

OFFICIAL TRANSCRIPT ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO.

TITLE

UNITED STATES,

Petitioner

v.

S. A. EMPRESA de VIACAO AEREA RIO

GRANDENSE (VARIG AIRLINES); and

UNITED STATES,

Petitioner

v.

UNITED SCOTTISH INSURANCE CO.

et al.

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: No. 82-1349

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: No. 82-1350

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PLACE

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in United States v. Varig Airlines
4 and the consolidated case.

5 Mr. Geller, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
8 ON BEHALF OF PETITIONER

9 MR. GELLER: Mr. Chief Justice, and may it
10 please the Court:

11 The Federal Aviation Administration has been
12 charged by Congress with the responsibility of promoting
13 safety of flight of civil aircraft. The agency fulfills
14 its statutory mandat in two principal ways, one of which
15 is essentially legislative, the other of which can be
16 described as law enforcement.

17 First, the FAA promulgates regulations
18 prescribing minimum safety standards governing the
19 design, material, construction and performance of civil
20 aircraft. These standards take up more than 500 pages
21 in Title VIX in the Code of Federal Regulations.

22 The second, the FAA tries to police the
23 aircraft industry's compliance with these safety
24 standards by reviewing design and performance data,
25 conducting tests and deciding whether to certify that

1 particular aircraft are in conformity with its
2 regulations. Congress has made it unlawful to operate
3 an airplane that does not have a current airworthiness
4 certificate issued by the FAA.

5 These cases were brought under the Federal
6 Tort Claims Act on behalf of the owners and passengers
7 of two airplanes that crashed due to in-flight fires.
8 Respondents sought more than \$100 million in damages
9 from the United States on the ground that the FAA was
10 negligent in carrying out its statutory responsibilities
11 by certifying the airplanes that crashed even though
12 they allegedly did not comply with the Agency's safety
13 standards.

14 The Ninth Circuit agreed with Respondents'
15 arguments. We have sought certiorari because we believe
16 that Congress could not possibly have intended to expose
17 the United States to tort liability to members of the
18 general public for errors in carrying out its regulatory
19 responsibilities.

20 Although the issues here are solely ones of
21 law, I think it would be useful to begin by briefly
22 describing the facts of these cases in order to show
23 just how far reaching and unprecedented the Ninth
24 Circuit's judgment in this case really is. The United
25 Scottish Insurance case involves an airplane that was

1 manufactured in the United Kingdom in 1951.

2 It was sold to an air taxi service known as
3 Air Wisconsin. In 1965 Air Wisconsin contracted with
4 Aerodyne Engineering Corporation for the installation of
5 a gasoline fuel heater, and as required by FAA
6 regulations Aerodyne applied for what is called a
7 supplemental type certificate authorizing the
8 installation of the heater.

9 In 1966, the following year, the airplane was
10 sold by Air Wisconsin to Respondent Dowdle who owned
11 Catalina-Vegas Airlines, another air taxi service.
12 Between 1966 and the crash of that plane in 1968
13 Catalina-Vegas inspected its airplane on at least eight
14 occasions including two major yearly inspections of the
15 gasoline heater.

16 The District Court found that the crash
17 occurred because the gasoline line leading to the heater
18 was not adequately clamped to reduce vibration allegedly
19 in violation of the FAA safety standard prohibiting
20 "excessive vibration in fuel lines". The court held
21 that the FAA was negligent in inspecting the airplane
22 and in issue a supplemental type certificate.

23 The Court of Appeals affirmed the judgement,
24 as I said a moment ago, agreeing with the District Court
25 that the FAA was liable under California's law as a good

1 samaritan. The Ninth Circuit said that the government
2 had performed a service for the Respondents within the
3 meaning of the Good Samaritan Doctrine and that the
4 government should expect that members of the general
5 public would rely on its certifications of
6 airworthiness.

7 QUESTION: What was the time lapse between the
8 government's inspection and the accident?

9 MR. GELLER: The inspection would have taken
10 place in 1965. The accident took place in 1968.

11 The facts of the Varig case involve conduct by
12 the FAA, Mr. Chief Justice, even more remote than the
13 three years that was involved in United Scottish. The
14 Varig concerns the crash of a Boeing 707 on a flight
15 from Rio de Janeiro to Paris in 1973.

16 The FAA had issued a type certificate for the
17 Boein 707 in 1958, 15 years prior to the crash. The
18 plane involved in that case had been sold by Boeing to
19 Seaboard Airlines.

20 In 1969 Seaboard Airlines resold the plane to
21 Varig, which is the Brazilian air carrier. The
22 Brazilian took the plane out of the United States
23 permanently at the point, which had the result of
24 voiding its FAA airworthiness certificate.

25 Respondent alleged that the crash in that case

1 occurred because the towel disposal area in one of the
2 aft lavatories on the Boeing 707 was not designed to
3 contain fires, allegedly in violation of the FAA
4 regulations, and that the FAA was negligent in 1958, 15
5 years earlier, in not noticing this defect and in
6 issuing a certificate for the airplane.

7 QUESTION: What was that certificate? That
8 was the --

9 MR. GELLER: Type certificate.

10 QUESTION: That is the first one, is it not?

11 MR. GELLER: Yes, although the complaint in
12 that case was not too clear as to exactly which
13 certificate they were complaining about. Now we
14 understand from the briefs that Respondents in the Varig
15 case were complaining about the issuances of a type
16 certificate, which was the first certificate.

17 QUESTION: Are the various certificates
18 cumulative in a sense that if you miss something that
19 you should have caught in the first place you should
20 catch it in the next or not?

21 MR. GELLER: Well, the Airworthiness
22 Certificate is the final certificate that is issued to
23 each plane as it comes off the assembly line, and the
24 FAA does not inspect each plane.

25 QUESTION: I understand that.

1 MR. GELLER: If the FAA, for example, would
2 revcke a type certificate it would have the result of
3 voiding the Airworthiness Certificate. You have to have
4 a valid type certificate in effect to have a valid
5 Airworthiness Certificate.

6 QUESTION: But an Airworthiness Certificate
7 does not necessarily inspect for what you would inspect
8 for in a type certificate?

9 MR. GELLER: No.

10 QUESTION: Mr. Geller, following the original
11 certification of airworthiness, exactly what is the
12 responsibility of the FAA with respect to inspection?

13 MR. GELLER: With respect to each airplane?

14 QUESTION: Yes, with respect to each
15 airplane.

16 MR. GELLER: The FAA does no further
17 inspections of individual airplanes.

18 QUESTION: It does have some responsibility to
19 make sure that the manufacturer or operator of the
20 aircraft --

21 MR. GELLER: It has general responsibilities
22 to make certain that the manufacturer is carrying out a
23 program of maintenance, and it has, I am told, regular
24 inspections of air carriers to make sure that they are
25 in general complying with maintenance requirements. But

1 it no longer looks at any particular airplane. That is
2 the responsibility of the air carrier.

