Note

Unconstitutional but Authorized: The Federal Tort Claims Act Should Not Immunize the United States When Federal Officers Violate the Constitution

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INTRODUCTION

When Monica Castro was 16, she moved into a home in Texas with her boyfriend, Omar Gallardo.[1] One year later, she gave birth to their daughter, R.M.G.[2] R.M.G. and Ms. Castro were United States citizens, but Mr. Gallardo was an undocumented immigrant and a Mexican national.[3] Mr. Gallardo abused Ms. Castro, and a few days before her daughter's first birthday, Ms. Castro fled their home, leaving R.M.G. with Mr. Gallardo.[4] Assured of her own safety but desperate to recover her daughter, Ms. Castro went to the local Border Patrol station and promised the agents that she would give them information about Mr. Gallardo if they would help her get her daughter back.[5] Border Patrol agents did not follow through on the deal: they arrested Mr. Gallardo and took R.M.G. into custody with him.[6]

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1. Castro v. United States (*Castro I*), No. C-06-61, 2007 WL 471095, at *1 (S.D. Tex. Feb. 9, 2007), *rev'd*, 560 F.3d 381 (5th Cir. 2009), *rev'd per curiam*, 608 F.3d 266 (5th Cir. 2010) (en banc) (per curiam), *cert. denied*, 562 U.S. 1168 (2011).
2. *Id.*
3. *Id.*
4. Adam Liptak, *Family Fight, Border Patrol Raid, Baby Deported*, N.Y. TIMES (Sept. 20, 2010), https://www.nytimes.com/2010/09/21/us/21bar.html [https://perma.cc/HMG5-5J5K].
5. *Id.*
6. *Castro I*, 2007 WL 471095, at *2–3.

Ms. Castro arrived at the station to take custody of her daughter, but Mr. Gallardo claimed that Ms. Castro had walked out on him and that he wanted R.M.G. to remain in his care.[7] Border Patrol, hoping to avoid making a custody decision, decided not to interfere and denied Ms. Castro the single day she needed to obtain a court order to gain custody of her daughter[8] by quickly deporting both Mr. Gallardo and R.M.G. to Mexico.[9]

Ms. Castro did not see her daughter for three years until Mr. Gallardo's family in Mexico finally delivered R.M.G. to her.[10] When they were reunited, R.M.G. did not even recognize her mother.[11] Ms. Castro then brought a lawsuit against the United States pursuant to the Federal Tort Claims Act ("FTCA") alleging that Border Patrol tortiously violated her daughter's constitutional rights.[12] After a series of appeals, the Fifth Circuit affirmed the district court's decision to dismiss Ms. Castro's claim,[13] even though she had credibly alleged that Border Patrol agents violated R.M.G.'s Fourth Amendment rights by detaining her in immigration custody.[14]

According to the Fifth Circuit, Ms. Castro's claim under the FTCA was barred by the doctrine of sovereign immunity—the legal principle that "[t]he United States, as a sovereign, is immune from suit save as it consents to be sued."[15] The FTCA partially waives that immunity

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7. *Id.* at *2.

8. The chief of the Border Patrol station claimed in a deposition that holding Mr. Gallardo and R.M.G. at the station for one more night and thereby giving Ms. Castro time to obtain a court order would have cost a great deal of money. Liptak, *supra* note 4. When "[a]sked to quantify the daunting sum, [the chief agent] replied, 'Well over $200 plus.'" *Id.*

9. *Castro I*, 2007 WL 471095, at *3.

10. *Appeals Court to Rehear Infant Deportation Case*, KHOU 11 (Oct. 26, 2009), https://www.khou.com/article/news/appeals-court-to-rehear-infant-deportation-case/285-343009280 [https://perma.cc/YEP8-6CTT].

11. Liptak, *supra* note 4.

12. *Castro I*, 2007 WL 471095, at *3. Ms. Castro's claims included negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault. *Id.*; *see also* Complaint, Castro v. United States, No. C-06-61 (S.D. Tex. Feb. 10, 2006), 2006 WL 815707.

13. Complaint, *supra* note 12; *see also supra* note 1 (listing the procedural path of the *Castro* case through the Fifth Circuit).

14. The Fifth Circuit initially upheld Ms. Castro's claim, because "[w]hile Border Patrol Agents possess a general arrest authority for crimes committed in their presence, . . . generally speaking they do not have authority to arrest or detain U.S. citizens" under the Fourth Amendment. Castro v. United States (*Castro II*), 560 F.3d 381, 390–91 (5th Cir. 2009). Despite the relatively certain constitutional violation, the Fifth Circuit would later reverse in a per curiam decision. Castro v. United States (*Castro III*), 608 F.3d 266, 268 (5th Cir. 2010) (en banc) (per curiam).

15. United States v. Sherwood, 312 U.S. 584, 586 (1941); *see also* United States v.

for tort claims against the United States.[16] However, the FTCA carves out several exceptions that reestablish the default sovereign immunity doctrine over certain tort claims.[17] The FTCA provision that doomed Ms. Castro's claim was the discretionary function exception.[18] Very generally, it provides, according to the Supreme Court's interpretation, that even if federal law enforcement acts negligently, if federal officers (1) act within a valid range of discretion rather than in violation of any regulation, law, or federal directive and (2) that discretion is subject to a policy analysis, then any claim based on those actions is entirely barred.[19]

The discretionary function exception is written (and interpreted by the Supreme Court) so broadly that it could be used to shield almost any misconduct by federal officers or employees.[20] Within the scope of this Note, however, is a key problem that federal courts have struggled to resolve: even if a federal law enforcement officer is acting within a range of discretion and not in violation of any federal law, regulation, or directive, does the discretionary function exception bar the claim if the plaintiff can show that the law enforcement officer violates the United States Constitution? Scholars have paid little attention to this gaping hole in sovereign immunity law, even while courts have struggled to patch it.[21]

Mitchell, 445 U.S. 535, 538 (1980) (affirming the same); United States v. King, 395 U.S. 1, 4 (1969) (same). This principle is discussed *infra* in Part I.A.1.

16. The FTCA is codified in a bundle of statutes. *See* 28 U.S.C. § 1346(b) (the general provisions of the FTCA); 28 U.S.C. §§ 2671–2680 (procedural requirements of the FTCA and its exceptions); 28 U.S.C. § 2401 (the FTCA's statute of limitations); *see also infra* Part I.B.1 (describing the FTCA's statutory scheme).

17. *See infra* Part I.B.2.

18. *See Castro I*, No. C-06-61, 2007 WL 471095, at *9 (S.D. Tex. Feb. 9, 2007) ("[T]he Court determines that . . . the discretionary function exception applies to bar Plaintiffs' tort claims against the United States."). For a discussion of the discretionary function exception, see *infra* Part I.C.

19. *See infra* Part I.C.2. The text of the FTCA's discretionary function exception bars any claim "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.*" 28 U.S.C. § 2680(a) (emphasis added).

20. *See infra* Parts I.C.2, I.C.3.

21. A few scholars have briefly noted the problem but none have given it very serious treatment. *See* Robert C. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. ST. THOMAS L.J. 398, 401 (2011) ("Some legal disagreements exist . . . over whether allegations or findings of unconstitutional conduct necessarily preclude a finding that [the discretionary function exception applies] on the ground that no official has the discretion to act unconstitutionally."); Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 707 (2019) (noting that most courts have held that the discretionary function exception cannot protect

The question of whether the discretionary function exception can bar claims alleging that federal officers acted unconstitutionally has generated a significant federal circuit split.[22] The majority of circuits hold that no federal officer possesses the discretion to violate the Constitution, and thus the discretionary function exception cannot be used to shield federal law enforcement officers from liability when they violate constitutional rights.[23] A growing minority of circuits, however, holds the opposite.[24] The Seventh Circuit has explicitly held that the discretionary function exception can bar claims alleging unconstitutional conduct, and other circuits are trending toward this position.[25] The Sixth and Tenth Circuits have not expressly embraced the Seventh Circuit's position but have at least implied that it is the correct approach to the discretionary function exception.[26] And Ms. Castro's claim marks the point at which the Fifth Circuit slid away from its previous precedents, which were solidly in line with the majority,[27] and moved toward the Seventh Circuit's position.[28] Most recently, in June 2021, the Eleventh Circuit conducted the same maneuver as the Fifth and, despite its past support for the circuit majority's position, explicitly held that the discretionary function exception could preclude a claim alleging that officials unconstitutionally failed to protect a federal prisoner.[29]

This Note argues that the position taken by the circuit minority illogically expands the discretionary function exception. The exception should not protect the United States from liability when federal

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unconstitutional conduct); Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 747 (2006) (observing that, based on the circuit split, it is unclear whether FTCA claims based on unconstitutional acts, like torture, could be discretionary). The only published article to give the issue serious comment is a student work on the Fifth Circuit's *Castro* decision. *See* Brian Shea, Comment, *The Parent Trap: Constitutional Violations and the Federal Tort Claims Act's Discretionary Function Exception*, 52 B.C. L. REV. E- SUPPLEMENT 57, 66 (2011).

