employees were making policy decisions when executing a "spot-check" program in compliance with the Federal Aviation Act of 1955:

The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the "spot-check" program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals.¹⁸⁷

In contrast to *Varig Airlines* and *Gaubert*, there are no policy reasons that play a role in the decision of mine inspectors when conducting inspections. Each statute and regulation has already codified the overall policy behind the measures that being protecting the health and safety of miners. Thus, when a negligent inspection occurs, resulting in a miner's death or injury, the argument that the mine inspector's decision was made on the basis of "social, economic or political policy" would be implausible since the overall goal of the Mine Act and regulations are to protect the health and safety of the miners. For example, a mine inspector, in carrying out a regulation, negligently makes a decision as the regulation provides, and this negligent decision proximately causes the injury to a miner. The government, thereupon, argues that the mine inspector made his/her decision, although negligent, in furtherance of the ultimate goal of the regulation to protect the safety of the miner. It would be illogical, in this situation, to allow the discretionary function exception to bar liability against the government, because the policy consideration of protecting the health and safety of miners was not furthered. Any such "policy" reason that the government might claim that the mine inspector's decision was grounded in, could not be one that was made in protecting the health and safety of the miners, since the miner was injured or killed due to the MSHA inspector's decision.

Further, mine inspectors should not have the power to make decisions on the basis of "policy" since this would give mine inspectors the ability to do a case-by-case analysis, undermining the regulatory

---

scheme of the MSHA. Congress developed the Mine Act to give certain MSHA representatives the statutory authority to "develop and promulgate" any new regulation that would improve upon the health or safety standard of all the nation's mines. The mine inspectors' duties are not to create their own standards in regards to the health and safety of miners, but to follow and carry out the rules and regulations as specified in the Mine Act. Giving mine inspectors the ability to make a case-by-case analysis and weigh the interests of the overall goal behind the Mine Act and the regulations themselves, would be giving mine inspectors more power than the developers of the Mine Act.

Third, mine workers rely substantially upon the federal government to force mine operators to comply with minimum safety standards. This reliance is due to mainly the statute's regulatory scheme, which seeks not to encourage compliance through self-regulation or self-audit, but through strict rules set out by the MSHA, carried out by inspectors, and followed by all mine operators. Without self-regulation by miners and mine operators themselves, the mandatory inspections, that the MSHA is required by law to perform, are necessary and essential in order to protect the safety and health of the 320,000 mine workers in the United States. Since the statute gives no incentives to mine operators to develop their own safety and health programs to protect their workers, without inspections and enforcement by the MSHA, the safety and health of all the mine workers in the U.S. would be jeopardized and threatened. Further, most states do not allow miners to sue the mine operator since any injury that occurs to the miner during his employment would be covered by workers compensation laws.

By holding the federal government liable for a negligent inspection by a MSHA inspector, the government would be forced to maximize the quality of every mine inspector to ensure that each inspector exercises the utmost care in performance of his or her duties. The safety and health of each miner would be vastly improved due to enhanced inspections by all MSHA inspectors. Further, mine workers will have the added assurance that their employer is operating a mine free from any safety or health hazards that might cause injury or death.

188. 30 U.S.C. § 801(g); see also 30 U.S.C. § 954.
189. See Johnson, supra note 24, at 455.
191. See supra note 174.
Fourth and finally, MSHA inspectors do not exercise the policy discretion that Congress intended to protect through the discretionary function exception. 192 From the legislative history, it is evident that Congress contemplated giving certain regulatory agencies, specifically the "Federal Trade Commission or the Securities and Exchange Commission," broad protection from liability, but ultimately rejected such protection. 193 Congress explained that the exception was meant to protect the agencies from a suit in tort to "test the validity . . . [or] constitutionality of legislation, or the legality of a rule or regulation. . . through the medium of a damage suit for tort." 194 Yet, none of these concerns are raised in a suit over the negligent inspection of a mine by a MSHA inspector. The plaintiff-miner accepts the regulatory scheme of the MSHA and hopes that the inspections are performed without negligence to ensure the safety of the worker. An injured miner's suit, therefore, does not diminish or challenge the policy underlying the regulations or "second-guess" the policy decisions; rather it seeks to affirm such policy through the tort action. The miner seeks that the policy underlying the statute and regulations, the health and safety of the miner, is protected through competent inspections by MSHA inspectors.