3 QUESTION: There is no further certification
4 of --

5 MR. GELLER: No further certifications of
6 individual airplanes.

7 QUESTION: But they do check the maintenance?

8 MR. GELLER: They check the maintenance of air
9 carriers in general -- that is correct -- but not any
10 specific airplane.

11 We believe that the decision of the Ninth
12 Circuit is plainly incorrect for four reasons, any one
13 of which would require reversal of the judgment below.
14 First, Congress did not intend to subject the United
15 States to damages liability under the Federal Tort
16 Claims Act for actions arising out of government
17 regulatory activities, that is, for negligence in
18 enforcing the law in requiring that third parties comply
19 with the law.

20 Moreover, Respondents' claims are barred by
21 the misrepresentation and discretionary function
22 exemptions of the Tort Claims Act. Finally, the FAA's
23 regulatory activities even if they are to be judged
24 against the standards of state tort law do not violate
25 the Good Samaritan Doctrine.

1 We think the most serious error of the Court
2 of Appeals, certainly the one with the most damaging
3 ramifications is its unprecedented holding that Congress
4 intended to allow the courts to oversee government
5 regulatory or law enforcement activities in the guise of
6 adjudicating Federal Tort Claims Act suits.

7 QUESTION: Well, Mr. Geller, is it all that
8 unprecedented after the Court's decisions in Indian
9 Towing and Rayonier?

10 MR. GELLER: I believe so, Justice Rehnquist.
11 I hope to discuss this, but there is, I think, a basic
12 distinction between the sorts of operational activities
13 that were involved in those cases and the regulatory
14 activities that are involved in this case. I do hope to
15 expand on that in just a moment.

16 It seems clear to us from the legislative
17 history and the language of the Federal Tort Claims Act
18 that what Congress had in mind in passing the Act was a
19 sort of ordinary, common law, garden variety tort such
20 as automobile accidents, malpractice. On the other
21 hand, it seems just as clear to us that Congress did not
22 want the Act to be used as a way of challenging
23 so-called governmental functions.

24 The legislative history is replete with
25 evidence of Congress' concern that actions, for example,

1 of the FTC or the SEC not be the subject of a challenge
2 under the Federal Tort Claims Act. Congress not only
3 put in the discretionary function exemption to take care
4 of this problem but also emphasized the point by putting
5 into the Act twice, not once but twice, the express
6 requirement that the United States can only be held
7 liable in circumstances where a "private person under
8 state law would be liable".

9 This phrase appears not only in 28 U.S.C 2674,
10 which is the substantive liability provision of the
11 Federal Tort Claims Act, but the precise same phrase
12 appears in 28 U.S.C. 1346(b), which is the grant of
13 jurisdiction to the district courts to hear Tort Claims
14 Act cases. This Court recognized the same basic point
15 in the Feres case, which is one of the first decisions
16 of this Court interpreting the Federal Tort Claims Act,
17 but there the Court held that Congress did not intend to
18 allow the government to be held liable for engaging in
19 activities that are not even remotely analogous to
20 activities that private parties undertake.

21 The actions of a government agency in
22 enforcing safety legislation pursuant to a program of
23 inspection and certification simply have no counterpart
24 in the private sector. These sorts of regulatory
25 activities are a form of law enforcement.

1 The FAA, for example, has to make sure that
2 private parties are in compliance with the FAA statute
3 and safety regulations --

4 QUESTION: Mr. Geller, can a prison guard be
5 sued by an inmate for negligence?

6 MR. GELLER: Prison guard or the United
7 States?

8 QUESTION: Prison guard.

9 MR. GELLER: I assume a prison guard can be
10 sued.

11 QUESTION: Can the United States?

12 MR. GELLER: Under the Muniz case the United
13 States can be sued for negligence by a federal prisoner,
14 yes, for the sorts of torts that were involved in that
15 case.

16 QUESTION: But certainly no private person
17 would ever be sued for running a prison negligently.

18 MR. GELLER: Well, Muniz is a slightly
19 different case because the Court did an extensive study
20 of the legislative history of the Federal Tort Claims
21 Act in Muniz and determined that unquestionably congress
22 had intended to cover suits by state prisoners. On the
23 other hand, even in Muniz in light of what I said to
24 Justice Rehnquist earlier, even in Minuz just like in
25 Indian Towing and in Rayonier the federal government was

1 itself carrying out some direct service performing some
2 operational function. It is not regulating the conduct
3 of third parties to make sure that they were in
4 compliance --

5 QUESTION: How about negligent operation of a
6 military aircraft?

7 MR. GELLER: Negligent operation of a military
8 aircraft? If the United States itself is doing some
9 operations, performing some operations itself --

10 QUESTION: Well, it is out there carrying out
11 a training mission, and they negligently operate the
12 aircraft and it crashes.

13 MR. GELLER: Under Feres, of course, the
14 United States could not be sued by any soldier, but --

15 QUESTION: No, but how about --

16 MR. GELLER: A suit by civilians would be
17 appropriate because the United States is itself --

18 QUESTION: No private person is ever going to
19 be sued for running a military aircraft.

20 MR. GELLER: Well, the Court has said in these
21 operational cases that private persons do not have to be
22 engaged in the identical activities. It is sufficient
23 under the Federal Tort Claims Act that they engage in
24 similar sorts of activities.

25 QUESTION: Well, isn't the parallel more

1 accurately if Northwest Airlines falls on someone's
2 house and then destroys the house, Northwest Airlines is
3 liable. Now, if the Army -- if the Air Force falls on
4 someone's house, there is a private person liability
5 analogy.

6 MR. GELLER: Precisely, Mr. Chief Justice.
7 That is the point that the Court made in Indian Towing
8 and in Rayonier, but private people do not regulate the
9 affairs of other private people for the purpose --

10 QUESTION: Yes, but private people make
11 inspections. As a matter of fact, the FAA relies on
12 private people to make inspections for them. I suppose
13 those private inspectors can be sued.

14 MR. GELLER: Yes, Justice, but that is one of
15 the things that the Ninth Circuit said. I think one of
16 the most damaging statements in the Ninth Circuit's
17 opinion prevades the rest of the opinion in terms of its
18 error was the statement that the Ninth Circuit made that
19 the FAA has a responsibility like private inspectors to
20 inspect every portion of every aircraft. That is
21 plainly incorrect.