22. *See infra* Part II.A.

23. *See infra* Part II.A.1.

24. *See infra* Part II.A.2.

25. *See infra* Part II.A.2.a; Kiiskila v. United States, 466 F.2d 626 (7th Cir. 1972).

26. *See infra* Part II.A.2.b.

27. *See infra* Part II.A.2.c; Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987) (noting that the Fifth Circuit has "not hesitated to conclude that . . . action does not fall within the discretionary function [exception] when governmental agents exceed the scope of their authority as designated by statute or the Constitution").

28. *See infra* Part II.A.2.c.

29. *See infra* Part II.A.2.c; Shivers v. United States, 1 F.4th 924, 939 (11th Cir. 2021) (Wilson, J., concurring in part and dissenting in part) (noting with disfavor that, with this decision, "[t]he majority joins the one circuit[, the Seventh,] that has gone the other way").

officers commit credible violations of plaintiffs' constitutional rights.[30] The circuit majority's position is better aligned with Congress's intent to broadly waive sovereign immunity in the FTCA and the limited purposes it originally ascribed to the discretionary function exception.[31] Additionally, it is a logical absurdity to hold that federal officers do not possess discretion to violate federal law but are free to violate the Constitution—the source of all federal law.[32] Defenders of the circuit minority's approach attempt to avoid this glaring logical gap by noting that, under Supreme Court precedent and the text of the statute, the FTCA does not render the United States liable for constitutional claims.[33] However, this argument fails to account for the distinction between *purely* constitutional claims (not actionable under the FTCA) and constitutional claims *rooted in state tort law* (perfectly actionable).[34]

This Note also argues that Congress should intervene to harmonize the circuit split in favor of the circuit majority's position.[35] The modern, expansive discretionary function exception is a product of the Supreme Court's attempts to interpret Congress's intent; the exception's text opens the door to a broad interpretation but does not demand it. Congress could close this door by adding the Supreme Court's two-part discretionary function test to the text of the statute, with the caveat that conduct is not a matter of discretion if a federal statute, regulation, policy, *or the United States Constitution* prescribes a course of action for the employee to follow.[36] This solution has the immediate benefit of providing plaintiffs with an effective means of recovery for unconstitutional injuries inflicted by federal officers, which have traditionally been governed by entirely insufficient *Bivens* claims.[37] This solution bears the cost of incorporating the Supreme Court's expansive discretionary function test into the FTCA's text, but it has the best chance of legislative adoption and at least provides an

30. *See infra* Part II.B.
31. *See infra* Part II.B.1.
32. *See infra* Part II.B.2.
33. *See infra* Part II.B.3.
34. *See infra* Part II.B.3.
35. *See infra* Part III.
36. *See infra* Part III.A.
37. *See infra* Part III.B. This Section explains that *Bivens* claims are a dying cause of action increasingly disfavored by courts, and while they may achieve symbolic victories by holding federal officers individually liable for constitutional violations, they are a poor substitute for FTCA claims, which are designed to provide effective compensation to plaintiffs. *See generally infra* Part III.B.

outer boundary to curb further expansion of the discretionary function exception.[38]

Part I of this Note provides background on the FTCA, describing how the statute was designed to be a stark departure from absolute sovereign immunity, and how the discretionary function exception's expansion threatens a relapse toward absolute immunity.[39] It discusses the undemocratic history of sovereign immunity and the passage of the FTCA;[40] the FTCA's general provisions and exceptions;[41] and the discretionary function exception, including Congress's original purpose for the exception and its development beyond Congress's original intent via Supreme Court jurisprudence.[42] Part II identifies why the discretionary function's expansion is a problem, describing the circuit split over whether the exception bars claims alleging unconstitutional conduct by federal law enforcement.[43] It argues that the circuit majority's position is better aligned with Congress's intent while the minority position remains, despite its best counterarguments, logically flawed.[44] Part III argues that Congress should intervene to harmonize the circuit split, siding with the circuit majority and ensuring that federal officers are not awarded with the discretion to violate the Constitution.[45]

I. THE FTCA AND ITS RELAPSE TOWARD ABSOLUTE SOVEREIGN IMMUNITY

The FTCA, passed in 1946, is the modern iteration of a much older, underlying current of sovereign immunity law which American courts adopted from medieval English jurisprudence.[46] This Part begins in Section A by tracing the development of American sovereign immunity, culminating in FTCA's enactment after World War II.[47] Next, Section B outlines the modern iteration of the FTCA, including its general provisions and exceptions, emphasizing that its waiver of sovereign immunity is nominally broad but practically very limited.[48]

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38. *See infra* Part III.C.
39. *See infra* Part I.
40. *See infra* Part I.A.
41. *See infra* Part I.B.
42. *See infra* Part I.C.
43. *See infra* Part II.A.
44. *See infra* Part II.B.
45. *See infra* Part III.
46. Irvin M. Gottlieb, *The Tort Claims Act Revisited*, 1 TORT & MED. Y.B. 225, 225–27 (1961).
47. *See infra* Part I.A.
48. *See infra* Part I.B.

Finally, Section C introduces the discretionary function exception, widely considered the most important FTCA restriction, and its development through Supreme Court caselaw.[49] By examining the sovereign immunity doctrine's arc of development in the United States, this Part shows that the FTCA was designed to be a stark departure from absolute sovereign immunity but, through the discretionary function exception's expansion, the FTCA threatens to revert back toward this unfair default.

A. THE FTCA WAS DESIGNED AS A STARK DEPARTURE FROM ABSOLUTE SOVEREIGN IMMUNITY

This Section provides a brief history of sovereign immunity in the United States. It begins with the historical doctrine of sovereign immunity, inherited from English law, that the United States cannot be sued without its consent.[50] Next, it examines the private bill system, Congress's unwieldy first attempt to provide relief to claimants injured by federal officers by directly petitioning Congress.[51] Finally, this Section describes the push toward the creation of the FTCA, which was designed to depart from the unfairness of absolute sovereign immunity and the procedural impossibilities of the private bill system.[52]

1. The King Can Do No Wrong: Sovereign Immunity's Undemocratic Origins

The basic idea underlying the United States' sovereign immunity is that no one may sue the federal government without its consent.[53] This conceptual cornerstone can be traced back to English common law, which "embodied the simple reality that, because the king was the highest authority in the feudal system, it was impossible to appeal one of his decisions."[54] It was the product of a slow legal development that

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49. *See infra* Part I.C.

50. *Infra* Part I.A.1.

51. *Infra* Part I.A.2.

52. *Infra* Part I.A.3.

53. This waiver can only be enacted, at least in the United States, by Congress. *See* PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT 5 (Paul Figley ed., 2d ed. 2018) ("The doctrine of sovereign immunity provides that a sovereign state can be sued only to the extent that it has consented to be sued and that only its legislative branch can give such consent."); Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 TEMP. L. REV. 91, 95 (2015) ("The current doctrine can be summed up as follows: individuals may not sue the United States for monetary damages unless the United States has consented to suit by a *statutory* waiver of sovereign immunity." (emphasis added) (citing Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 456 (2005))).

