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THE EXPANDING RESPONSIBILITY OF THE GOVERNMENT AIR TRAFFIC CONTROLLER

STANLEY J. LEVY*

I. INTRODUCTION

TWO mid-air collisions in 1967 involving commercial jetliners focused public attention on the role of the United States in promoting aviation safety.¹ The Government's influence is felt in all phases of aviation from certifying aircraft airworthiness, to providing funds and establishing standards for airport development, to operating a multi-billion dollar air traffic control system. Almost every flight made in the United States is controlled to some degree by the Government's air traffic controllers who provide instructions, information, advice and guidance to pilots flying the planes. Despite some initial reluctance, the courts have recognized the extent and significance of the controller's role and have imposed an affirmative duty on the controllers to take reasonable action to prevent accidents. This is consistent with the reliance which users of airways place upon the Government and with the Government's responsibility to establish and foster maximum aviation safety.

Civil aviation has grown dynamically since the introduction of the jets in 1955. Planes now fly at speeds in excess of 500 miles per hour and within the next five years will be flying at two and three times the speed of sound.² More significantly, the number of planes flying has increased many fold to the point where our skies, particularly around major terminal areas, are severely overcrowded and in danger of becoming saturated.³ There has been a significant growth in the number of private

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1. In 1967, there were two major mid-air collisions involving commercial jets and private business planes which were both being "controlled" by Government air traffic controllers. In March, a Trans World Airlines DC-9 crashed near Urbana, Ohio killing 26 persons, and in June, a Piedmont Airlines Boeing 727 crashed near Ashville, North Carolina killing 82 persons.

2. The supersonic transports or SSTs are scheduled to be in commercial operation in the early 1970s. The American SST, Boeing's 2707, will carry 292 persons, fly at 1,800 mph and be operational by 1974. The British-French Concorde will carry 136 people, fly at 1,450 mph and be operational in 1971.

3. The Radio Technical Commission for Aeronautics reported that general aviation operations, which includes all civil aviation other than air carrier operation, increased from 8 million in 1954 to 26 million in 1965, a 225% increase and is forecast to increase another 210% to 55 million by 1977. Commercial operators increased their operations from 5.5 to 7.8 million between 1954 and 1965 and a 218% increase to 17 million is forecast for 1977. Report No. DO-135, "Long Range Planning for the Air Traffic Control System" 11 (Mar. 17, 1967).
"week-end" pilots. The combination of a greater number of relatively inexperienced pilots and an increased number of high performance planes has increased the dangers of flying and placed the traffic controller in a position of increased responsibility vis-à-vis the pilot.

The early rule, formulated before the advent of high speed aircraft, limited the traffic controller's duty to advising aircraft operating in restricted visibility conditions of ground based objects or other aircraft which the controller knew or reasonably should have known constituted a collision hazard. The courts accepted the premise formulated by the Federal Aviation Agency and its predecessor, the Civil Aeronautics Administration, that the pilot was primarily, if not solely, responsible for the safe operation of the plane, and the controller served simply as an aide, providing some advice or assistance. However, judicial revaluation quickly demonstrated that the rule was inflexible and did not reflect the controller's responsibilities or satisfy the needs of the public or the aviation industry.

There has been increasing judicial recognition that aviation safety requires the combined efforts of both the pilots and the controllers. The courts reasoned that aviation safety was more likely to be achieved by imposing concurrent duties and responsibilities on both the pilot and the controller. The courts have also recognized that the public, the airlines and the pilots place a high degree of reliance upon the Government controllers. In Ingham v. United States, Judge Kaufman, speaking for a unanimous court, stated:

Our conclusion that the change in visibility should have been reported is in tune with the heavy degree of reliance which passengers place upon the government for insuring the safety of their flights. . . . Much of the success in preventing such [aviation accident] disasters can be attributed to the federal government's assumption of the

4. In fiscal 1965 the Federal Aviation Agency, now the Federal Aviation Administration (FAA), issued 132,608 airman certificates. In 1966, this was exceeded by 23% as the FAA granted licenses to 166,940 pilots. FAA Ann. Rep., Fiscal Year 1966, at 3.

5. See Marino v. United States, 84 F. Supp. 721 (E.D.N.Y. 1949) (where liability was imposed); Schultetus v. United States, 277 F.2d 322 (5th Cir.), cert. denied, 364 U.S. 828 (1960) (where liability was denied).

6. Part 60 of the Civil Air Regulations (14 C.F.R. 60) in effect during 1955-63 stated: "§ 60.2 The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft. . . ." When the CAR's were changed over to the Federal Aviation Regulations (FAR), § 60.2 was carried over as F.A.R. 91.3. A footnote to § 60.21-1 provided in part: "It is the direct responsibility of the pilot to avoid other aircraft when flying in VFR conditions even with a traffic clearance."


supervision of commercial flying; and public confidence in air travel has been fostered in large measure by knowledge that our government, recognizing the high stakes involved, is constantly overseeing the carrier's operations in order to promote safety.9

There is no longer a serious question of whether the controller has a duty to exercise due care in assisting pilots; the question is the extent and scope of that duty. A review of the legislative and judicial history will help place the current re-examination of the Government's role in proper context and suggest the extent to which the courts are likely to expand the controller's duties in the three most common situations involving alleged controller negligence: mid-air collisions and near misses, vortex turbulence and weather reporting.

II. DEVELOPMENT OF THE AIR TRAFFIC CONTROL SYSTEM

The air traffic control system has been unable to keep pace with the dynamic expansion of aviation. This has been due in large part to the failure of the Congress and the administration to provide sufficient money for the hiring of personnel and the development and purchase of new equipment. Money for air traffic control has been scarce except following public outcry resulting from one or a series of major accidents. Consequently, the technological innovations necessary to keep pace with the expanded number of aircraft capable of travelling at high speed have been delayed and adequate staffing has seldom been possible. The history of the system has invariably been that progress has followed disaster.