22 There is nothing in the FAA statute, or
23 manuals or regulations that imposes that responsibility
24 on the FAA. Quite the contrary, the FAA has always had
25 the responsibility to do nothing more than spot check or

1 to do as extensive an investigation of any aircraft as
2 it determines is necessary to make certain that the
3 private parties who have the operational
4 responsibilities are complying with the FAA safety
5 standards.

6 QUESTION: Mr. Geller, there is nothing in the
7 opinions of the Court in Indian Towing and Rayonier and
8 Muniz to suggest that liability turned on direct
9 operational responsibility. Is this something you are
10 just extrapolating from facts in those cases?

11 MR. GELLER: Justice C' Connor, I believe there
12 is something in those opinions that support precisely
13 what I am saying here. For example, in Indian Towing
14 350 U.S. at page 64 the Court begins its opinion by
15 saying, "The question here is one of liability for
16 negligence at what this Court has characterized the
17 operational level of government activity."

18 Four pages later on page 68, the Court
19 repeats, "It is hard to think of any government activity
20 on the operational level or present concern which is
21 uniquely governmental in the sense that it has not at
22 one time or another been privately performed."

23 So the Court's opinions in those cases do
24 suggest that what the Court had in mind were operational
25 rather than regulatory activities.

1 QUESTION: Well, but the Court rejected the
2 government's argument of the government function defense
3 in those cases.

4 MR. GELLER: In those cases, Justice O'Connor,
5 I think a different argument was made and rejected. In
6 terms of -- Those cases involve operational activities.
7 The government had suggested that in the universe of
8 operational activities there should be a distinction
9 made between governmental proprietary activities and
10 uniquely governmental activities.

11 What the Court said in that case is that when
12 we are dealing with operational activities everything
13 that the government does is governmental, and it is
14 foolish to distinguish between proprietary activities
15 and uniquely governmental activities. This case
16 involves a distinctly different sort of governmental
17 activity which is a regulatory activity.

18 Private people do not engage in regulatory
19 activities. They do not impose sanctions on other
20 private people. They do not issue certificates to allow
21 other private people to engage in interstate commerce.
22 That is what we have in this case.

23 QUESTION: Mr. Geller, instead of kind of
24 assuming that these are all either red squares or black
25 squares, would it not be just as accurate to say that

1 Feres and Dalehite was one mode of construction of the
2 Federal Tort Claims Act and that Indian Towing and
3 Rayonier and Muniz was a somewhat different one, and now
4 the government is asking us to kind of return to Feres
5 and Dalehite, which I think is perfectly proper for the
6 government --

7 MR. GELLER: I think that all of these
8 distinctions are reconcilable, Justice Rehnquist,
9 because I do think there is a basic distinction between
10 operational activities, which were what was involved and
11 what the Court emphasized was involved in Indian Towing
12 and in Rayonier, and regulatory activities in terms of
13 the private person language that Congress twice put into
14 the Federal Tort Claims Act.

15 QUESTION: But it is almost impossible to
16 reconcile the opinion in Dalehite with the opinion in
17 Rayonier. In fact, Rayonier says that the Dalehite in
18 part is no longer good at all.

19 MR. GELLER: Only as to the parts of Dalehite
20 that concern operational activities, the fighting of a
21 fire. In fact, speaking of Dalehite I think the precise
22 distinction that I am trying to make here was emphasized
23 by Justice Jackson's opinion in Dalehite.

24 Dalehite as you mentioned, Justice Rehnquist,
25 involved a suit challenging a number of activities by

1 the government. The Court eventually held that the suit
2 was barred by the discretionary function exemptions of
3 the Federal Tort Claims Act.

4 Justice Jackson and two other justices
5 dissented in that case on the grounds that what the
6 government had been engaging in there was operational.
7 It was something like what private parties could do.
8 Therefore, Justice Jackson thought the government should
9 be held liable if it acted negligently.

10 But Justice Jackson went on to point out the
11 sorts of governmental activities that even he and the
12 other dissenters agreed could not be the basis of a
13 Federal Tort Claims Act suit. I will just read one
14 sentence from Justice Jackson's opinion because I think
15 it highlights a distinction we are making here.

16 Justice Jackson said, "When an official exerts
17 governmental authority in a manner which legally binds
18 one or many he is acting in a way in which no private
19 person could. Such official should be controlled solely
20 by the statutory or administrative mandate and not by
21 the added threat of private damage suits."

22 So even the dissenters in Dalehite understood
23 this basic distinction between operational activities
24 that the government may engage in or private people may
25 engage in and the quintessentially governmental

1 activities of regulation and law enforcement which is
2 what we have in this case.

3 QUESTION: Mr. Geller, may I ask you this
4 question. Would the decision of the Ninth Circuit Court
5 of Appeals apply to the Pure Food and Drug Law?

6 MR. GELLER: We believe that it would because
7 the decision of the Ninth Circuit in terms of its
8 construction of the private person language and the Good
9 Samaritan Doctrine does not rely on any facts that are
10 unique to this case. The Good Samaritan Doctrine
11 requires a showing that the defendant has (1) performed
12 a service for another; and (2) that other people
13 including the general public, according to the Ninth
14 Circuit, are entitled to rely on that service.

15 If the Ninth Circuit is right about its
16 construction of those terms it would presumably apply to
17 every government regulatory activity because --

18 QUESTION: Automobile safety.

19 MR. GELLER: Exactly. The Occupational Safety
20 and Health inspector goes in and inspects a plant and
21 negligently, let's say, fails to detect --

22 QUESTION: Environmental Protection Agency
23 action?

24 MR. GELLER: Yes. The Federal Deposit
25 Insurance Corporation, a bank examiner examines the

1 books of a bank and negligently fails to discover that
2 the bank is failing. Presumably under the Ninth
3 Circuit's decision the United States could be sued under
4 the Tort Claims Act by bank depositors or creditors or
5 shareholders under the Good Samaritan Doctrine because
6 according to the Ninth Circuit the United States when it
7 engages in these regulatory activities is performing a
8 service for the public and the public is entitled to
9 rely on it and nothing more need be shown.

10 I might add that these are not fanciful
11 notions, Justice Powell. There is as we pointed out in
12 our brief a suit pending right now against the United
13 States under the Federal Tort Claims Act for \$4 billion
14 challenging on theories similar to those adopted by the
15 Ninth Circuit the government's allegedly negligent
16 inspection and certification of the Three Mile Island
17 nuclear power plant, the Nuclear Regulatory Commission's
18 allegedly negligent certification. The government's
19 motion to dismiss in that case was denied on grounds
20 that are quite similar to the Ninth Circuit's decision
21 in this case.

22 So we believe that --

23 QUESTION: Mr. Geller, before you go on do the
24 other countries who buy our older airplanes from our
25 airlines, Venezuela, France, England, do they have

1 counterparts to our FAA?