54. Bosworth, *supra* note 53, at 93 (citing Nevada v. Hall, 440 U.S. 410, 415

began in the reign of William the Conqueror and eventually crystallized, by the nineteenth century, into the simple maxim that "[t]he King can do no wrong."[55] The original concept of sovereign immunity, then, was inextricably tied to the institution of a personal sovereign; while English citizens could seek relief against the Crown (an abstract entity), "tortious acts could never be directly attributed to the king himself."[56]

Given that sovereign immunity was an idea originally tied to a monarch's personal untouchability, it is puzzling that this area of the law made its way into American jurisprudence. Indeed, despite very early indications from the Supreme Court that the United States might pursue its own brand of sovereignty,[57] United States courts affirmed the English sovereign immunity doctrine in a series of early nineteenth century cases.[58] The courts' reasons for adopting English sovereign immunity law remain obscure and largely unjustified.[59] However, Congress affirmed the courts' decisions by enacting limited waivers to its sovereign immunity throughout the 1800's and thereby confirming that its default position was that the United States was immune from suit.[60]

(1979)).

55. Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 349–54 (1925) (citations omitted) (tracing the development of sovereign immunity in England).

56. John S. Gannon, Note, *Federal Tort Claims Act—Seeking Redress Against the Sovereign: Balancing the Rights of Plaintiffs and the Government When Applying Federal Rule of Civil Procedure 15(c) to FTCA Claims*, 30 W. NEW ENG. L. REV. 223, 233 (2007).

57. In *Chisholm v. Georgia*, the Supreme Court held that it had jurisdiction over a case in which the state of Georgia was a defendant against an individual of another state, despite Georgia's claim of sovereign immunity. 2 U.S. 419, 426, 429 (1793). However, states quickly responded by overturning this holding via the quick passage of the Eleventh Amendment. WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT: ANALYZED AND ANNOTATED 1–2 (1957).

58. John W. Miller, II, Comment, *Sovereign Immunity: The King Can Do No Wrong*, 8 AM. J. TRIAL ADVOC. 471, 472 (1985); *see also, e.g.*, Cohens v. Virginia, 19 U.S. 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary does not authorize such suits."). *Cohens* was the seminal case on the establishment of sovereign immunity in the United States and it was widely followed. *See, e.g.*, United States v. McLemore, 45 U.S. 286, 288 (1846) (affirming that a federal court lacked jurisdiction over a case because "the government is not liable to be sued, except with its own consent, given by law"). The doctrine was only sporadically questioned. *See, e.g.*, United States v. Lee, 106 U.S. 196, 204 (1882) (questioning the principle but accepting that it is "the established law of this country").

59. *See, e.g.*, James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1539 (2000) ("[I]t is not obvious why the United States so willingly adopted the royal doctrine.").

60. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 530–31 (2008) (describing the creation of "private

The principle underlying modern sovereign immunity is thus not clearly grounded in any constitutional provision.[61] Instead, it is sourced from a pragmatic recognition—in historical English law—that the king could not be personally hauled into a court over which he was sovereign.[62] Scholars have recognized that this idea is disconnected from the United States' system of a limited, constitutional government; after all, the most basic problem with applying sovereign immunity law is that "[w]e have no king to whom it can be applied."[63] As Professor Erwin Chemerinsky points out:

> A doctrine derived from the premise that "the King can do no wrong" deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives. American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion.[64]

While reading the proceeding Sections, it is important to bear in mind that the most basic argument in favor of the FTCA's very limited and unforgiving waiver of sovereign immunity as well as its expansive exceptions—like the discretionary function exception—is this idea that the United States is immune as a default position.[65] But this idea is not so fundamental or well-grounded as proponents of a narrow waiver of sovereign immunity would believe. Rather: "The doctrine of immunity . . . has been frequently attacked as an anachronism unsuited to democratic society . . . ."[66] Despite this democratic deficiency, Congress accepted absolute sovereign immunity as a default when it began its first foray into waiving immunity via the private bill system.

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bills" to appropriate funds to pay claims).

61. At least one scholar, however, has recognized that the United States' immunity, at least for money damages, could be grounded in the Appropriations Clause. *See* U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1107 n.10 (2009).

62. Gannon, *supra* note 56, at 232–33 ("[T]he structure of the English feudal system was such that a king was immune from suit.").

63. Langford v. United States, 101 U.S. 341, 343 (1879); *accord* Gannon, *supra* note 56, at 233–36.

64. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) (footnote omitted).

65. *See, e.g.*, *infra* Part II.B.3 (addressing an argument that the United States has not rendered itself liable for constitutional claims).

66. Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 534 (1947).

2. The Private Bill System: The United States' Failed First Attempt at Waiving Sovereign Immunity in Tort

After American courts adopted the English idea of sovereign immunity, Congress was left with the conundrum of how to reconcile the default position of pure sovereign immunity with the First Amendment's guarantee that citizens have the right to "petition the Government for a redress of grievances."[67] Congress applied the article quite literally and instituted a system whereby individuals who were injured by federal employees would submit their claims directly to the legislative branch.[68] In this system, Congress handled each claim individually; if Congress decided to grant the claim, it passed a bill that specifically waived its immunity for that claim alone, authorizing the Treasury Secretary to make payment to the injured party.[69]

As might be imagined, the private bill system had massive problems from the beginning, which only grew as the federal government's size and scope expanded in the early twentieth century.[70] For plaintiffs, the process was expensive and often resulted in denial of relief.[71] And for the government, the process was burdensome and time-consuming, as, "[b]y the Twentieth Century, congressional procedures for addressing private claims were well established but remarkably inefficient."[72] Congress began looking for a solution, and between 1920 and 1946, considered more than thirty bills to reform the private bill system.[73] In 1942, President Roosevelt took a special interest in the mess of private bills unaddressed by Congress, spurring momentum for reform.[74]

67. U.S. CONST. amend. I.

68. The first tort claim the private bill system processed went into effect on April 13, 1792, to compensate an individual whose premises were damaged by resident American troops. WRIGHT, *supra* note 57, at 2.

69. Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 7 (1946).

70. Miller, *supra* note 58, at 473 (noting that the private bill system "provided little relief to persons injured from governmental negligence").

71. Gannon, *supra* note 56, at 235. Gannon points out that the only other option for plaintiffs was to sue the individual federal employee directly, which left "little possibility of collecting an adequate judgment unless the particular government official was wealthy." *Id.* at 246.

72. FIGLEY, *supra* note 53, at 6–7.

73. Figley, *supra* note 61, at 1109.

74. In Roosevelt's message to Congress in 1942, he lambasted the private bill system, noting that the legislative branch had acted on less than 20% of the 6,300 claims brought in the last three Congresses. Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 270 (2009).

In 1945, congressional enthusiasm for federal tort reform reached a critical energy after a U.S. Army bomber negligently crashed into the 79th Floor of the Empire State Building while attempting a landing during low visibility conditions, causing fourteen deaths.[75] The absence of any realistic means for the plaintiffs to recover prompted Congress to pass the FTCA, a broad waiver of the United States' sovereign immunity that would enable citizens to sue the Federal government.[76]

3. Congress Attempted to Create a Broad Waiver of Immunity by Enacting the FTCA

Congress passed the FTCA in 1946 in part to alleviate the significant backlog of private bills and to move federal tort claims adjudication to the judiciary, thereby relieving Congress of its burden.[77] The FTCA's legislative history reveals that Congress hoped to create a broad waiver for tort liability. A Senate Report on the bill in 1946 noted that its action was a response to the current system being "unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace."[78] The goal of the legislation, according to a House Report on the legislation, was to create a situation in which "[t]he liability of the United States will be the same as that of a private person, under like circumstances, in accordance with the local law."[79]

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75. Joe Richman, *The Day a Bomber Hit the Empire State Building*, NPR (July 28, 2008), https://www.npr.org/templates/story/story.php?storyId=92987873 [https://perma.cc/PG5P-5ZXS].

76. Cooper T. Fyfe, Comment, *The Detrimental Pitfall of the FTCA: Overturning* Feres *& Endorsing the Sergeant First Class Richard Stayskal Military Medical Accountability Act of 2019*, 52 TEX. TECH. L. REV. 877, 881 (2020).