Prior to 1940, most airport traffic control towers were operated privately or by municipalities with the federal government issuing certificates to tower operators and suggesting standardized procedures. In 1936, the Civil Aeronautics Administration (CAA) began operating some enroute airway facilities, and, in 1941, the CAA was given authority to operate a number of control towers.10 Gradually, the CAA assumed control of all enroute traffic control facilities and almost all airport towers.

9. Id. at 235-36. The Court went on to state: "The carriers, relying on the FAA to keep their pilots informed of current weather conditions, would be likely to reduce both the quantity and quality of their own weather reporting. In light of this reliance, it is essential that the government properly perform those services it has undertaken to provide albeit voluntarily and gratuitously." Id. at 236.

10. Air traffic control was originally the responsibility of the Civil Aeronautics Administration (CAA) created by enactment of the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. § 401. The 1938 act was superseded by the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301, which abolished the CAA and transferred its duties and personnel to a newly established independent agency, the FAA. In 1967, the FAA lost its independent status and was transferred as an entity to the newly established Department of Transportation (DOT) as one of a number of administrations within DOT. 80 Stat. 931, 938 (1967).
In 1956 and 1957, two mid-air collisions focused attention on the air traffic control system and highlighted the inadequacy of the CAA. Legislation was drafted; however, it took two more mid-air collisions in 1958 to create the public clamor which resulted in the passage of the Federal Aviation Act of 1958 and the establishment of the independent Federal Aviation Agency with an expanded mandate for aviation safety. One of the main purposes of the new legislation was to improve the management of civilian and military air traffic and to expand and modernize the traffic control system. Under the Act, the FAA Administrator was required to consider "the development and safety" of air commerce; to provide for the use of the airspace "under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft . . .;" "to operate and maintain . . . air-navigation facilities . . ." and "provide necessary facilities and personnel for the regulation and protection of air traffic . . . within the limits of available appropriations;" and to prescribe air traffic rules governing aircraft flight and for the protection of aircraft.

In addition to creating an independent agency to operate and administer the air traffic control system, between 1958 and 1965 the nation committed billions of dollars to aviation safety. The funds were used for expanded research and development, to obtain modern radar and other traffic control equipment, to build new facilities and to employ thousands of new controllers. By the end of 1964 over half a billion dollars had been spent for equipment which had a replacement value of $1,150,000,000, and by 1967 the FAA was operating 28 Air Route Traffic Control Centers (ARTCC), 305 control towers and 330 flight service stations (FSS) and combined station towers, and employed 17,000 air traffic controllers and a total staff of over 43,914 people. This massive commitment by the

11. On June 30, 1956, a United Air Lines DC-7 and TWA Super Constellation crashed over the Grand Canyon and 128 persons died. On January 1, 1957, a DC-7 and a military jet crashed over Los Angeles, the wreckage fell into a school yard killing two children.
12. On April 21, 1958, a United DC-7 collided with a military jet over Las Vegas and 48 persons died. On May 20, 1958, a Capital Airways Viscount collided with a military jet over Brunswick, Maryland and 13 persons died.
federal government has not gone unnoticed by the public, the users of the airways or the courts.\(^{21}\)

However, by 1965 the economy wave had again reached the FAA and its appropriations were cut substantially. This in turn led to a slowdown in equipment acquisition and to a freeze on the hiring of additional controllers, forcing the controllers to work overtime and to handle more aircraft than is considered advisable.\(^{22}\) Following this cutback in funds, the number of mid-air crashes\(^{23}\) and "near misses"\(^{24}\) began rising again. Following the second major mid-air disaster in 1967, congressional hearings were conducted and in response to the public clamor and congressional urging the administration has stated that more funds will be available for air traffic control activities, however, no additional money has as yet been appropriated.

The claims against the Government based on traffic controller negligence have increased significantly. The Government is a defendant in most near miss and mid-air crash cases\(^{25}\) and in many cases involving marginal weather operations and wake or vortex turbulence.\(^{26}\) Its future involvement and exposure is likely to increase. Therefore, it is increasingly important to define the scope of the controllers' duties.

23. On December 16, 1961, a United Air Lines DC-8 and a TWA super constellation collided over New York City, and 128 persons aboard the planes and 8 persons on the ground died. Following a period of years without a major mid-air disaster, they have occurred with some frequency since 1964. In December, 1964, an Eastern Air Lines shuttle collided with a TWA jet over Carmel, New York. Fortunately, the TWA plane was able to reach Kennedy Airport and the Eastern plane made a partially controlled landing. On February 8, 1965, an Eastern DC-7 departing Kennedy Airport crashed off Jones Beach while taking evasive action to avoid a Pan Am jet approaching the airport. In 1967, there were the two major crashes mentioned in note 1.
24. The Federal Aviation Agency reported 463 near misses in 1966, and 25 mid-air collisions between general aviation aircraft. The actual figure is probably significantly higher since most incidents are not reported because pilots fear punitive actions which may be imposed. N.Y. Times, Mar. 23, 1967, at 23, col. 6.
25. The Government has been sued along with the airline in the mid-air collisions involving the crashes over the Grand Canyon, Las Vegas, Brunswick, Md., Brooklyn, New York, Carmel, New York and the near miss case over Jones Beach. It will probably be named as a party in both 1967 mid-air crashes.
26. In 1967, the FAA reported that 56 cases had been closed and 172 new cases begun, representing a 20% increase in litigation. It further reported that the amount claimed in damages increased from $171,160,000 to $207,817,262 and that "the main issue in these aircraft accident cases is responsibility for the safe operation of the aircraft—FAA's responsibility in operating the air traffic control system vis-à-vis that of the pilot flying the aircraft." FAA Eighth Ann. Rep., Fiscal Year 1966, at 104.
III. THE RIGHT TO SUITE THE GOVERNMENT

The threshold issue in air traffic control liability cases is whether an action can be maintained under the Federal Tort Claims Act (FTCA). The Government has claimed immunity from tort liability based on various "exceptions" or defenses set out in the FTCA. The Government has asserted that the controllers' actions are purely governmental in function and not the type performed by a private party; that controllers exercise judgment and the "discretionary function" exception bars recovery; that in providing advice and instructions a representation is involved and the "misrepresentation" exception is applicable; and that the "execution of . . . a regulation" provision bars suit where the controllers were complying with the agency's interpretation of its own manual provisions. Each of these alleged defenses has been rejected.