VI: FURTHER RESTRICTIONS ON PLAINTIFF-MINE WORKERS BRINGING TORT CLAIMS AGAINST THE FEDERAL GOVERNMENT

Even after a court declares that the MSHA inspectors' discretion is not grounded in policy, there are still two major restrictions that a plaintiff must overcome in order to be able to bring a claim for the negligent safety inspection of a mine. First, the miner must allege that the tort committed by the mine inspector would be a tort if the action was committed by a private individual in the state in which the inspection occurred. Second, a plaintiff must allege facts that support a finding that the mine inspector was negligent in the manner in which he or she inspected the mine. In these allegations, the plaintiff may not allege that MSHA is negligent in the manner in which safety and health regulations are promulgated or enforced. 195

193. Id.
194. Id.
195. This means that a plaintiff may not allege that MSHA was negligent in failing to promulgate a certain safety standard or that the generalized enforcement methods set forth by
The FTCA makes the federal government liable for torts committed by its employees in the scope of their employment if those tortious actions would have been a tort, if committed by a private individual.\textsuperscript{196} This means that a mine worker-plaintiff must prove the existence of some state law tort duty owed to the worker from the mine inspector.\textsuperscript{197}

Unless the plaintiffs have pled facts sufficient to justify liability under ordinary state-law principles, and thus invoked the court's subject matter jurisdiction under the general waiver of sovereign immunity in [FTCA], there is no need to resort to the exceptions [], to dismiss the suit.\textsuperscript{198}

The Sixth Circuit explained that although the mine inspectors' actions were not grounded in public policy, and therefore were not barred by the discretionary function exception, the plaintiffs failed to establish that the mine inspector owed the injured workers a state tort law duty.\textsuperscript{199} While the argument that MSHA inspectors are not protected by the discretionary function exception may seem to enlarge the liability of the government, the state tort law duty requirement prevents “opening the floodgates of litigation.”

Secondly, the plaintiff must allege facts which fall outside the protected policy discretion of regulatory agencies. This means that the mine worker's factual allegations must be limited to the negligent inspection of the mine. Once the mine worker alleges that either a statute, regulation, or the process of making the regulations promulgated by MSHA is negligent, those actions are protected by the discretionary function exception, even though they may be negligent. The plaintiff-mine worker needs to allege facts which are more analogous to those alleged in the third Berkovitz factual situation than those alleged by the plaintiffs in both Varig Airlines and Gaubert.\textsuperscript{200} The mine worker would

\begin{itemize}
  \item MSHA are negligent. Rather, the plaintiff must allege facts, which demonstrate that on a certain date, the MSHA inspector failed to perform his or her inspection in a competent manner.
  \item 197. See supra note 190-92 and accompanying text (exploring the requirement of the FTCA that a plaintiff establish an analogous private liability in order to sustain the action).
  \item 198. Myers, 17 F.3d at 898-99 (explaining that although the discretionary function exception does not prevent the suit against the mine inspectors, there was no state tort law duty owed to the plaintiff by the mine inspector).
  \item 199. See id. at 901 (holding that although the discretionary function exception did not bar the suit, the lack of state cause of action prevented the suit from continuing).
  \item 200. See Berkovitz, 486 U.S. at 533-34; Varig Airline, 467 U.S. at 799-804; Gaubert, 499 U.S. at 318.
\end{itemize}
have to be specific, making it clear that the goal of the suit was not to change the regulatory scheme adopted by MSHA, but rather, that the mine inspector was negligent in the actual inspection of the mine. This requirement is the most difficult for plaintiffs because it necessarily involves the heart of the argument about the discretionary function exception. A plaintiff who mistakenly pleads that the negligence was committed by the regulator in making the regulations, will lose the ability to bring the suit. Only those plaintiffs who allege that the inspector negligently performed his/her duty, and thus violated a state tort law duty owed to the worker, will be able to bring their claim under the FTCA.