77. Gottlieb, *supra* note 69, at 4. The FTCA was passed as part of a package of bills comprising the Legislative Reorganization Act of 1946, an attempt to alleviate Congress's more onerous administrative responsibilities. *See* Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946); David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 377–78 (2011). The legislative history of the bill and its prior versions demonstrates the frustration Congressmembers had with the private bill system. *See, e.g.*, S. REP. NO. 79-1400, at 7 (1946) (listing federal tort reform as a measure to reduce Congress's burden of adjudicating "many local and private matters which divert its attention from national policy making and which it ought not to have to consider"); *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 6 (1940) (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen. of the United States) (noting one senator's frustration with the fact that two days per week of Senate business were spent considering private bills).

78. S. REP. NO. 79-1400, at 30. This report incorporated House Report 1287, cited *infra* note 79.

79. H.R. REP. NO. 79-1287, at 2 (1945).

Congressional opponents of tort reform warned against the creation of broad government liability in the FTCA, noting that it "charts an entirely new course" for federal tort claims.[80] Charting a new course was certainly the intent of legislators and lawyers who pushed for the bill from the 1920s to the 1940s. In a hearing on an earlier iteration of the bill, proposed in 1940, a statement by the American Bar Association noted that one of the bill's purposes was to "afford the private citizen easy and simple access to the courts of the United States for the relief of injuries." and that "the ability to proceed against the Government for torts committed by its agents should be a right."[81] And in an explanatory memorandum to a similar House bill, proponents argued that whatever early justifications of sovereign immunity existed, including the principle that "the king can do no wrong," it was time to "make available an equitable and effective remedy for the redress of tortious acts" through which "persons incurring property loss or physical injury . . . *may be entitled to the same redress as if the principal for whom the agent acted were a private rather than sovereign entity*."[82] It is through this lens that the long list of exceptions[83] included with the bill should be considered—they were added to the FTCA, not to create a very limited sovereign immunity, but to provide safeguards given the "radical innovation" inherent in the bill.[84]

Courts observing the creation of federal tort liability through the FTCA noted that Congress intended to introduce a broader waiver than its "traditional all-encompassing immunity" and "establish novel and unprecedented governmental liability."[85] Analyzing the inception of the FTCA, Judge James Alger Fee of the Ninth Circuit Court of Appeals noted that the FTCA was originally "heralded as abolishing the medieval maxim, 'The King can do no wrong,' with respect to modern government."[86] Additionally, scholars expected that the statute would, in the area of tort law, finally lower the United States from the status

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80. *Id.* at 4.

81. *Tort Claims Against the United States: Hearings on H.R. 7236 Before the H. Comm. on the Judiciary*, 76th Cong. 5 (1940) (statement of Charles Ruzicka, Rep., American Bar Association).

82. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 77th Cong. 37–46 (1942) (memorandum with attached appendices) (emphasis added).

83. These exceptions are now codified in 28 U.S.C. § 2680 and discussed *infra* Part I.B.2.

84. *Tort Claims Against the United States: Hearings on H.R. 7236 Before the H. Comm. on the Judiciary*, 76th Cong. 22 (1940) (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen. of the United States).

85. Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957) (commenting on the purposes of the FTCA).

86. Builders Corp. of Am. v. United States, 259 F.2d 766, 770–71 (9th Cir. 1958).

of an untouchable sovereign to a position like a private company that could be held vicariously liable for the torts of its officers.[87] However, as the next Section will demonstrate, hopes for a broad waiver of liability never came to fruition. Despite liberal language in the statute's core provision, the FTCA is surrounded by a network of pitfalls and traps that ensnare litigants, precluding many claims before they can ever be heard on their merits.

B. THE FTCA IN PRACTICE: NOMINALLY BROAD BUT RIDDLED WITH EXCEPTIONS

The scholar and FTCA practitioner Paul Figley describes sovereign immunity as a "moat protecting the United States from suit" to illustrate the limited nature of the FTCA's waiver of immunity.[88] When Congress enacts a limited waiver of that immunity, it lays a "drawbridge across the moat" that provides claimants with a means of obtaining relief.[89] To cross the moat, the claimant must comply with all of Congress's requirements for bringing a valid claim. But even if they do so, the drawbridge is still filled with gaps and barriers that can obstruct the claimant's crossing. The general process of bringing an FTCA claim involves two major hurdles, which are the subject of this Section: (1) presenting a facially "cognizable" claim;[90] and (2) overcoming relevant exceptions to the FTCA's waiver.[91] This Section demonstrates that while it is relatively easy to present a facially valid claim under the FTCA, such claims often fall victim to the broad and various exceptions to the FTCA's waiver of sovereign immunity. This disconnect is strikingly illustrated by the shock Congress experienced in 1974 when it learned that any FTCA claims arising from grave abuses of power by federal law enforcement during "no-knock raids" were precluded by the FTCA.[92]

1. Presenting a "Cognizable" Claim Is a Relatively Low Bar for Claimants

The FTCA contains several key provisions that outline plaintiffs' path to recovery and the requirements for presenting a facially valid

87. Gottlieb, *supra* note 46, at 225–26. Shortly after the bill was passed, for example, the Yale Law Journal observed: "The clear purpose of the Act is to prescribe the same substantive rules as are applicable ordinarily between private litigants in the Federal district courts." *The Federal Tort Claims Act*, *supra* note 66, at 553.

88. Figley, *supra* note 61, at 1109.

89. *Id.*

90. *See infra* Part I.B.1.

91. *See infra* Part I.B.2.

92. *See infra* Part I.B.2.

(or "cognizable") claim. They are found in a bundle of U.S. code provisions.[93] Where there are gaps in the statutory provisions, Department of Justice regulations patch them.[94] The core provision of the FTCA is 28 U.S.C. § 1346(b), which states that federal district courts:

> [S]hall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . 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.[95]

In *FDIC v. Meyer*, the Supreme Court analyzed this provision and found that there are six elements that a claimant must meet for their claim to be facially "cognizable," that is, for the FTCA to be deemed the appropriate vehicle for obtaining recovery.[96] These elements are: (1) the claim be against the United States; (2) for monetary damages; (3) alleging injury, loss of property, personal injury, or death; (4) caused by the negligent or wrongful act of a federal employee;[97] (5) while the employee was acting within the scope of his employment; (6) so long as a private person would be liable for the tort in accordance with the law of the state in which the tortious act or omission occurred.[98]

If a claim is cognizable, then the FTCA is the claimant's exclusive remedy for that claim.[99] So long as the claimant adheres to the FTCA's

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93. *See supra* note 16 (listing the statutes constituting the FTCA).

94. *See* 28 C.F.R. §§ 14.1–14.11 (creating procedures for: which agency claims must be presented to (§ 14.2); who may file a claim (§ 14.3); evidence required to be brought alongside a claim (§ 14.4); dispute resolution mechanisms (§ 14.6); claim denial procedures (§ 14.9); and procedures for payment of an approved claim (§ 14.10)); 28 C.F.R. § 15 (including procedures for how to identify which agency is involved in a tort claim (§ 15.2), creating agency reports on tort proceedings (§ 15.3), and procedures for the removal of tort suits to federal court (§ 15.4)).

95. 28 U.S.C. § 1346(b)(1).

96. 510 U.S. 471, 476 (1994). In this case, the Court decided that constitutional claims are not facially cognizable. *Id.* at 477. Note, however, that *FDIC v. Meyer*'s holding is narrow, and courts generally hold that it does not bar all constitutional claims but only claims that lack any basis in state tort law. *See infra* Part II.B.3.

97. The United States is not liable for the acts of federal contractors. 28 U.S.C. § 2671.

98. *FDIC*, 510 U.S. at 477.