The leading case on the issue of the Government's liability for the negligent operation of the air traffic control system is Union Trust Co. v. United States, where the court rejected the Government's claim that

22. 28 U.S.C. § 1346(b) provides that "The District Court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 2674 provides that "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2680 provides, "Exceptions. The provisions of this chapter and § 1346(b) of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights." Id.

32. 113 F. Supp. 80 (D.D.C. 1953). The jury returned a verdict against Eastern but exonerated the Bolivian pilot and the District Judge held the Government liable.
both the "discretionary function" exception and the "private party" argument relieved it of responsibility for its controller's negligence. An Eastern Air Lines DC-4 and a Bolivian government military aircraft collided in mid-air while attempting to land at the Washington National Airport. The United States was sued for the negligence of the controller in clearing both aircraft to land on the same runway at the same time. The Government claimed that its controller performed an essentially governmental function, regulatory in nature and not analogous to functions performed by a "private party" and that his actions involved the exercise of discretion of a public character. The court traced the history of air traffic control in the United States and concluded that "when the United States entered the business of operating a civil airport and an air traffic control tower in connection therewith, it assumed a role which might be and was assumed by private interests." Therefore, the court stated that unless some other provision of the FTCA barred recovery, "the government is liable for the negligent acts or omissions of its control tower operators in the performance of their functions and duties ...."

The court went on to rule that even though the controllers might be exercising some judgment in the course of controlling planes the discretionary function exception was inapplicable to them. It cited Dalehite v. United States to show that the Tort Claims Act would not bar suit for negligence of government employees at the "operational level" where there is no room for policy judgment and decision. It found that even if the controller was "exercising discretion [in handling aircraft, he was] not performing the sort of discretionary functions contemplated by section 2680(a) and clearly described in the Dalehite decision." The court concluded that the controller handled merely operational details and went on to state that "discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."


33. 221 F.2d at 74.
34. Id.
36. 221 F.2d at 78.
37. Id. at 77.
Having rejected the defenses, the court of appeals, without reference to any manual or regulation, found the controller negligent.

It is therefore our opinion that, if a Government towerman negligently clears two planes to land on the same runway at the same time, or is guilty of some other negligent act or omission in doing his work, the Government is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by the driver of a mail truck who, in exercising discretion as to how to drive, negligently runs through a red traffic light.\(^{38}\)

In a short *per curiam* opinion, citing *Indian Towing v. United States*,\(^{39}\) the Supreme Court granted certiorari and affirmed as to the government.\(^{39a}\)

The Government rarely asserts either the discretionary function defense or private party analogy since the *Union Trust* case which conclusively rejected both and enunciated the principle that once the Government decided to operate a control tower, its employees were required to act in a reasonable and careful manner and the United States would be liable for their failure to do so.

More recently, the Government has relied on the "execution of a . . . regulation" and "misrepresentation" exceptions in ATC cases.\(^{40}\) The Government claims that when the FAA promulgates an operating manual to govern controllers' actions and offers testimony concerning the construction of that manual its interpretation is binding on the court. If the controller fails to follow the manual provision, then the defense is inapplicable.\(^{41}\) However, the defense should be rejected on other grounds as well. The FAA manual is not a "regulation" within the meaning of the Administrative Procedure Act.\(^{42}\) To adopt the agency's approach would permit a governmental agency, such as the FAA, acting without the pro-

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38. Id. at 78.
39. 350 U.S. 61 (1961). *Indian Towing* involved an action for damages caused by the negligence of the Coast Guard in failing to properly maintain a lighthouse light, thus causing a tug to crash. The Court held that since the Government had decided to operate the light and having "engendered reliance on the guidance afforded by the light, it [the Government] was obligated to use due care to make certain that the light was kept in good working order" and to discover and repair any outages or give warning of the outage to users of the waterways. Id. at 69.
41. The private party analogy was asserted in *Air Trans. Associates, Inc. v. United States*, 221 F.2d 467 (9th Cir. 1955).
42. 28 U.S.C. §§ 2680(a) & (h) (1964).
43. 373 F.2d at 227.
44. 5 U.S.C. § 1003(b) (1964).
tection of the Administrative Procedure Act to promulgate operating manuals for its personnel, cloak the manuals with the force of law, and then interpret them at some time subsequent to adoption in complete disregard of the manual's plain language and of the reliance and understanding which airlines, pilots and the public place upon the manual provisions.

More serious was the Government's reliance on the misrepresentation exception. The defense was raised in United Airlines, Inc. v. Wiener, the leading case arising out of a mid-air crash over Las Vegas. The Ninth Circuit rejected the defense stating that "the gravamen of the action is not misrepresentation but the negligent performance of operational tasks, although such negligence consisted partly of a failure of a duty to warn." In Ingham the Government asserted this defense on appeal and raised it as the major ground in its unsuccessful petition for certiorari. Ingham was a favorable factual situation for raising the misrepresentation defense since it involved inaccurate reporting of known weather information reflecting substantially deteriorating conditions and the failure to report known weather information. The Government, relying on flood control and Veterans Administration malpractice cases, claimed that the essence of the controller's negligence involved an inaccurate communication or a failure to communicate known weather information and that this was a negligent misrepresentation for which it could not be liable. If this defense was upheld, it would bar suits against the Government in any air traffic control case where the controller provided inaccurate information or failed to provide information available to him. It would not be limited to weather reporting but could extend to reporting the position

45. 335 F.2d 379 (9th Cir. 1964). The plaintiffs claimed that the controllers who cleared the commercial airliner had a duty to provide information necessary for a safe flight, and they cleared the plane without advising it of a hazardous Air Force flight training procedure.