CONCLUSION

The goal of the Mine Act is to improve both the health and safety of mine workers. With this goal in mind, in applying the Berkovitz/Gaubert two-prong discretionary function exception test to the decisions made by the MSHA inspectors in following the regulatory scheme of the statute, the second part of the test, the policy prong, clearly can not apply for four reasons. First, allowing governmental immunity would lead to broad regulatory protection from liability that the Supreme Court explicitly rejected in Berkovitz. Second, MSHA inspectors are not permitted to apply policy considerations in their inspections since these considerations have already been promulgated into the regulations and the statute. Allowing MSHA inspectors to make determinations on a policy basis would thwart the power that the Mine Act gave to certain MSHA representatives who developed and promulgated the regulations. Third, mine workers depend on the MSHA inspector, an agent of the federal government, to ensure that their employer is operating a safe and healthy workplace. Allowing the government to escape liability for one of its agents would only foster higher injury or death rates in the mines subject to the Act, contradicting with the first two goals of the MSHA. Lastly, the inspectors do not

201. See Varig Airlines, 467 U.S. at 813-15 (explaining that the plaintiffs could not bring a suit alleging negligence of the entire FAA regulatory scheme).
203. See supra Part IV; Berkovitz, 486 U.S. at 536-38; Gaubert, 499 U.S. at 324-325.
204. See supra Part V.
205. See supra Part V.
206. See supra Part V.
207. See supra Part V.
208. U.S. Department of Labor Mine and Health Administration, History of the Mine Safety
exercise the kind of meaningful policy discretion that Congress intended to protect by enacting the discretionary function exception.\textsuperscript{309}

The argument in favor of the government incurring liability for the negligence of the actions of the MSHA inspectors does not necessarily mean that the government will lose every suit brought against it, or open a floodgate for these kinds of suits.\textsuperscript{210} The restrictions left in place by both the Federal Tort Claims Act and the nature of the suit itself will limit the claims brought against the government. A plaintiff still needs to establish a state tort law duty owed to the plaintiff by the MSHA inspector.\textsuperscript{211} Even in the circuits which hold that the discretionary function exception does not bar liability against the government, a plaintiff’s claim will still be dismissed without the court finding a state tort law duty.\textsuperscript{212} For example, in \textit{Myers}, the court found no bar to the suit under the discretionary function exception; yet, the claim was still dismissed because of the plaintiff’s failure to establish a state tort law duty.\textsuperscript{213}

Moreover, the restriction on the nature of the complaint will necessarily limit the claims brought against the government. The only suits that would be exempt from the discretionary function exception would be those cases where the plaintiff alleges that the inspector negligently failed to complete his/her inspection, negligently gave the mine operator the wrong advice, or negligently carried out the duties provided by the statute or regulation at hand. This would include claims where the inspector should have caught a violation, but did not. However, this would not include claims where the plaintiff alleged that the regulation itself was inadequate to protect the miner’s health and safety.\textsuperscript{214} The decision of what regulations to enact to promote miner health and safety is clearly still within the protection of the discretionary function exception. This is the kind of policy-based discretion that Congress clearly intended to protect from a suit in tort.

This policy of exempting the MSHA mine inspectors from seeking protection under the discretionary function exception is also justified based upon a weighing of each of the parties' interests involved in the case. The federal government seeks to regulate the industry in such a

\textsuperscript{309} See supra Part V.
\textsuperscript{210} See supra Part VI.
\textsuperscript{211} See supra Part VI.
\textsuperscript{212} Myers, 17 F.3d at 899.
\textsuperscript{213} Id.
\textsuperscript{214} See supra Part VI.
way as to promote miner health and safety through use of its limited resources.\textsuperscript{215} The miner wants the government to actively enforce the statute and regulations to ensure that a mine operator maintains a minimum standard of health and safety. By allowing a miner to bring a claim against the federal government, the miner is helping to ensure that the government fulfills its regulatory function in a competent manner. Allowing liability in this context gives the miner a direct way to apply pressure to the government to ensure that the miner can rely upon the conclusions or determinations made by the MSHA inspector. Ultimately, this type of liability will help promote the miner’s safety and health, the core goal and purpose in the creation of the Mine Act.\textsuperscript{216}

\textit{Jay Lapat* & James P. Notter**}

\textsuperscript{215} See 30 U.S.C. § 801(a)

\textsuperscript{216} See id.

* I would like to thank my co-author and friend, Jim, for his diligence and dedication to this project. His ability to make the entire process seem easy is an extraordinary trait. I would also like to thank the staff members and editors on our Journal for all the valuable insight they added. I hope this note can serve as a stepping stone to any worker who has been injured in this dangerous field.

** I would like to thank my co-author and friend, Jay for his creativity and perseverance in completing this note. Jay conceived this topic and his vision led to its final product. I would like to thank Jonathan Manley for his help in forming the title of this note. I would also like to thank the staff and editors of this Journal for their help in developing and editing this note. It has been a privilege and honor to serve as your editor-in-chief. Finally, I would like to thank my family who has unconditionally supported me in everything I have done and continue to do.