99. James E. Pfander, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 427–28 (2011) (describing the FTCA's judgment bar as a barrier to claimants pursuing multiple actions); *see also* FIGLEY, *supra* note 53, at 59–60 (describing the immunities and defenses available to federal employees under the FTCA). The FTCA contains a "judgment bar" clause, mandating that a cognizable claim under § 1346(b) "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission

strict procedural requirements, including its strict statute of limitations[100] and the requirement to exhaust administrative remedies before filing a lawsuit,[101] and it passes unharmed through the network of FTCA exceptions,[102] the claim may proceed against the United States on its merits. A facially cognizable claim credibly alleges that "the United States is liable for the torts of its employees to the extent that private employers are liable under state law for the torts of their employees."[103] The merits of an FTCA claim depend on whether the wrongful acts alleged by the claim constitute torts under state law.[104] Thus, the claim is only valid against the United States if the federal employee's act was within the scope of their employment *as defined by state law*.[105] In sum, the cognizability requirements create broad

gave rise to the claim." 28 U.S.C. § 2679(b)(1). Thus, the FTCA "bars a claimant from litigating a *respondeat superior* claim against the government (as master) and then pursuing the same claim against the employee (as servant)." Pfander, *supra*, at 427. However, the judgment bar does not preclude co-claims against a federal employee for constitutional violations, or when otherwise authorized by statute. 28 U.S.C. § 2679(b)(2); FIGLEY, *supra* note 53, at 59.

100. To be considered timely, the agency must receive an FTCA claim in writing within two years of when the claim accrued. *See* United States v. Kubrick, 444 U.S. 111, 120 (1979) (noting that a claim accrues when "the plaintiff has discovered both his injury and its cause"); 28 C.F.R. § 14.2(a) (specifying that the claim must be *received* by the agency, not merely sent by the claimant). If it is not received within two years, then it is "forever barred." 28 U.S.C. § 2401(b). Once the agency receives the claim, it has six months to approve it, deny it, or approve it in part (opening settlement negotiations). Gannon, *supra* note 56, at 239. If six months have passed without the agency taking action on the claim, then it is deemed denied. HENRY COHEN & VIVIAN S. CHU, CONG. RSCH. SERV., 7-5700, FEDERAL TORT CLAIMS ACT 3 (2009). If the agency denies the claim or it is deemed denied by agency inaction, the claimant must file a lawsuit within six months at the appropriate district court to keep the claim alive, or else, again, the claim will be "forever barred." 28 U.S.C. § 2401(b).

101. Before filing a lawsuit, the claimant must exhaust the administrative remedies available by presenting their claim for monetary damages to the appropriate administrative agency. 28 U.S.C. § 2675(a); Gannon, *supra* note 56, at 239. The general practice is to submit a Standard Form 95: Claim for Damage, Injury, or Death ("SF-95"), along with appendices with any additional required evidence. *See Documents and Forms*, U.S. DEP'T OF JUST., https://www.justice.gov/civil/documents-and-forms-0 [https://perma.cc/6LMZ-P5S5] (providing a link to the SF-95 form). As explained above, the administrative claims process is governed by a strict statute of limitations scheme. *See supra* note 100. If a claimant skips the stage of filing an administrative claim and instead begins the process by filing a lawsuit, then the United States may file a motion to dismiss and force the claimant to begin the claims process from the beginning. 28 U.S.C. § 2679(d)(5) (providing a mechanism for claimants to file an administrative claim after their lawsuit has been dismissed); COHEN & CHU, *supra* note 100 (explaining the process).

102. *See infra* Part I.B.2.

103. COHEN & CHU, *supra* note 100, at 1.

104. FIGLEY, *supra* note 53, at 66; WRIGHT, *supra* note 57, at 59.

105. The scholar Irvin M. Gottlieb describes early uncertainties in the law

liability for the United States, making it (at least nominally) as easy to sue the United States for a tort claim as it would be to bring a tort claim against any private person for the same act. But the merits of a claim will only be heard after it passes through the FTCA's laundry list of exceptions—it is with these exceptions that the United States is able to significantly narrow its liability.

2. Exceptions to the FTCA Significantly Narrow the United States' Tort Liability

Under Figley's metaphor of the "moat" of sovereign immunity, the FTCA's numerous exceptions act as gaps in the drawbridge over the moat which often trip up claimants attempting to cross. Most of these exceptions are listed in 28 U.S.C. § 2680. Prominent among these is the discretionary function exception, which is the subject of the next Section.[106] A number of the other exceptions are far less broad and are subject matter-specific; thus, they are rarely litigated and almost never present a problem for claimants.[107] Significant blanket exceptions include 28 U.S.C. § 2680(k), precluding claims "arising in a foreign country," and § 2680(h), precluding claims arising out of a litany of intentional torts.[108]

Other exceptions are not within the statutory text but have been derived from the cognizability provision in § 1346(b) that, for any tortious act committed by a federal officer, the United States is only liable to the same extent as a private person would be in similar circumstances. In *Feres v. United States*, for example, the Supreme Court held that the United States is immune from suits by military personnel who were injured pursuant to their service because "no private individual has power to conscript or mobilize a private army."[109] And, as will be a matter of significant discussion in this Note, the Supreme Court has established a widely-misinterpreted exception for constitutional claims on the theory that an individual could never be liable for a

regarding whether federal or state law would govern scope of employment questions. Gottlieb, *supra* note 46, at 241–56 (discussing relevant caselaw, and describing how state law became the governing law for FTCA purposes); *see also* Williams v. United States, 350 U.S. 857 (1955) (per curiam) (determining the issue by applying California law to decide the scope of employment for a federal officer).

106. *See infra* Part I.C.

107. *See, e.g.*, 28 U.S.C. § 2680(b) (immunity for failures in transmitting mail or postal matter); § 2680(f) (immunity for damages caused by a quarantine); § 2680(i) (immunity for damages caused by fiscal operations of the Treasury); §2680(l)–(n) (immunity for acts arising from the Tennessee Valley Authority, the Panama Canal Company, or certain federal banks).

108. 28 U.S.C. § 2680(k), (h).

109. 340 U.S. 135, 141 (1950).

constitutional violation, given that the Constitution is not a constraint on individuals.[110]

In the past, Congress has been surprised to learn of the great breadth of the FTCA's exceptions. In 1974, egregiously illegal "no-knock raids" by federal law enforcement officers became highly publicized.[111] Congress was shocked to discover that any FTCA claims arising from these acts would be categorically precluded by the intentional torts exception, which bars claims for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[112] Concerned about the fact that intentional and illegal conduct was entirely barred from FTCA liability, Congress amended the FTCA to include the so-called "law enforcement proviso," which provides that the intentional torts exception will not preclude claims against federal law enforcement that commit any of the first six listed torts in the statute.[113] Thus, Congress has, in the past, been startled to learn of the broad nature of sovereign immunity and taken action to constrain it within reasonable bounds. This amendment constrained the intentional torts exception, but it did nothing to limit its even broader statutory cousin, the discretionary function exception.

C. THE DISCRETIONARY FUNCTION EXCEPTION IS OVERLY-BROAD

The FTCA provides that if a claim is 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," then it is entirely barred.[114] Unlike other exceptions, the discretionary function exception's application is not an open-and-shut subject matter analysis.[115] Rather, it requires the application of a complex test

110. *See infra* Part II.B.3.

111. COHEN & CHU, *supra* note 100, at 14.

112. *Id.*; 28 U.S.C. § 2680(h).

113. COHEN & CHU, *supra* note 100, at 14; *see also* Nicholas Henes, Case Comment, *Liability and Consent of the United States to Be Sued—Torts in General: The United States Supreme Court Interprets the Federal Tort Claim Act's Law Enforcement Proviso*, 89 N.D. L. REV. 341, 341 (2013).

114. 28 U.S.C. § 2680(a).

115. For example, the analysis for whether the intentional torts exception applies is straightforward: did the claimant allege "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"? 28 U.S.C. § 2680(h). If so, the claim is barred. *Id.*

formulated by the Supreme Court.[116] Its purposes, development, and impact on sovereign immunity law are the subject of this Section.

1. The Discretionary Function Exception Was Designed to Protect Policy-Based Decisions

The text and legislative history of the discretionary function exception is scant, leaving a great deal of room for courts to interpret its meaning and purpose. The statute itself fails to define a discretionary function,[117] and the meager legislative history associated with the exception has been derisively described by one scholar as "scraps."[118] The wide band of interpretation available under the discretionary function exception has led to multiple circuit splits as to how it should be applied.[119] A significant aspect of the discretionary function's original purpose, however, was explained by a 1945 House report:

> This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity . . . where no negligence on the part of any Government agent is shown, and the only grounds for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency . . . based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. . . . The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort.[120]

Based on this history, scholars note that the discretionary function exception was considered "essential to preserv[ing] the

116. *See infra* Part I.C.2.a.