46. Id. at 398. Similarly in Wenninger v. United States, 234 F. Supp. 499 (D. Del. 1964) the court stated: "A failure to warn of an existing danger, when a duty to do so exists, is in a sense an implicit assertion that there is no danger. For some purposes, at least, this may be properly characterized as a misrepresentation. This is not the type of misrepresentation, however, that § 2680(h) was intended to cover. This is made clear by the comments in United States v. Neustadt, 366 U.S. 696, 711, n.26, 81 S. Ct. 1294 . . . § 2680(h) does not deprive the Court of jurisdiction." Id. at 505 (complaint dismissed on other grounds).

47. 389 U.S. 931 (1967).


49. Beech v. United States, 345 F.2d 872 (5th Cir. 1965); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962).
of other aircraft, failing to report the outage of navigational aids and various other readily conceivable factual situations. Moreover, if successful, the defense would have an impact in a myriad of situations extending far beyond air traffic control cases. The court recognized this and stated that "the government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the government that involved communications in any form." The court rejected the misrepresentation defence and found the controller's operational negligence analogous to Indian Towing.

The Coast Guard's negligent failure to maintain the beacon lamp in the lighthouse is closely akin to the controller's failure to provide up-to-date weather conditions. Both cases thus involved a negligent failure on the part of government employees to perform a duty they had undertaken—to provide information and warnings to travelers of the waterways in one case and airways in the other. And in both cases, the breach of this duty resulted in injuries and deaths.

The Government's efforts to assert immunity in traffic control cases have to date been futile. There is no reason to expect any change in judicial attitude in the future. Thus, the threshold issue has been resolved and no suit has been barred by any FTCA defense. Where the Government has been successful in avoiding liability it has been due to the plaintiff's failure to establish actionable negligence.

IV. THE EARLY RULE—RESTRICTED RESPONSIBILITY

The early traffic control cases established a rule of limited controller responsibility and seldom imposed liability on the United States. The plaintiff had the burden of establishing that the controller negligently breached a duty owed to the plaintiff, that the breach proximately caused the accident, and that the plaintiff was free of contributory negligence. Plaintiffs were generally successful where the tower operator was providing direction or control to an aircraft operating in restricted visibility conditions and the plaintiff was not flying the plane. Two reasons ex-
plained plaintiffs' failures even where they successfully proved that the controllers' negligence was the proximate cause of the crash. The most obvious reason to deny recovery was if plaintiff was contributorily negligent. Thus, recovery was denied where a pilot blindly descended into a truck; where he flew below authorized flight minimum; where he failed to observe a converging plane; where the pilot who should have been aware of wake turbulence requested an intersection (or mid-runway) take off. Contributory negligence must be determined by a factual analysis in each case.

Second, and most significant, have been cases where courts have found that the controller had no duty to act or had a minimal duty vis-à-vis the pilot. Thus, courts have found that the controller had no duty to ascertain the type of license before issuing a clearance, or to warn a pilot of wake turbulence before the dangers of wake turbulence were generally recognized; and they have found that he has only a minimal duty compared to the pilot's, even when the controller's clearance results in a mid-air collision. In those cases, the courts have reasoned that the clearance was permissive, not mandatory, and the pilot remained directly responsible for the safety of the aircraft and its occupants. It is this issue, the scope of the controller's duties vis-à-vis the pilot, which has undergone pronounced expansion. This is apparent by reviewing the three major types of air traffic control cases: mid-air collisions and near misses, wake turbulence and weather reporting.

V. Mid-Air Collision and Near Misses

The Government is a potential defendant where injuries or death results from a mid-air collision or evasive action taken to avoid a collision.

the tower had a duty to the repairman to exercise reasonable care and to warn him of approaching aircraft, particularly where the controller had directed the aircraft to that runway. Liability was imposed in one unusual case where the controller provided rescue planes with inaccurate information concerning the crashed plane's location. Blumenthal v. United States, 189 F. Supp. 439 (E.D. Pa. 1960), aff'd, 306 F.2d 16 (3d Cir. 1962).

60. United States v. Miller, 303 F.2d 703 (9th Cir. 1962); United States v. Schultetus, 277 F.2d 322 (5th Cir.), cert. denied, 364 U.S. 828 (1960).
61. 14 C.F.R. § 91.3 (1967).
The Civil Air Regulations, and now the Federal Air Regulations impose a duty on the Government "to promote the safe, orderly, and expeditious flow of air traffic" and to control aircraft in flight "for the purpose of preventing collision between known aircraft . . . ." However, the Government was rarely liable where the plaintiff was in operational control of one of the aircraft involved and was rarely absolved of responsibility where the plaintiff was an innocent passenger. The courts have imposed a concurrent duty on both pilot and controller to avoid collisions and thus, to foster aviation safety. They have been judged by the applicable standard of due care which prevails in the jurisdiction. In addition, the controllers have been required to meet the FAA's standards as set forth in the various operating manuals.

In the Union Trust case, the controller cleared two planes to land on the same runway at the same time and failed to warn either of the hazard represented by the other plane. In a suit by passengers, the court found this conduct improper and determined that the controller failed to exercise reasonable care without reference to any manual or regulation. However, following Union Trust, the Government was absolved of responsibility in three suits by pilots of planes involved in mid-air crashes. The three cases all involved contributory negligence by the plaintiffs and an obvious judicial reluctance to impose a duty on the controller when the pilots were operating in good weather and had the capability of avoiding the accident. In United States v. Schultetus the Fifth Circuit concluded that the trial court overlooked "the principle that the direct and primary responsibility for the operation of the aircraft over or in the vicinity of an airport rests upon the pilots of aircraft." The court found that the "clearance" issued by the controller was an authorization to land, permissive in character, which did not relieve the pilots of their duty to avoid collisions with other planes and that by issuing a warning to one of the planes, the controller completely fulfilled his duty as set forth in the FAA Manual. In United States v. Miller the court stressed that the optimum of safety is achieved when concur-