2 MR. GELLER: We have bilateral treaties with a
3 great many countries that do have similar arrangements.
4 Brazil is one of those countries. Brazil, in fact,
5 issued an Airworthiness Certificate to this plane in
6 1969 when Varig bought the plane four years prior to the
7 crash. Presumably Varig is the Brazil national airline,
8 and Brazil certified its own plane as airworthy, which
9 adds to the peculiarity of Varig's suing the United
10 States here for a certification that the FAA made in
11 1958.

12 QUESTION: It is a reality or assume it is
13 that throughout South America and Africa you will find
14 even old DC-3's that were purchased from our airlines
15 still functioning on shuttle flights. Those planes go
16 back 35, 40 years.

17 Under the Ninth Circuit opinion would the
18 crash of a DC-3 down in Venezuela or off in Ethiopia
19 open the door to the same kind of liability as is
20 involved here?

21 MR. GELLER: Presumably, Mr. Chief Justice.
22 There is no limiting principle in the Ninth Circuit's
23 opinion that would not allow it to be extended to that
24 case. Here, for example, the Ninth Circuit found that
25 the public in general is entitled to rely on FAA

1 inspections even though in the Varig case 62 of the
2 plaintiffs are Brazilian residents who were flying from
3 Rio de Janeiro to Paris on a Brazilian airline.
4 Nonetheless, the Court of Appeals found that the
5 reliance aspect of the Good Samaritan Doctrine was
6 satisfied. That is the aspect of the Ninth Circuit's
7 opinion that we find particularly troubling.

8 If there are no further questions, I would
9 like to reserve the balance of my time.

10 CHIEF JUSTICE BURGER: Very well.

11 Mr. Gerry.

12 ORAL ARGUMENT OF RICHARD F. GERRY, ESQ.,

13 ON BEHALF OF RESPONDENT

14 MR. GERRY: Mr. Chief Justice, and may it
15 please the Court:

16 The Congress in the Federal Tort Claims Act
17 decided decades ago that the government should and will
18 be liable if a private person in like circumstances
19 would likewise be liable. Liability is, of course,
20 limited to a finding of negligence, and legislative,
21 judicial and policy decisions are outside the gamut, but
22 in overzealous performance of their duties the lawyers
23 of the Justice Department try to turn back the clock to
24 the pre-Federal Tort Claims Act era when injured parties
25 would have to go to Congress in private bills as they

1 would if turned away here in order to resolve their
2 problems with the government.

3 In these cases, each of them, there can be no
4 doubt that there was negligence on the part of
5 government employees which attributed as a proximate
6 cause to the death of 128 people and the total loss of
7 two aircraft. Still, we are here 15 years after one of
8 these accidents and 10 years after the other trying to
9 enforce the liability which the Congress itself decreed
10 more than 30 years ago.

11 QUESTION: Mr. Gerry, with respect to that
12 last hypothetical I put to your friend, suppose to make
13 it more concrete the Venezuela Airlines bought a DC-3
14 from Northwest Airlines when those planes were discarded
15 and it has been used in Venezuela for 20, 25 years and
16 then you get the same fact situation you have got here,
17 liability of the FAA of the United States through FAA
18 inspection?

19 MR. GERRY: Liability only if in the issuance
20 of the original --

21 QUESTION: I am assuming the same facts as you
22 have in this case.

23 MR. GERRY: Liability only if in issuance of
24 the original type certificate the FAA or its
25 predecessor, the CAA, was negligent. The fact is --

1 QUESTION: Even if that was 20 or 25 years
2 ago.

3 MR. GERRY: The actual facts are, Mr. Chief
4 Justice, at the time of the certification of the DC-3
5 the CAA did not conduct itself in the same fashion as it
6 did in 1958 when it certified the 707. So I think that
7 such liability would be remote.

8 Between the time of the certification of the
9 DC-3 and the time of the certification of the 707 the
10 government had continued to permeate the field and to
11 take over the responsibilities that had previously been
12 conducted by private manufacturers. This all started
13 with the private manufacturers doing all of the
14 inspection, all of the decision as to whether or not an
15 aircraft should be released, and then went on to where
16 we presently are or were in 1958 where only after the
17 FAA had inspected each and every part of the aircraft
18 could an aircraft be released to be used by the general
19 public.

20 So as a practical matter the answer to your
21 question would be no. As a legal matter, if they
22 negligently had done the same in that case as they had
23 in this, I would think the answer would have to be yes
24 because the rule as I understand it in the federal court
25 is that the liability attaches at the time of the impact

1 of the negligence, not at the time of the actual
2 negligence itself.

3 We are here asking this Court to affirm these
4 cases to send a clear message to the executive branch to
5 accede to the wishes of Congress and to cease clogging
6 the courts with this kind of litigation and to say to
7 the Justice Department when it is clear that negligent
8 errors have been made at the operational level which
9 cause death, injury or destruction of property not to
10 waste more of the public treasury in a futile struggle
11 against the inevitable but to do as private industry and
12 the insurance industry does, cut their losses by
13 compromise and settlement and preserve the time of the
14 courts for other possibly more difficult matters.

15 In these cases --

16 QUESTION: Well, I doubt that we would have
17 granted certiorari if we did not feel this was an issue
18 of some significance.

19 MR. GERRY: I agree with the Court, and,
20 Justice Rehnquist, I think it is an issue of high
21 significance. It has been since Union Trust that this
22 Court has made a pronouncement in the aviation field,
23 and I think it is really timely for the Court to again
24 give us guidance in this field. I think that that
25 guidance should be that the --

1 QUESTION: In your favor.

2 MR. GERRY: Obviously.

3 (Laughter)

4 MR. GERRY: In these cases the negligence of
5 the government employees is obvious, glaring and found
6 by the District Court in findings of fact in the one
7 case and conceded in the other case.

8 QUESTION: Were these aircraft subject to
9 inspection in the countries to which the airline's
10 purchaser is attached?

11 MR. GERRY: Yes, they were, Your Honor. I am
12 aware of a question asked of counsel for the government
13 as to whether or not the inspections would have
14 occurred, and there is a finding of fact in the United
15 Scottish case that it is impossible, uneconomical,
16 unreasonable and unfeasible for an owner of an aircraft
17 inspected and certificated by the Federal Aviation
18 Administration to take down the entire aircraft and
19 inspect it completely.

20 That happens two times where the entire
21 aircraft or a subsequent installation is inspected.
22 When the aircraft is originally certificated then it is
23 totally inspected by the FAA and by the manufacturer
24 also.

25 QUESTION: In the Scottish case that you are

1 just referring to, what was the time span between the
2 FAA inspection and the accident?