117. The "Definitions" section of the FTCA provides no guidance on discretionary functions. *See* 28 U.S.C. § 2671.

118. Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 705.

119. Bosworth, *supra* note 53, at 100 (noting that "lack of a real legislative history" has led to a circuit split on whether the burden of asserting and proving the discretionary function exception lies with the plaintiff or the United States); David S. Fishback, *The Federal Tort Claims Act Is a* Very Limited *Waiver of Sovereign Immunity—So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, 59 U.S. ATT'Y'S BULL. 16, 29 (2011) (describing a circuit split on whether the application of the exception is a jurisdictional issue).

120. Gottlieb, *supra* note 69, at 41 n.133 (emphasis omitted) (quoting H.R. REP. NO. 79-1287, at 5–6 (1945)). This report is based on similar language entered into the record by former Assistant Attorney General, Francis Shea, at a House Judiciary Committee hearing in 1942. Bosworth, *supra* note 53, at 99.

necessary latitude of action inherent in the exercise of discretion unhampered by threat or pressure of damage suits."[121] It is designed to stop plaintiffs from using a tort suit as a means for challenging rules or regulations they dislike; the FTCA should be used to make plaintiffs whole, not to challenge federal policy. And, as the scholar James R. Levine points out, allowing the judiciary to have an appellate function over the discretion of executive officers would "force judges to 'second guess' decisions of executive officers, violating the principle of separation of powers and interfering with government processes."[122] In sum, the discretionary function exception was designed to prevent the FTCA from becoming *more* than an efficient remedy for victims of tortious acts. As this Note will demonstrate, however, the exception has expanded to the point that the FTCA may now be much *less* than that.[123]

2. The Discretionary Function Exception Has Evolved Beyond Its Original Purpose

The discretionary function exception was designed to protect the integrity of federal policy-based decisions, but the text of the exception is bare. Almost immediately after the FTCA's passage, the Supreme Court stepped in to create a functioning test for determining what conduct is discretionary. In *Dalehite v. United States*[124] and *Indian Towing Co. v. United States*,[125] the Supreme Court articulated a distinction between planning-level and operational-level conduct—under these cases, application of the discretionary function exception depended, not so much on the nature of the conduct, but on who was making the decision. If the tortious act took place in the context of planning and strategizing by high-level officials, it would likely be protected as a discretionary function,[126] but if the conduct merely carried out one of those decisions and was performed by a lower-ranking

121. Gottlieb, *supra* note 69, at 44; *see also* Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 450 (1997) (arguing that the best justification for the exception is that court review of federal policy decisions "does violence to the separation of powers" and is impractical given courts' limited ability to evaluate public policy).

122. Levine, *supra* note 59, at 1541.

123. *See infra* Part II.B.

124. 346 U.S. 15 (1953).

125. 350 U.S. 61 (1955).

126. In *Dalehite*, the Court found that the Government's decisions on how to store fertilizer, which contributed to a massive explosion, were protected as discretionary functions because the decisions were "performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department." 346 U.S. at 40.

official, the exception would not bar a negligence claim.[127] As one might imagine, courts struggled to apply this test consistently, given that the Supreme Court had given little guidance as to where operational conduct ceases and planning conduct begins.[128] This Section describes the Supreme Court's attempt to clarify the definition of discretionary functions in a series of cases that led to the two-prong test that prevails today,[129] and it concludes by describing how this test is so broad that it can apply to almost any conduct by United States officers and employees.[130]

a. The New Two-Prong Test: Varig*,* Berkovitz*, and* Gaubert

To clarify the muddled state of the law created by *Dalehite* and *Indian Towing*, the Court revisited its previous test for discretionary functions in *United States v. Varig Airlines*.[131] In *Varig*, the Court chipped away at the planning versus operational conduct distinction, holding that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies."[132] And in *Berkovitz v. United States*, the first iteration of the modern test emerged.[133] The Court held that, for the discretionary function to apply, the conduct must "involve[] an element of judgment or choice."[134] Significantly, "the discretionary function exception *will not apply when a federal statute, regulation, or policy specifically prescribes a course of action* for an employee to follow."[135] Moreover, even if the federal employees' conduct involved the requisite judgment, "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield."[136] The Court

127. In *Indian Towing*, the Court decided that the discretionary function exception could not protect the United States for its negligent failure to maintain a lighthouse—which caused the plaintiff's tugboat to run aground—because once the Government had made the planning-level decision to maintain a lighthouse, "it was obligated to use due care to make certain that the light was kept in good working order." 350 U.S. at 69.

128. *See* Miller, *supra* note 58, at 474–76 (describing the courts' predicament).

129. *See infra* Part I.C.2.a.

130. *See infra* Part I.C.2.b.

131. 467 U.S. 797 (1984).

132. *Id.* at 813. The Court affirmed, however, that the exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities." *Id.* at 808.

133. 486 U.S. 531 (1988).

134. *Id.* at 536.

135. *Id.* (emphasis added). This language, which lists many sources of federal law that federal officers cannot violate, but which excludes the U.S. Constitution, forms the basis for the circuit split that is discussed in Part II.

136. *Id.*

clarified that the exception was designed to protect "only governmental actions and decisions based on considerations of public policy."[137]

In *United States v. Gaubert*,[138] the Court accepted the *Berkovitz* factors as the new, two-prong test for discretionary functions.[139] The first prong of the test is "whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations."[140] The Court incorporated *Berkovitz*'s admonition that violations of federal statutes, regulations, or policies are nondiscretionary.[141] The scholar, James R. Levine, summarizes this element succinctly:

> [T]he question is whether the conduct of the government actor was 'discretionary in nature.' A plaintiff can show that [the] conduct is not discretionary by alleging that a government employee violated some mandatory regulation, guideline, or procedure. . . . It is reasonable to assume that if an official violates an express regulation or procedure, this is not a proper exercise of discretion.[142]

The second prong of the test is whether, based on the nature of the action rather than the status of the actor, the discretionary acts are "susceptible to policy analysis."[143] It does not matter whether the federal actor actually had policy considerations in mind when they made the decision, but only that considerations of social, economic, or political policy can be retroactively applied to them.[144] These prongs do not provide a bright-line rule for what conduct is or is not discretionary—they require courts to apply the test on a case-by-case basis.

b. The Discretionary Function Exception Covers a Broad Range of Conduct Under the Modern Test

It has been left to the lower courts to apply this test and hammer out the general categories of discretionary functions. Through this process, the discretionary function exception has broadened.[145] Generally, courts have held that law enforcement conduct is a discretionary act subject to policy analysis.[146] Other examples abound. In *Varig*,

137. *Id.* at 537.

138. 499 U.S. 315 (1991).

139. Longstreth, *supra* note 21.

140. *Gaubert*, 499 U.S. at 328. The Court also held that when a regulation requires a particular course of conduct, and the employee follows it, the action is protected. *Id.* at 324.

141. *Id.* at 322.

142. Levine, *supra* note 59, at 1542 (quoting *Gaubert*, 499 U.S. at 322).

143. *Gaubert*, 499 U.S. at 325.

144. *Id.* ("The focus of the inquiry is not on the agent's subjective intent . . . .").

145. *See infra* notes 161–67 and accompanying text.

146. Stern, *supra* note 21, at 655 ("Many courts and scholars view the discretionary function exception . . . as an impediment to adjudicating claims based on law

the Court decided that the Federal Aviation Administrations' system of spot-checking the airplanes for quality control purposes was discretionary, and thus exempt from suit, because a statute gave the agency the authority to determine the manner in which to conduct inspections.[147] In *Berkovitz*, however, the exception did not preclude a claim where the law required all vaccine lots in a batch to comply with safety standards, and the Food and Drug Administration negligently approved an unsafe vaccine batch even though it did not comply with the required safety standards.[148] Figley describes other instances in which the discretionary function applies:

> The exception bars suits arising from broad decisions of nation-wide import such as President Carter's determination to cancel wheat sales in retaliation for the Soviet Union's invasion of Afghanistan . . . . It also bars claims for smaller, everyday events such as falling trees (if forestry officials have discretion to determine what inspections to conduct), the sale of used motor vehicles 'as-is' . . . or failing to manage or destroy dangerous wildlife in national parks.[149]

Thus, under the modern test, almost any act by a federal official can qualify as discretionary, so long as it can be at least remotely tied to some federal policy consideration, and it is not in violation of any relevant federal regulation or rule.