62. 14 C.F.R. § 1.1 (1967). (Definitions of "Air traffic control" and "Air traffic clearance").
64. United States v. Miller, 303 F.2d 703 (9th Cir. 1962); United States v. Schultetus, 277 F.2d 322 (5th Cir.), cert. denied, 364 U.S. 828 (1960); Stanley v. United States, 239 F. Supp. 973 (N.D. Ohio 1965).
65. 277 F.2d 322 (5th Cir. 1960).
66. Id. at 328.
67. 303 F. 2d 703 (9th Cir. 1962).
rent duties are imposed on pilots and tower operations. It rejected the asserted liability on the ground that even if the controller was negligent, it failed to relieve the pilot of his “direct responsibility” for the safety of his aircraft. In Stanley v. United States the controller, unaware that plaintiff’s plane was in the vicinity since he had not seen it or been notified of its presence by plaintiff who was operating under visual flight rules conditions, cleared a flight of military jets for a low pass over the field which resulted in the crash. Although plaintiff’s claim failed because he failed to show that the controller knew or should have known of plaintiff’s plane being in the area, the court stressed the pilot’s responsibility for his own safety under the applicable Civil Air Regulations. After reviewing the regulations, it determined that the controller’s function was:

to aid . . . pilots to avoid collisions by issuing traffic clearances or other information based on known or observed aircraft in the area which, in the traffic controller’s judgment, constitute a potential hazard to the operation of the aircraft concerned.

However, in four other cases involving mid-air collisions and injuries caused by near misses, including one on behalf of a deceased pilot of one of the planes involved, the Government was held jointly liable. In Cattaro v. Northwest Airlines, Inc., both the Government and the carrier were held responsible to an injured passenger when a commercial airliner took sudden evasive action to avoid being struck by a military jet. The planes were being controlled by different sectors within an FAA air route traffic control center (ARTCC). Because of a failure of coordination within the control center, the controller handling the commercial airliner was not informed of the jet’s clearance limit and authorized the

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68. The court recognized that: “with increasing density of traffic, increasing speed, and increasingly complex aircraft which require more attention inside the cockpit, safe operation is facilitated by providing assistance from ground personnel. Such assistance is provided by the towers.” Id. at 710 (footnote omitted).


70. Id. at 978.


72. The FAA operates 30 air route traffic control centers, commonly referred to as centers, throughout the United States. The centers provide air traffic services for aircraft operating under instrument flight rules (IFR) during the en route portion of a flight. Each center is divided into numerous sectors with responsibility for a particular geographic area within the geographic area of the center’s control. As an aircraft flies throughout the country air traffic control responsibility will pass or be “handed off” from the airport’s departure controller to the center, and from sector to sector within the center. The plane will be handed off from center to center until it enters the terminal area. Control will then be handed off to the appropriate airport controller for landing and taxiing clearances and instructions.
collision course. Without referring to any operating manual the court stated: "A Government air traffic controller cannot authorize an airplane to fly a collision course with another airplane then being monitored by another Government controller and escape liability by claiming neither controller had a duty to separate them." The statement seems obvious. However, in view of the Government's claim, the court felt compelled to articulate this basic premise. One of the grounds for holding the Government liable in the cases arising out of the Las Vegas mid-air collision between a military jet and a commercial airliner was the controller's failure to warn the commercial airliner of a military jet flight practice procedure. The airliner was operating under instrument flight rules which meant that it continuously reported its progress to the FAA control center and expected the controller to provide instructions and clearances which, at a minimum, would prevent collision with other aircraft. The court pointed out that while an IFR clearance did not "insure" positive separation from all aircraft, it did impose an obligation on the controllers to warn of known hazards and to assist pilots "by providing such advice and information as may be useful for the safe and efficient conduct of a flight." Courts have relied on the controller's own manual as a basis for finding a duty to warn and to aid pilots operating in an airport area in visual flight rule conditions. In Hochrein v. United States, the court said the controller had not completely fulfilled his duty when he took no further action after warning one of two planes of the possibility of a collision. Unlike Schultetus and Miller, the court stated that more was required when the controller's warning signal was disregarded. The court stated that "[t]he continuing failure to so inform Hochrein of the existence of a possible danger, in the form of an unseeing aircraft, was a continuing breach of duty owing to Hochrein . . ." and that this breach contributed to the crash.

The last reported case involving a mid-air collision arose from the crash between a commercial liner and an Air National Guard jet. The

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73. 236 F. Supp. at 895.
75. 335 F.2d at 397, citing 14 C.F.R. § 617.4, setting forth relevant air traffic control rules.
77. Id. at 320.
78. Maryland ex rel. Meyer v. United States, 257 F. Supp. 768 (D.D.C. 1966). Plaintiffs originally contended that the National Guard pilot was acting in the course of employment for the United States. The issue was tried separately and it was ruled that the United States was liable for the pilot's negligence. At trial, the pilot of the jet was found negligent and the commercial aircraft absolved of responsibility. This was affirmed in 322 F.2d 1009 (D.C.
court recognized the pilot's obligation to use a high degree of care but stressed that the pilot and controller had a concurrent duty. The court found the controller's "instant inattention" was the difference "between safety and disaster" and that his failure to see what was on the radarscope and immediately issue a warning was a proximate cause of the crash. It stated that the center controllers have a duty to use diligence to observe and detect on the radarscope any traffic flying on visual flight rules and other obstructions in the vicinity of the aircraft that is being controlled and immediately to warn the pilot of any impending danger. While this duty is not absolute and does not mean that the Government is an insurer of safety, nevertheless, due care must be exercised to discharge it adequately. "What constitutes due care under any circumstances necessarily depends in large part on the risk and hazard involved." The Government has also contributed a portion of the total amount in settlement of other cases arising out of mid-air collisions. It was a co-defendant with the two airlines in cases arising out of the mid-air collision over Brooklyn, New York and paid approximately three million dollars toward the settlement. According to FAA Administrator Najeeb Halaby, "The Department of Justice, after carefully looking over the case said that the litigation risk of the judge . . . holding the government culpable indicated we had better settle . . . ."

The Government will undoubtedly find itself a co-defendant and share responsibility in most mid-air collision cases. The increased hazards of flight resulting from more planes placing increased reliance on radar control and assistance will result in the court's imposing a higher standard upon both the government and the aircraft operator. Apportioning responsibility based on who has "primary" or "direct" responsibility is

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79. 257 F. Supp. at 774. "Failure to see and realize what was visible and discernible [on the radar scope], followed by failure to give immediate warning, constituted negligence that was one of the proximate causes of the accident." Id.