3 MR. GERRY: About two and a half years, from
4 1965 to 1968.

5 QUESTION: The Scottish case?

6 MR. GERRY: In the Scottish case.

7 QUESTION: I thought that was the time on the
8 other case.

9 MR. GERRY: No, the other case was from 1958
10 at the time of the issuance of the original type
11 certificate for the Boeing 707 and 1968, the time of
12 the -- 1973, the time of the accident, 15 years in that
13 case.

14 QUESTION: When do you think the negligence
15 occurred in the Varig case?

16 MR. GERRY: In the Varig case, in the original
17 type certification, Your Honor --

18 QUESTION: There was not a repetition of that
19 negligence when the plane was given an Airworthiness
20 Certificate?

21 MR. GERRY: Your Honor --

22 QUESTION: I just want yes or no.

23 MR. GERRY: No is the answer.

24 QUESTION: How about in the Scottish case?

25 MR. GERRY: It occurred at the time of the

1 initial installation of the fuel line, and there was
2 no --

3 QUESTION: What kind of a certificate was
4 that?

5 MR. GERRY: That was a supplemental type
6 certificate.

7 QUESTION: And again the Airworthiness
8 Certificate, there was no negligence then?

9 MR. GERRY: Well, the Airworthiness
10 Certificate in the Dove case had initially been issued
11 by the British government --

12 QUESTION: Yes.

13 MR. GERRY: -- some time earlier in the
14 fifties. Then when the British government issues a type
15 certificate the American government accepts that type
16 certificate as the Brazilian government accepts ours.

17 QUESTION: Do you know whether or not the FAA
18 ever delegates to the manufacturer the issuance of the
19 type certificate?

20 MR. GERRY: They never delegate the issuance
21 of the type certificate, but they do delegate at the
22 present time --

23 QUESTION: Airworthiness inspection.

24 MR. GERRY: They delegate some inspection
25 activities to designated representatives called

1 designated --

2 QUESTION: What kind of certificates are --

3 MR. WALDRON: They do not issue certificates,
4 Your Honor, at all.

5 QUESTION: I know they do not, but they are
6 not type inspections that they delegate.

7 MR. GERRY: They do at the present time
8 delegate inspections that go into making up the type
9 certificate, but they do not delegate the authority for
10 issuance of the type certificate itself. At the time of
11 the Varig aircraft certification there was not this
12 delegation option as far as the type certification of
13 the Boeing 707 according to the testimony so far adduced
14 in the case.

15 QUESTION: How about in the Scottish case?

16 MR. GERRY: No. In the Scottish case there is
17 a specific finding of fact that the inspection had to be
18 done under the FAA's manual 8110.4, which the court took
19 judicial notice, had to be done by an FAA inspector.
20 There was testimony by the person who signed that
21 aircraft off, the head of the section, that it had to be
22 done by a FAA inspector, could not be done by a
23 licensed, private person.

24 QUESTION: I take it you think that does not
25 make any difference anyway.

1 MR. GERRY: Yes, I do think it may make a
2 difference. Obviously if the inspector has the duty to
3 do it and that inspector is a FAA inspector, then the
4 liability lies with the government.

5 QUESTION: What if he has the discretion to
6 delegate it to somebody else?

7 MR. GERRY: No one in the field has that
8 discretion. Only the FAA administrator can delegate.

9 QUESTION: All right. Suppose there is the
10 discretion to delegate to a non-FAA employee the job of
11 inspection.

12 MR. GERRY: If they do that --

13 QUESTION: Will that make a difference in your
14 case?

15 MR. GERRY: Not in my case.

16 QUESTION: Of course that did not happen, but
17 what if in some other case it happens. Do you think
18 that would make a difference?

19 MR. GERRY: I might think it might, but the
20 government in its manual says a DER, who is a designated
21 engineering representative, while performing those
22 duties which are part of his responsibilities as an
23 agent of the administrator for all intents and purposes
24 becomes an employee of the government and thereby may
25 incur liability for the United States if he is

1 negligent. Now whether or not that is true, I do not
2 know, but it seems to be the opinion of the United
3 States on the subject.

4 QUESTION: Mr. Gerry.

5 MR. GERRY: Yes, sir.

6 QUESTION: Is it your argument that the
7 present law exempts the responsibility of the
8 manufacturer to inspect?

9 MR. GERRY: Absolutely not. Contrary to what
10 the government says --

11 QUESTION: You seem to be arguing that.

12 MR. GERRY: No. Contrary to what the
13 government says, I think the manufacturer remains
14 liable, and the --

15 QUESTION: But the government has got a bigger
16 pouch?

17 MR. GERRY: This is like any other area where
18 there is more than one tortfeasor. They are concurrent
19 joint tortfeasors in this case, and the decision as to
20 who should bear the final risk of loss here should come
21 in the case that will follow this when the government
22 sues for indemnification as its attorneys have publicly
23 said that they would do.

24 QUESTION: I take it no movement in that
25 direction has yet been taken.

1 MR. GERRY: It has not, Your Honor. There has
2 been no final judgment and, therefore, no action filed
3 for indemnification by the United States. There has
4 been a publication by attorneys for the FAA which says
5 that that is their intention in cases where the
6 government is found responsible, and under the law of
7 California where we have equitable contribution I would
8 assume that they would sue both for indemnity and for
9 equitable contribution.

10 QUESTION: Do the FAA attorneys have any
11 jurisdiction over a question of that kind?

12 MR. GERRY: I do not know, Your Honor.

13 QUESTION: Only the Attorney General of the
14 United States could make that decision.

15 MR. GERRY: I agree with you, Your Honor.
16 They were the attorneys, however, responsible for the
17 prosecution of these cases.

18 As I was saying, Your Honor, there is no doubt
19 about the negligence in these cases. It was found in
20 the United Scottish case to be negligence and also to be
21 a proximate cause.

22 It was at an operational level. There was no
23 discretion left in --

24 QUESTION: Well, is there not considerable
25 judgment or discretion in determining what is excessive

1 vibration?

2 MR. GERRY: I believe that there is judgment,
3 but there is not policy discretion such as that which is
4 provided in the Federal Tort Claims cases, Justice
5 O'Connor. My understanding is that the Federal Tort
6 Claims Act exception found in 2680(a) deals with
7 administrative policy discretion, and that when only a
8 scientific decision such as in Griffin v. United States
9 where obviously there was more discretion, a scientific
10 determination as to whether or not a lot of virus should
11 be permitted to enter the marketplace, where only a
12 scientific or mechanical or operational decision has to
13 be made that that is not the type of discretion talked
14 about in the FTCA.

15 QUESTION: Mr. Gerry, in the Dalehite case
16 they said that the decision as to how to bag fertilizer
17 was discretionary, did they not?