3. The Modern Discretionary Function Exception Is Dangerously Expansive

The discretionary function exception is widely considered the most important of all the United States' defenses to tort liability.[150] It is a useful means for the United States to preclude claims on a motion to dismiss, before their merits can ever be heard. No matter how bad the facts of a given case are for the United States, the discretionary function exception's application is a purely legal analysis, and the degree of negligence or wrongdoing involved is irrelevant.[151]

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enforcement techniques and practices."). Stern cites caselaw in which courts have used the discretionary function exception even to bar claims for conduct "eerily similar" to the no-knock raids which led to the creation of the intentional torts exception. *Id.* at 702; *see also supra* Part I.B.2 (describing the creation of the intentional torts exception's law enforcement proviso).

147. 467 U.S. 797, 815–16 (1984).

148. 486 U.S. 531, 547 (1988).

149. FIGLEY, *supra* note 53, at 31–32.

150. *See id.* at 29 (stating that the discretionary function exception is widely considered the most important FTCA exception).

151. *See* Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1029 (9th Cir. 1989) ("[N]egligence is simply irrelevant to the discretionary function inquiry."); Mitchell v. United States, 787 F.2d 466, 468 (9th Cir. 1986) (noting that negligence is irrelevant to the exception because it applies whether or not federal officers abused their discretion).

Additionally, the *Gaubert* test is extremely broad;[152] as Levine points out, "[t]his test has allowed the discretionary function exception to swallow much of the liability that the FTCA purports to create."[153] In essence, the exception creates a perverse incentive for federal agencies to *avoid* creating clear guidelines governing their officers' behavior because the absence of any rules or directives that could be violated is evidence in *support* of the exception's application.

In summary, while § 1346(b) creates a textually broad application of the FTCA, idealistically declaring that the United States will be liable to the same extent as a private party,[154] the law is pockmarked with exceptions awaiting the unwary claimant.[155] And the most powerful of these, the discretionary function exception, is capable of overcoming almost any claim by arguing that the federal officer acted within a valid band of discretion: even, in some circuits, that the officer had discretion to violate the U.S. Constitution.

II. A MINORITY OF FEDERAL CIRCUITS WRONGLY HOLD THAT FEDERAL OFFICERS HAVE DISCRETION TO VIOLATE THE CONSTITUTION

A majority of federal circuits (seven of the twelve) hold that conduct cannot be discretionary if it violates the U.S. Constitution,[156] but a growing minority holds that whether an officer's act is a matter of discretion is entirely separate from an analysis of the act's constitutionality.[157] This Part examines the competing positions of the majority and minority circuits, arguing that the majority position is better aligned with Congress's intent while the minority's position produces a logically absurd result.[158]

A. CIRCUITS SPLIT ON WHETHER FEDERAL OFFICERS HAVE DISCRETION TO VIOLATE THE CONSTITUTION

This Section describes the circuit split that exists regarding whether the discretionary function exception can protect the United

152. *See supra* Part II.A.2 (describing the *Gaubert* test).

153. Levine, *supra* note 59, at 1541. In a much more scathing and vivid indictment of the exception, Judge Merritt of the Sixth Circuit Court of Appeals proclaimed that the exception "has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act." Rosebush v. United States, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting).

154. 28 U.S.C. § 1346(b)(1).

155. *See* 28 U.S.C. § 2680 (listing exceptions to the FTCA).

156. *See infra* Part II.A.1.

157. *See infra* Part II.A.2.

158. *See infra* Part II.B.

States from lawsuits alleging that federal officers unconstitutionally and tortiously harmed the plaintiff. A majority of circuits agree that conduct cannot be discretionary if it violates the Constitution, emphasizing the logical absurdity that would result if federal officers lacked the discretion to violate federal statutes or regulations under the discretionary function exception but were permitted to freely violate constitutional rights.[159] However, a growing minority of circuits tack to the opposition position.[160] This Section will examine these competing approaches to elucidate the logic underlying each approach.

1. The Majority Approach: There Can Be No Discretion to Violate the Constitution

A majority of circuits hold that the discretionary function exception cannot bar FTCA claims against federal officers where the plaintiff credibly alleges that the officer violated their constitutional rights.

159. *See infra* Part II.A.1.

160. *See infra* Part II.A.2.

These include the First,[161] Second,[162] Third,[163] Fourth,[164] Eighth,[165] Ninth,[166] and the D.C. Circuit.[167] Their holdings are primarily based on

161. *See* Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009); Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 254 (1st Cir. 2003) ("[C]ourts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional . . . ."); Hornof v. Waller, No. 2:19-cv-00198-JDL, 2020 U.S. Dist. LEXIS 198578, at *24 (D. Me. Oct. 20, 2020) (holding that the discretionary function exception could not preclude false arrest and false imprisonment claims that were based on allegations that federal officers violated the plaintiffs' Fourth Amendment rights); McIntyre v. United States, 447 F. Supp. 2d 54, 60 n.7 (D. Mass. 2006) ("If the challenged act or omission violates the Constitution . . . the conduct is not, and cannot be, discretionary.").

162. *See* Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally . . . ."); Huntress v. United States, 810 F. App'x 74, 76–77 (2d Cir. 2020) (affirming the same); El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 268 (D. Conn. 2008) ("[O]fficials do not have discretion to violate the [C]onstitution . . . .").

163. *See* U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988) ("[C]onduct cannot be discretionary if it violates the Constitution . . . ."); Prisco v. Talty, 993 F.2d 21, 26 n.14 (3d Cir. 1993) (affirming the same); Xi v. Haugen, No. 17-2132, 2021 WL 1224164, at *29 (E.D. Pa. Apr. 1, 2021) (holding that the discretionary function exception could bar a claim, in part because the court found that the defendant's conduct did not violate the plaintiff's constitutional rights); Muhammad v. United States, 884 F. Supp. 2d 306, 314 (E.D. Pa. 2012) (holding that the discretionary function exception could not bar a claim for a warrantless search by the FBI because "the FBI agents had no discretion to violate the Constitution").

164. *See* Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001) (adopting the precedent of *U.S. Fiduciary & Guaranty Co.*, the Third Circuit's landmark case); Reyes-Filiciano v. United States, No. 1:18cv76, 2019 WL 9077311, at *13 (N.D.W. Va. Dec. 19, 2019) ("Because the alleged intentional torts of those [federal] agents were implemented consistent with federal law and the Constitution, those actions may properly be considered discretionary functions."); Clemmons v. United States, No. 0:16-1305-DCC-PJG, 2018 WL 6984946, at *5 n.4 (D.S.C. Dec. 13, 2018) ("The discretionary function exception does not apply . . . when the conduct at issue violates the [C]onstitution.").

165. *See* Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003) (per curiam) (holding that the plaintiff's claim that the FBI waged an unconstitutional surveillance campaign against him were not barred by the discretionary function exception because the plaintiff "alleged they were conducted in violation of his First and Fourth Amendment rights"); Raz v. Mueller, 389 F. Supp. 2d 1057, 1076 (W.D. Ark. 2005) ("Federal agents do not have discretion to commit constitutional violations.").