80. Id. at 772.


82. See note 23 supra, listing major mid-air collision cases in which the Government is a party defendant.
a sterile, semantic exercise which does nothing to further aviation safety. The better approach, and certainly the safer one, is to impose upon both the pilot and the controller a realistic standard of concurrent responsibility for the safety of all aircraft.

VI. WAKE TURBULENCE CASES

Wake turbulence constitutes an invisible, but dangerous hazard to aircraft operations. Its dangers were not fully appreciated until a few years ago. The cases against the Government have been prosecuted on the theory that the controller has a duty to warn of the danger and assure adequate separation between aircraft. With one exception they have not been successful because of a failure to establish the cause of the crash or because of the plaintiff's own contributory negligence. But even in this difficult area the courts have shown an increasing recognition of the vital role the controller can and should play in warning pilots, particularly inexperienced pilots, of the invisible hazard of wake turbulence.

Plaintiffs' claims have been rejected in three of the four reported cases. In one case, the plaintiff failed to establish that the controller knew of the phenomenon and the court rightly reasoned that there could be no duty without knowledge. However, implicit in the court's reasoning was the understanding that with knowledge of the wake turbulence phenomena a duty would probably be imposed on the controller. In a second case, the court stated that the controller did have a duty to consider and warn the pilot of turbulence. The court, relying on the CAR requirement that controllers assist pilots by "providing such advice and information as may be useful for the safe . . . conduct of a flight," ruled that even though the FAA had not promulgated separation standards based on turbulence, the controllers "in the exercise of reasonable care, do have a duty to take into consideration turbulence hazards when giving clearance to land."

The controller's duties were re-examined in two recent cases which

83. When a plane moves through the air its wings and engines (and the rotors in a helicopter) create turbulent forces which flow behind the aircraft and gradually dissipate with time and distance. It is particularly hazardous for small planes which, operating at close to their stall speeds, pass in close proximity to larger planes while attempting to land or take off.


86. 14 C.F.R. § 617.4 (1967) (as in effect on the date of the accident).

87. 183 F. Supp. at 493.
reached diametrically opposite results. In *Hartz v. United States* the court rejected plaintiff's claim because of plaintiff's own contributory negligence. However, the court went on to reject plaintiff's assertion that there was a common law duty of due care applicable to the controller, finding instead that the controller's duty was fixed by the FAA operating manuals, which he had complied with. Unfortunately, the court became mired in an unnecessary and confusing discussion of whether the pilot or the controller had the "primary" or "main" responsibility for the safe conduct of the flight. There is no question that the CAR's (now the FAR's) give the pilot the authority to refuse to land or take off even after he receives a clearance from the controller. While the pilot retains the ultimate authority for the safety of his aircraft, it does not mean that the controller is not also under duty to act where safety requires. The court's opinion suggests a very restricted scope of duty, limited to the literal language of the controller's operating manual and easily superceded by any negligence by the pilot.

The result and the approach adopted in *Furumizo v. United States* was diametrically contrary to *Hartz*. In *Furumizo*, the district court stated that the controller "had a duty to exercise judgment to attempt to avoid danger where such danger was, or should have been, obviously imminent," and that a "mere" warning of turbulence was not enough where the controller should have realized that the pilot was commencing an "extremely hazardous or suicidal" take off attempt. The court rejected the Government's claim that "traffic regulations" was the only standard applicable to the controller's conduct. It stated that the Federal Aviation Act imposed a duty on the FAA to provide for aircraft safety and that the controller's own manuals "equally stress the safety and protection of aircraft." The court stressed the concept of concurrent responsibility and concluded that the controller was not slavishly bound to follow the book but was expected to exercise judgment and had the authority, even under his own manuals, to lengthen the separation between aircraft if "the danger of air turbulence appeared imminent." The Ninth Circuit

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90. Id. at 992.
92. 245 F. Supp. at 993 (emphasis omitted).
93. Id. at 992. "However, this Court finds that the regulations and directives did not leave the tower controllers devoid of any duty to exercise judgment in the interests of safety where, in a situation like this, they knew, or should have known, that a light Piper taking off at the time and in the manner and under the circumstances of this particular case must almost certainly encounter air turbulence of a degree so severe as to be imminently
unanimously affirmed and ruled that the controller had a duty to reissue his warning when he realized that his original warning was being ignored. The court rejected the Government's contention that having cleared the plane and given a warning, the controller's obligation ended—a view directly opposite to that expressed in Hartz. The court stated:

The government maintains that giving this type of clearance transferred to the pilot of the Piper, or left with him, the sole responsibility for avoiding the danger. No doubt, he had that responsibility. United States v. Miller, supra. And it may be (we do not decide) that if, after giving the warning, the attention of the controllers had been diverted elsewhere, either by their duties or even fortuitously, so that they did not see the Piper start its takeoff in disregard of the warning, the United States would not be liable. But we are unwilling to hold, as the government would have us do, that when the controllers did see the Piper start its takeoff, they had no duty to act. The danger was extreme, and they knew it. Nothing in the regulations or manual says that, under such circumstances, controllers shall not act. As the trial judge points out . . . the regulations and manual do not make mere automata of the controllers. Their job requires that they act in the interest of safety, and it would be strange indeed if that overriding duty did not include an obligation to seek, by appropriate instructions, to warn a pilot who is starting to take off when it is apparent to them that he will encounter a severe hazard. 94

The court was not required to and did not rule whether the controller had the authority to deny or delay granting a clearance.