18 MR. GERRY: I most respectfully disagree, and
19 I think that we are a long way from Dalehite. I think
20 that --

21 QUESTION: What do you mean when you say you
22 think we are a long way from Dalehite?

23 MR. GERRY: Well, I think in those cases that
24 have followed there is been a great deal of this Court's
25 interpretation of what was in Dalehite, and although it

1 has not been overruled in all of its aspects, as it
2 should not be, I think in those aspects where there was
3 only operational negligence such as in fire fighting
4 that this Court has in Rayonier taken care of that
5 problem. If a bagging case come up I suppose the Court
6 would take care of that problem.

7 QUESTION: Unless maybe it decided to take
8 care of Rayonier and Indian Towing the way you suggest
9 those cases took care of Dalehite. There is a certain
10 sinuosity to judicial construction of statutes over a
11 period of time, is there not?

12 MR. GERRY: I have found it that way, Your
13 Honor.

14 (Laughter)

15 MR. GERRY: We believe that in this case the
16 government is liable under the congressional mandate of
17 the Federal Tort Claims Act. There may also be others
18 liable, but that is for another case and another time.

19 We think that we have to point out to the
20 Court serious errors in the government's argument and
21 errors in the government's brief. On page 3 of the
22 government's reply brief they say there is nothing that
23 indicates that the design of the Boeing 707 was
24 defective.

25 I do not know where they have been in the

1 years that this case has been prosecuted because
2 contrary to their statement there is not testimony
3 whatsoever that the lavatory trash container involved in
4 the 707 crash and burn in Paris could contain or meet
5 the requirements of 4(b)381(d), and all of the
6 knowledgeable witnesses agree that the containers were
7 defective.

8 The NTSB sent an investigator, Mr. Kapustin.
9 Mr. Kapustin looked at what was left of this, looked at
10 several other 707's and he came to the conclusion as set
11 forth in the appendix at page 128 that it needed no
12 expert opinion. You did not even have to be an expert.
13 It was a simple open and shut situation.

14 The compartments did not meet the
15 requirements. They were not capable of containing fire
16 or smoke.

17 Mr. Nelson, the FAA's own top person who has
18 been deposed in this case, states that the odds are
19 extremely small that any of the items, that is, any of
20 the 707 ever manufactured after the type certification
21 were not of type design, and the lavatories had been
22 approved that way with the defect in them in the
23 beginning. They were not in compliance with the
24 regulations. These things all appear in his
25 deposition

1 QUESTION: I suppose it is the inevitable
2 cigarette disposal.

3 MR. GERRY: It has been, Your Honor.
4 Hopefully some day we will not have cigarettts on
5 airplanes. At the present time because of this and
6 other cases we have new placards. We have an ashtray
7 outside the lavatory as you enter. All of that occurred
8 probably because of this case. Unfortunately sometimes
9 we make these advancements over the dead bodies of the
10 people who suffer from the defective prduct to begin
11 with.

12 In order to look at this case, I would like to
13 with the Court look just a little bit at the process
14 that is involved here. The Federal Aviation Agency --
15 Administration now -- has taken over over the years the
16 entire certification process including the final process
17 in the inspection.

18 Now in the government's brief -- You may be
19 mislead if you read the brief into thinking that the
20 manufacturing inspector is a representative of the
21 manufacturer. In their brief they suggest that the
22 primary responsibility for all of this remains with the
23 manufacturer, and they cite a statute and a regulation
24 and then go on to say, "Finally, the Agency's operating
25 manual has always stated it is the primary

1 responsibility of manufacturing inspectors to determine
2 that prototype products conform with safety
3 requirement."

4 In turn, the FAA is merely empowered to make
5 safety inspections. But the manufacturing inspector is
6 an FAA employee who is there in the manufacturer's plant
7 and who according to their manual must -- as they say
8 has the primary responsibility of the manufacturing
9 inspector to determine that prototype products conform
10 with drawing specifications and evaluated.

11 The manual from 1957 which applies is on file
12 to the Court and clearly shows that they have to look at
13 every process and that in this case they did look at
14 every process but missed this one. Once there is a type
15 certificate issued --

16 QUESTION: On your theory as I understood your
17 previous response, Mr. Gerry, 25 years after the
18 airplane was built or 30 years the United States could
19 be liable if it falls in Venezuela or Zambisi or some
20 other place.

21 QUESTION: If it is a design certification.

22 MR. GERRY: If they were negligent in the
23 beginning, if the manufacturer was negligent in the
24 beginning, they could if that negligence then became
25 operative at that point. Now, in the case of the Boeing

1 707 all of the aircrafts were manufactured according to
2 the type certificate, and the type certificate permitted
3 huge holes in the lavatory trash container which caused
4 a chimney effect to take the smoke up into the overhead
5 and carry it forward to the pilot's compartment. These
6 holes were part of the type certification of the
7 aircraft.

8 Once you get a type certification if you are
9 an aircraft manufacturer you certainly do not want to
10 get back in the mess of bureaucratic bumbling that you
11 were in before and attempt to change that certificate.
12 You cannot make a single change in the aircraft without
13 getting the kind of supplemental type certificate that
14 is involved in the other case, in the United Scottish
15 case where in order to change anything you have to go
16 there.

17 So once you have got it through all of the
18 design and engineering changes you set in concrete the
19 bad aspects of the design as well as the good aspects.
20 We sometimes find ourselves flying with obsolete unsafe
21 or less safe parts of aircraft because it is so
22 economically and otherwise difficult to get a change.

23 There are those who believe that --

24 QUESTION: Well, you do not suggest it would
25 have been difficult to -- If you think this is such a

1 glaring, obvious defect you would not think it would
2 have been very hard to get a change.

3 MR. GERRY: No, I do not think so in this
4 case, Your Honor, but the incentive is gone. Once
5 you've got a type certificate you remove the incentive
6 to go forward and to continue to change. The incentive
7 is to produce what has already been authorized.

8 QUESTION: Well, I suppose there is some
9 incentive to produce a safe aircraft.

10 MR. GERRY: Yes. That is why we have
11 supplemental type certificates and that is why there are
12 issuances of supplemental type certificates.

13 QUESTION: You have to have proof of
14 negligence, do you not?

15 MR. GERRY: Absolutely. There is no product
16 defect in the sense of strict liability. We need to
17 prove to a federal judge sitting without a jury --

18 QUESTION: That a reasonable designer should
19 have known this was a bad deal.

20 MR. GERRY: That is correct. We have done
21 so. We have done so twice in the United Scottish case.

22 QUESTION: If technology developed subsequent
23 to the original inspection and certification, it was not
24 generally known at the time of the certification, that
25 would not be the sort of case that you bring here.

1 MR. GERRY: No, state of the art has always
2 been a defense to a negligence action even if not to a
3 strict liability action. In fact, Your Honor, no
4 knowledgeable attorney would bring an action against the
5 United States at all if there was any other way to go,
6 and wind up here 15 years later or wind up here 10 years
7 later without even having had a case tried. No, as long
8 as there is another economically viable defendant we
9 will go the other way.

10 QUESTION: The manufacturer was not
11 available?

12 MR. GERRY: The manufacturer in the United
13 Scottish case went out of business and had only \$100,000
14 worth of insurance. The manufacturer in the Varig case
15 settled the cases with some of the passengers on the
16 aircraft.

17 The government's brief suggests that in order
18 to rely on the Good Samaritan Doctrine we have to prove
19 that our decedents would have foregone alternative
20 safety precautions. I do not know where they get that
21 and they cite not authority for that novel statement of
22 law.

23 My understanding is that what is necessary is
24 to show that there was reliance by the people, not that
25 they have to forego, and in this case -- in the United

1 Scottish case there is a finding of the court below of
2 specific and general reliance by the decedents and by
3 the survivors.

4 QUESTION: You mean the average person that
5 rides on a plane is familiar with this statute?

6 MR. GERRY: I think the average person that
7 rides on the plane anyplace in the United States and the
8 world, Justice Marshall, is familiar with the
9 government's involvement in the aviation industry, that
10 they --

11 QUESTION: That the government has to inspect
12 every piece of that plane?

13 MR. GERRY: I do not think that is so, nor do
14 I think --

15 QUESTION: Well, you just said so.

16 MR. GERRY: Well, no --

17 QUESTION: You said the inspection examines
18 every piece of the plane.

19 MR. GERRY: I said that.

20 QUESTION: Well, does the average airplane
21 rider know that?

22 MR. GERRY: I do not think that --

23 QUESTION: If so, take me out of the group.

24 MR. GERRY: I do not think --

25 QUESTION: I did not know it until this case

1 was filed.

2 MR. GERRY: I do not think they do, nor did I
3 intend to say that they knew that. What I intended to
4 say, Your Honor, -- I am sorry if I expressed myself
5 badly -- was that the average person riding in an
6 aircraft is aware of the role of the government in the
7 process of aviation, that they are involved.

8 Also, under the restatement of torts --

9 QUESTION: Who that rides a plane has read
10 that book that you just read from, the one where you say
11 the inspector does this?

12 MR. GERRY: The owner of the aircraft --

13 QUESTION: What is the name of that book?

14 MR. GERRY: This is the manual procedure type
15 certification --

16 QUESTION: Does the average plane rider know
17 anything about that book?

18 MR. GERRY: No, but the owner --

19 QUESTION: Has the average rider ever heard of
20 that book?

21 MR. WALDRON: I do not believe so, Your Honor,
22 no. The owner of the aircraft does, and under the
23 restatement of torts section 324A(b), there does not
24 need to be reliance by the average rider of the
25 aircraft. There needs to be reliance only by the owner

1 of the aircraft and in --

2 QUESTION: Why don't you argue that? You said
3 everybody knows.

4 MR. GERRY: I did not mean, Your Honor, actual
5 knowledge of each and every particular. I am sorry if I
6 was found to mislead the Court in that.

7 Also the government is liable if it increases
8 the risk of harm, and in that regard I think that there
9 is a misunderstanding of what that term means. It is
10 not the risk in putting out an aircraft that is less
11 airworthy, but it is the risk of having that aircraft on
12 the market at all.

13 If the government does their job properly, the
14 government inspectors, the aircraft would not be on the
15 market with the defects in it and, therefore, the risk
16 to the general public including our decedents is greater
17 than it would be otherwise.

18 There was a statement by counsel that after
19 there is the issuance of the type certificate there are
20 no further inspections of the particular aircraft by the
21 FAA. That, although it is not extremely important to
22 the decision here, is not the total fact in the case.
23 There are additional inspections if there are
24 supplemental type certificate as there were in United
25 Scottish and there was such an inspection so held.

1 The government has raised a number of defenses
2 in the case including negligent misrepresentation. We
3 had thought that that had been put to rest in Block v.
4 Neal, and the government had said in their reply brief
5 in the petition for certiorari that unless there was
6 proof that the persons in this case had relied on the
7 certificate itself that the misrepresentation defense
8 would not apply.

9 There is no proof in the case that any of the
10 passengers ever saw or relied upon the certificate
11 itself or on the Airworthiness Certificate that was
12 carried in the airplane. We believe, Your Honor, that
13 the record adequately shows and it has been found in the
14 case that was permitted to go to trial that the
15 government inspectors at the operational level were
16 negligent, that their negligence was a proximate cause
17 of the deaths and destruction of the aircraft here, that
18 that gives rise to liability, that it does not bring
19 into play because of the operational level the
20 discretionary function exception to the Federal Tort
21 Claims Act, and that when the government asks this Court
22 to become the protector of the treasury they should
23 instead go as they were instructed to do in the Indian
24 Towing and Rayonier cases to the Congress and have
25 congressional changes in the bill.

1 If Congress did not wish to have liability in
2 these cases it can change, and if the Federal Aviation
3 Agency does not wish to be sued in these cases, it does
4 not have to be --

5 CHIEF JUSTICE BURGER: Your time has expired
6 now.

7 MR. GERRY: -- this much involved in
8 aviation.

9 Thank you.

10 CHIEF JUSTICE BURGER: Do you have anything
11 further, Mr. Geller.

12 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

13 ON BEHALF OF PETITIONER -- REBUTTAL

14 MR. GELLER: Just a few things, Mr. Chief
15 Justice. I am afraid I do have to respond to certain of
16 the misstatements that Mr. Gerry made.

17 Let me just respond first to one of the last
18 things he said. Respondent said he does not know where
19 we got this notion that under the Good Samaritan
20 Doctrine the reliance aspect requires a showing that
21 other ways of protecting one's self were not exercised.
22 Let me just refer the Court to the note E to section
23 324(a) of their statement of torts which says, "The
24 reliance must have induced the defendant to forego other
25 remedies or precautions against the risk."

1 We cite this in our brief along with cases
2 that have interpreted that provision that support our
3 statement. The Respondents have assured this Court that
4 it need not worry about the peculiar result in this case
5 because the Plaintiffs will always have to show
6 negligence.

7 Let's be clear what that means. There was no
8 proof in this case, nor could there be in any of these
9 cases that a particular FAA inspector went in, looked at
10 a particular aircraft and determined that it was all
11 right whereas the safety standards show it was not.

12 The proof in these cases as in this case in
13 particular was the following: An inspection had to be
14 made according to the Ninth Circuit before a certificate
15 could be issued. A certificate was issued.