The cases show, with the exception of Hartz, an emerging concept of responsibility in wake turbulence cases. The controller has a duty to consider wake turbulence when granting clearances, to issue warnings when turbulence may be a factor and to continue to reissue the warnings if it appears that the pilot has not fully appreciated the hazards. It is still an open question whether the controller may, in the exercise of reasonable care, deny or delay a clearance. Airlines and pilot groups have urged that the controllers be prohibited from denying or delaying a pilot's request for a take-off or landing clearance. The FAA has acceded to this view believing that it means less of a burden on the controller and that it will insulate the FAA from responsibility. It has formulated its operating manuals so as to deny this power to its controllers except where necessary to avoid collision. This shortsighted and self-interested approach by the agency primarily charged with fostering aviation safety

dangerous to the occupant or occupants of the light plane, which might well include an unskilled student pilot whose life depends upon the exercise of due care by both his instructor pilot and the tower control operator. That these regulations did contemplate, permit and authorize the exercise of discretion and judgment on the part of tower control operators to lengthen separation if the danger of air turbulence appeared imminent is proved by the acts and publications of the F.A.A. . . ." Id. at 1002-03 (emphasis omitted).

94. 381 F.2d at 968.
denies the pilot and the public the benefit of the controller's professional judgment solely for the purpose of avoiding potential liability and catering to one segment of the aviation community. The approach is unsound, unsafe, unresponsive to the public's need and unlikely to meet with approval. In an appropriate case, involving a passenger rather than a pilot, the reasoning and logic of the district court in *Furumizo* will probably be adopted and the controller will be required to exercise his professional judgment in the further interest of aviation safety.

VII. WEATHER REPORTING CASES

Accurate and up-to-date weather information is vital to aviation safety. Reported and forecast weather effects flight operations and may even determine whether a take off or landing may be attempted. Particularly in marginal visibility conditions, accurate weather information is critical to safe aircraft operations. Courts have imposed a duty upon controllers to report accurate, complete and current weather information. Recently, one district court has gone so far as to hold that the controller should deny a take off clearance where he knows that existing weather conditions make take off hazardous.

The Federal Aviation Act requires the Weather Bureau to make observations, furnish reports to the FAA and to assist in the dissemination of weather reports "in order to promote safety and efficiency in air navigation to the highest possible degree." The Weather Bureau and the FAA have jointly developed an extensive system to obtain current weather information and to disseminate it to the ultimate users, the pilots. The Weather Bureau has observing stations at many locations including most major airports and the observations of its trained meteorologists are disseminated nationally via an extensive communications network.

The first issue faced in weather reporting cases was whether the controller could deny a request for a clearance solely because of adverse weather. The Government's position has consistently been that even where the reported weather is below operating minimums the controller is required to issue a clearance, if requested, but should explicitly notify the pilot of the below minimum conditions and report the flight operation as a violation for subsequent disciplinary proceedings, if the pilot chooses to proceed with the below minimum operation.

The Government's position was adopted in the first weather reporting case. In *Smerdon v. United States* the plaintiff unsuccessfully contended

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96. 135 F. Supp. 929 (D. Mass. 1955). The controller was located in a darkened radar room, and had no personal knowledge of weather conditions. He learned through weather
that the controller had a duty to determine whether the weather condition was safe for a landing, and to deny a clearance if visibility was "unsafe." The court adopted the narrow view that the CAR's limited the controller's responsibility to collision avoidance and that the plane was properly controlled "insofar as its safety from collision was concerned." The court pointed out that the controller reported the weather accurately and assisted the pilot following the pilot's decision to make the approach. The court noted that the regulations did not go as far as plaintiff urged. It stated that: "These regulations [the CAR's] do not place upon Air Traffic Control Operators the responsibility of determining whether or not a given weather condition is safe for a landing." 7

However, in *Stark v. United States* 8 the court ruled that the controller did have a duty to determine if weather conditions permitted a safe flight. In *Stark*, a request for a take off clearance was granted even though the visibility had fallen to zero and the crew had not been advised of this deterioration. The plane crashed on take off due to the pilot's inability to maintain his bearing. The court stated that the controller should have advised the pilot of the decrease in visibility but, since the pilot could see as well as the controller, that failure was not the proximate cause of the crash. The court rested its decision on the fact that the controller knowingly violated the Civil Air Regulations by issuing the clearance knowing that the weather was below minimums. The court ruled that the controller had the power and duty to deny a clearance both under the CAR's and under prevailing "custom and practice." 9 Thus, *Stark* is directly contrary to *Smerdon* on the issue of whether the controller has the authority and the duty to deny a clearance in dangerous weather conditions.

Both *Stark*, *Smerdon* and every other reported case recognize a duty to report accurate, complete and current weather. 10 The leading case on

7. Id. at 932.
9. Major General Joseph Caldera, President of the nonprofit advisory Flight Safety Foundation, recently proposed that weather specialists be given authority to deny the right to take off to non-instrument rated pilots in potentially bad weather. The proposal was criticized by many groups representing private pilots. N.Y. Times, Dec. 24, 1967, at 50, col. 2.
10. One of the earliest traffic control cases imposed liability on the Government partly because the controller failed to advise the pilot of a thunderstorm and the pilot entered the
the issue of whether reporting is Ingham v. Eastern Air Lines, Inc.\textsuperscript{101} holding the Government liable for the controller's failure to accurately disseminate available visibility information to an aircraft making a final landing approach in marginal weather conditions. The controller had been notified that visibility had deteriorated substantially, but was still above the aircraft's landing minimum. He not only failed to report it to the approaching plane, but misled the crew by restating the superseded visibility. The court rejected as "inordinately narrow" the Government's claim that its manual required the controller to report visibility on initial contact and thereafter only if visibility fell below weather minimums.\textsuperscript{102} It found that the Government had accepted a duty to report necessary weather changes and that the "more meaningful and reasonable interpretation" of the Government's manual:

required the approach controller to report those subsequent changes which, under all the circumstances, the crew would have considered important both in determining whether to attempt a landing, and in preparing for the weather conditions most likely to be encountered near the runway. In our view, a drop in visibility of 25\%, from one mile to three-quarters of a mile, bringing existing weather conditions dangerously close to landing minimums, is such a critical change that, in the interests of safety, it should have been reported to the crew of EAL 512.\textsuperscript{103}

The court noted that the carriers place a "heavy degree of reliance" on the controllers and have reduced their efforts to inform their crews of weather changes. The court also rejected the Government's claim that since the initial decision to provide weather information was a gratuitous one, it could proceed "with impunity to violate its own regulations and act in a negligent manner."\textsuperscript{104} It stated that, like the good samaritan, once