16 Subsequently, it was determined that the plane
17 was not in compliance with some safety standards.
18 Therefore, the government had to be negligent in
19 conducting its inspection. It is a res ipsa theory.

20 Now it falls down for a number of reasons, one
21 of which is that it is based on this fallacious
22 assumption that the government has some obligation under
23 the statute to do a head to toe inspection of every
24 airplane. I think it is important that the Court
25 realize that that is simply not true under the statute

1 or regulations.

2 The FAA has never done anything more than
3 conduct spot checks in particular cases, and it reserves
4 the right in any particular case to inspect any part of
5 the airplane. It has no obligation under the FAA Act or
6 the regulations to do so.

7 There was also a grudging admission from Mr.
8 Gerry that the manufacturers do in fact have a
9 nondelegable duty to make an inspection of every part of
10 their equipment to make sure that it is in compliance
11 with the safety regulations and that they can be sued.
12 In this case, for example, Varig did sue Boeing. The
13 passengers did sue Varig and Boein. Aerodyne was sued.

14 This, I think, precisely shows the distinction
15 between these sorts of regulatory cases and the
16 operational cases that I was referring to earlier
17 because in the operational cases the United States is
18 the only possible defendant, and the Court referred to
19 this, for example, in Rayonier in pointing out why the
20 operational activities in that case were not immune from
21 suit under the Federal Tort Claims Act, one of the
22 things that the Court said was that if the United
23 States, which performed these operations, could not be
24 sued, the plaintiff could not sue anyone.

25 But in these regulatory cases there will

1 always be by definition a private party, a manufacturer,
2 an operator, or an installer that will have failed to
3 comply with the safety standards, and that operator or
4 manufacturer is liable to people who are harmed. This
5 is a suit against the United States for damages because
6 the United States did not exercise its regulatory
7 authority to make certain that that manufacturer or
8 operator complied with the statute.

9 Finally, while it may not be terribly
10 significant here I cannot let the record reflect that
11 there was, in fact, negligence in the issuance of the
12 type certificate for that Boeing 707. There is zero
13 proof in this record that the type certificate was in
14 any way faulty.

15 If in fact --

16 QUESTION: Did the District Court make any
17 finding?

18 MR. GELLER: That case has not yet gone to
19 trial.

20 QUESTION: Oh, the Varig case.

21 MR. GELLER: The Varig case has not yet gone
22 to trial, but Mr. Gerry has asserted that it is
23 undisputed that there was negligence in that case. That
24 is disputed.

25 If in fact the 707 that crashed in 1973 had a

1 defect it is far from clear that it was a design defect
2 rather than a production defect or a maintenance
3 defect. Varig completely refurbished the inside of
4 those planes after it took them out of the United States
5 in 1969.

6 So those are the sorts of problems that would
7 arise in cases like this. There will never be proof of
8 actual negligence. It will be a res ipsa theory, and
9 this ties in with our argument that these are in fact
10 discretionary determinations because under the statute
11 it is clear that the FAA has complete discretion, which
12 airplanes to inspect and how thorough that inspection
13 should be.

14 QUESTION: Well, not at the type stage.

15 MR. GELLER: At the type stage, Justice
16 White.

17 QUESTION: Well, now, not then.

18 MR. GELLER: Even then, Justice White.

19 QUESTION: So you disagree with your
20 colleague?

21 MR. GELLER: Yes, we do. Nothing has changed
22 since 1958. Designated engineering representatives who
23 are not FAA employees who by and large work for the
24 manufacturer have the obligation to inspect the airplane
25 to make sure it is in compliance with the FAA

1 regulations, and the FAA reserves the right to make spot
2 checks.

3 QUESTION: They do not have any discretion as
4 to whether to have an inspection. It is just who has to
5 do it.

6 MR. GELLER: The regulations make clear that
7 it is the manufacturer that has no discretion whether to
8 make the inspection. We do not dispute that. The
9 manufacturer has an obligation to inspect its products
10 carefully.

11 QUESTION: But the FAA cannot issue a type
12 certificate without there having been an inspection by
13 somebody.

14 MR. GELLER: That is true, but that is far
15 from saying --

16 QUESTION: I am just saying that part of it is
17 not discretionary.

18 MR. GELLER: Well, but that is also not the
19 basis for the Respondents' suit in this case. They are
20 not suing us for an invalid inspection performed by
21 Boeing. They are saying the United States was negligent
22 in not conducting a careful enough inspection, and what
23 we are saying is that the decision whether to inspect
24 and how careful that inspection should be under the
25 statute is discretionary.

1 QUESTION: Is there not evidence as to --
2 There is no evidence in this record as to who made the
3 inspection in this case?

4 MR. GELLER: In which of the two cases?

5 QUESTION: In either one of them?

6 MR. GELLER: That is correct.

7 That will be the case in all of these sorts of
8 cases, and that is one of the problems in allowing suits
9 like this to proceed because the United States is not
10 engaging in operational activities. It's merely
11 engaging in regulatory activities to make sure that
12 other people, the private parties --

13 QUESTION: I would think in a good many cases
14 you could discover who actually made the inspection.

15 MR. GELLER: Well, even if you could, Justice
16 White, the problem is you will never be able to know
17 precisely what they inspected because they only have a
18 duty to spot check. They may check off a box saying
19 they inspected the fuselage, but that will not tell you
20 whether they looked at any particular part.

21 QUESTION: Well, that is not true at the type
22 stage, is it?

23 MR. GELLER: Yes, it is, Justice White. In
24 fact, it is most true at the type stage because at the
25 type stage the FAA frequently will get hundreds and

1 hundreds of thousands, especially for an airplane like
2 the 707, of documents, and it could not possibly -- the
3 FAA only has about 300 inspectors -- it could not
4 possibly at the type stage inspect every portion of
5 every airplane. That is the responsibility of the
6 manufacturer and the designated engineering
7 representative who works for the manufacturer.

8 Thank you.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.

10 The case is submitted.

11 (Whereupon, at 11:08 a.m., the case in the
12 above-entitled matter was submitted.)

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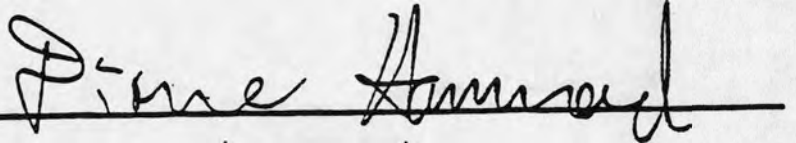
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines); and ~~United States v. United Scottish Insurance Co. et al.~~
Docket Nos. 82-1349 and 82-1350

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", written over a horizontal line.

(REPORTER)

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