\textsuperscript{101} 373 F.2d 227 (2d Cir. 1967).
\textsuperscript{102} Id. at 235. Air Traffic Control Procedures Manual, ATP 7110.1A § 265.2. At trial plaintiff claimed other violations of FAA manuals and of the duty of due care. It asserted that surface visibility, sky cover information and quadrantal visibility, which also showed deteriorating conditions, should have been reported and that the Runway Visual Range (RVR), an electronic visibility measuring device, which showed visibility to be below landing minimums should have been used. Plaintiff also contended that the Weather Bureau and FAA incorrectly determined that the visibility observed by the tower controller rather than that observed by the Weather Bureau observer "controlled" aircraft operations. These claims included violations of other provisions of the Air Traffic Control Manual, the Communications Manual, ATP 7300.1, the Facility Operation Manual, ATP 7230.1 and the Weather Bureau's Manual of Surface Observations, Circular "N." Both the district court and the court of appeals rejected the claim concerning the RVR and did not pass on the other issues raised by the plaintiff.
\textsuperscript{103} 373 F.2d at 235.
\textsuperscript{104} Id. at 236.
the Government undertakes to act it will be liable if the activities are negligently performed.\textsuperscript{105}

The court found the violation of FAA operating manuals sufficient basis for the finding of negligence and did not discuss the controller's common law duties. The court also rejected the Government's contention that its failure to report the visibility change was not a proximate cause of the crash.\textsuperscript{106} The court recognized that the final decision to land or not must properly rest in the pilot's hands since he is in the best position to observe the weather and judge its effect on the landing attempt. However,

[i]f the pilot does decide to attempt a landing, information concerning recent and significant changes in weather conditions is essential to his mental computations and the exercise of his judgment . . . . Thus, it was of the utmost importance that the crew not be lulled into a false sense of security. The pilot should have been told that weather conditions were becoming marginal, and that he might well encounter less than minimum visibility upon reaching the runway.\textsuperscript{107}

The court's approach to the weather reporting problem is a balanced and reasonable one. It recognizes the pilot's responsibility for the safety of his plane while at the same time recognizing his need for accurate information for advance planning and intelligent decision making. Requiring air traffic to provide complete, accurate and up-to-date weather information may impose a minimal additional burden on the controller. However, this is a small price to pay if the information averts even a single accident. The reliance of the public and the carrier on air traffic controllers are factors which no longer can be ignored. The imposition of concurrent responsibilities on both controller and pilot provides maximum safety.

VIII. CONCLUSION

The early air traffic control cases enunciated a restricted rule of liability for air traffic control activities. The restricted rule accurately reflected the extent of the controller's duties vis-à-vis the pilot. However, since aviation has developed dynamically in the past decade, the division of responsibility has changed and the legal rules are in the process of adapting themselves to the developments which have taken place in aviation operations.

In the early days, the pilot bore almost the sole responsibility for the

\textsuperscript{105} Id.

\textsuperscript{106} The Government claimed, as it did successfully in Stark, that the pilot had the most accurate and up-to-date knowledge of the weather on the runway since he was there and the control tower observer was more than one and one-half miles from the runway threshold.

\textsuperscript{107} 373 F.2d at 237.
safety of his aircraft. The air traffic control facilities were limited. The courts spoke in terms of the pilot having a "direct" or "primary" responsibility for the safety of his aircraft. As aviation changed the responsibilities of the controllers increased and pilots relied on controllers to a greater extent for advice, information and in certain circumstances for guidance and direction. As more air traffic control cases were tried, courts acquired a better understanding of the controllers' duties and his role vis-à-vis the pilot. More and more, the courts recognized that aviation safety was fostered by imposing concurrent duties on both pilot and controller.

The courts have tended to increase the affirmative duties of the controller in each of three major areas of air traffic responsibility in accordance with the expanded scope of his operation responsibilities. The Government's efforts to circumscribe the area of the controller's duties by restrictive operating manuals have been rejected. The courts have asserted that the controller must satisfy not only the Government manual requirements but also the accepted standard of due care prevailing in the jurisdiction. They have stressed his duty to aid and assist pilots and they expect the controller to exercise his professional judgment, rather than blindly follow a limited and limiting standard which fails to consider the needs of safety as its prime criteria.

While this approach may cause some uncertainty on the controller's part concerning the extent of his responsibility and may impose an additional burden on him, it more accurately reflects the relative role of the controller and the pilot and the public's understanding and reliance on the Government's participation in aviation operations. The full extent of the controller's responsibilities has not been definitely established. However, the broad outline seems clear. There is an affirmative duty to assure separation between aircraft and prevent mid-air collisions. This is the major reason for the existence of the entire air traffic control system. At a minimum this duty extends to all aircraft operating under positive control. It also applies to cases where the danger of the collision was or should have been obvious to the controller. As the turbulence, weather and collision cases demonstrate the controller must provide pilots with accurate and up to date information which may affect flight safety. The controller must assure that the pilot receives all relevant information he needs to make an intelligent judgment concerning the course of his flight.

The controller will be required to warn pilots of imminent dangers, whether the hazard involves turbulence, weather conditions or possible collisions. Where the danger is imminent and the pilot demonstrates no
awareness of the hazard, a mere perfunctory warning will not be sufficient to discharge the controller's responsibility to warn. At a minimum, the controller will be required to exercise his professional judgment and discretion to issue the appropriate warnings. The controller will not be permitted to evade responsibility where he could have acted to prevent the accident. Some courts and some members of the aviation community believe that controllers should be authorized and required to deny clearances and pilot requests if the controller believes the requested course of action is hazardous. They argue that this will free the controller to exercise his professional judgment and act as a check on reckless pilot conduct. However, most pilots, air carriers and FAA officials oppose this approach and with the exception of one case, it has not been adopted. Without a change in the appropriate regulations and manuals it is not likely that the courts will impose this type of duty on the controllers.

The extent of the controller's responsibility has not been definitely established. However, it is clear that the judicial attitude of fostering aviation safety has led the courts to impose a concurrent responsibility on pilots and controllers.