166. *See* Nieves Martinez v. United States, 997 F.3d 867, 879 (9th Cir. 2021) (noting that "agents do not have discretion to violate the Constitution," but holding that the discretionary function exception precluded the plaintiffs' claims because there was no constitutional violation); Galvin v. Hay, 374 F.3d 739, 758 (9th Cir. 2004) (holding that the discretionary function exception could not bar a claim where federal officers unconstitutionally dispersed a prayer service); Nurse v. United States, 226 F.3d 996, 997, 1002 (9th Cir. 2000) (holding that the plaintiff's claim that U.S. Customs Service agents unconstitutionally detained her pursuant to "unconstitutional policies" was not barred because "governmental conduct cannot be discretionary if it violates a legal mandate").

the logical contradiction that would arise if federal officers were free to violate constitutional rights, even while they lack discretion to violate federal laws and directives under the Supreme Court's two-part *Gaubert* test. For example, in *Limone v. United States*, the U.S. Court of Appeals for the First Circuit considered whether to apply the discretionary function exception and bar a malicious prosecution claim against the FBI for hiding exculpatory evidence that would have exonerated the plaintiff and prevented him from serving thirty-five years on death row.[168] The court noted that "[i]t is *elementary* that the discretionary function exception does not . . . shield conduct that transgresses the Constitution."[169] Likewise, in *Myers & Myers, Inc. v. United States Postal Service*, the U.S. Court of Appeals for the Second Circuit described the fact that "a federal official cannot have discretion to behave unconstitutionally" as a "tautology;"[170] that is, "a statement that is true by virtue of its logical form alone."[171] These courts essentially recognize that if a federal officer lacks the authority to violate statutes, regulations, or policies,[172] then they impliedly lack the authority to violate the Constitution: that is, the *source of authority* for those rules and statutes. There is no shortage of cases in the circuit majority that have held, as a logical matter, that it is a self-evident principle that federal officers lack discretion to violate the Constitution.[173] These circuits' profound assurance in the principle demonstrates that this approach to the discretionary function exception is solidly entrenched in the circuit majority's jurisprudence. However, a growing minority of circuits have moved away from the circuit majority's confident approach to the issue.

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167. *See* Loumiet v. United States, 828 F.3d 935, 943 (D.C. Cir. 2016) ("We hold that the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges [violates] a constitutional prescription."); Woodruff v. United States, No. 16-1884 (RDM), 2020 WL 3297233, at *7 (D.D.C. June 18, 2020) ("Under *Loumiet*, then, the discretionary function exception does not shield conduct that the plaintiff has plausibly alleged violates the Constitution.").

168. 579 F.3d 79, 85–86 (1st Cir. 2009). The plaintiff in this case was one of three who had been the victims of the FBI's misconduct—the other two had already died in prison. *Id.*

169. *Id.* at 101 (emphasis added) (citation omitted).

170. 527 F.2d 1252, 1261 (2d Cir. 1975).

171. *Tautology*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/tautology [https://perma.cc/BTJ3-DVES].

172. United States v. Gaubert, 499 U.S. 315, 322 (1991); *see also supra* Part I.C.2.b (describing the relationship between the discretionary function exception and matters of policy consideration).

173. *See* cases cited *supra* notes 161–67 (almost uniformly describing the principle as one that, logically, speaks for itself).

2. The Minority Approach: Discretionary Acts Do Not Implicate the Constitution

Five federal circuits have ranged from implying to explicitly holding that the discretionary function exception can bar claims that credibly allege constitutional violations committed by federal officers. The Seventh Circuit has taken the strongest position, explicitly holding that the discretionary function exception may bar claims alleging constitutional violations.[174] The Sixth and Tenth Circuits have not expressly ruled on the issue but have at least implied that the Seventh Circuit's position is correct.[175] And the Fifth and Eleventh Circuits, previously among the circuit majority, have moved toward the Seventh Circuit's position.[176]

a. The Seventh Circuit Explicitly Holds that Federal Officers Possess Discretion to Violate Constitutional Rights

In *Kiiskila v. United States*,[177] the Seventh Circuit considered whether the discretionary function exception barred a claim for tortious interference with contract rights[178] brought by a civilian employee of a military base against the base's commanding officer and, vicariously, the United States.[179] The plaintiff claimed the commanding officer wrongfully enforced a regulation excluding her from the base after the plaintiff took part in a political demonstration.[180] In resolving the claim, the court treated the discretionary function analysis as one that has nothing to do with the constitutionality of a federal officer's act.[181] The court was clear that the commanding officer's act violated the plaintiff's constitutional right to free speech but barred the claim under the discretionary function exception, holding that "[s]ince [the officer] had discretion in choosing to apply the regulation, the Government remains immune from liability."[182] Thus, the Seventh Circuit took a strong position that the discretionary function

174. *See infra* Part II.A.2.a.

175. *See infra* Part II.A.2.b.

176. *See infra* Part II.A.2.c.

177. 466 F.2d 626 (7th Cir. 1972) (per curiam).

178. It should be noted that intentional interference with contract rights is excepted from FTCA liability by the intentional torts exception. 28 U.S.C. § 2680(h). The plaintiff in *Kiiskila* claimed, though, that the interference was negligent and therefore not barred. 466 F.2d at 627–28. The court never reached the interesting issue of whether *negligent* interference with contract rights is actionable under the FTCA because it barred the claim based on the discretionary function exception. *Id.*

179. *Id.* at 626–27.

180. *Id.* at 627.

181. *Id.* at 627–28.

182. *Id.* at 628.

exception could bar an FTCA claim even if the plaintiff credibly alleged that a federal officer violated their constitutional rights.

A Seventh Circuit district court followed the Seventh Circuit's position in a case where the U.S. Marshals Service allegedly committed malicious prosecution, noting that "[t]he fact that Plaintiff alleges [the federal officers] violated his constitutional rights does not put their conduct outside of the purview of the discretionary function exception."[183] Through these decisions, the Seventh Circuit took an anchoring position on this issue, and the Sixth, Tenth, Fifth, and Eleventh circuits have since orbited toward its approach.

b. The Sixth and Tenth Circuits Waver Toward the Seventh Circuit's Position

Contrary to the Seventh Circuit's strong position, the Sixth and Tenth Circuits have not directly addressed the discretionary function's applicability to constitutional violations. However, they have at least implied that they consider the discretionary function exception to be an entirely separate analysis from constitutionality and that the Constitution's requirements are irrelevant to whether an officer's acts are discretionary. For example, in *Snyder v. United States*, the plaintiff sued the United States after she was mistakenly arrested by the FBI on suspicion of selling and distributing OxyContin.[184] The plaintiff argued that the discretionary function exception could not bar her claim because the detention was unconstitutional, but the Sixth Circuit disagreed, granting the United States' motion to dismiss.[185] The Sixth Circuit implied support for the Seventh Circuit's position, noting that the plaintiff's constitutional argument "misses the mark. At issue here is whether [the federal officers] . . . follow express and explicit mandates or whether they exercise judgment."[186]

In contrast to the Sixth Circuit's ruling in *Snyder*, the Tenth Circuit has not directly indicated support for the Seventh Circuit's position and has instead declined to rule on the issue.[187] In the absence of

183. Linder v. McPherson, No. 14-cv-2714, 2015 WL 739633, at *13 (N.D. Ill. Jan. 29, 2015), *aff'd sub nom* Linder v. United States, 937 F.3d 1087 (7th Cir. 2019). The court was noticeably reluctant to apply this rule, rather remorsefully explaining that "[i]n spite of this recent trend of courts holding that it is outside of the discretion of federal employees to engage in behavior that violates the Constitution . . . [t]his Court is bound by the unequivocal holding of *Kiiskil* a [sic]." *Id.* (citations omitted).

184. 590 F. App'x 505, 507 (6th Cir. 2014).

185. *Id.* at 510–11.

186. *Id.* at 510 (quoting Snyder v. United States, 990 F. Supp. 2d 818, 827 (S.D. Ohio 2014)).

187. *See* Martinez v. United States, 822 F. App'x 671, 678 (10th Cir. 2020) (declining to rule on the issue because the plaintiff's "arguments for a Fourth Amendment

explicit direction from the circuit level, however, a Tenth Circuit district court held in *Ramirez v. Reddish* that constitutionality has nothing to do with the discretionary function exception and that it would "decline[] to superimpose such . . . an involved and detailed analysis of the constitutionality of the federal employee's conduct" without a mandate from Congress or a higher court.[188] The Tenth Circuit's position on the issue thus remains uncertain. In contrast to the wavering positions of the Sixth and Tenth circuits, the Fifth and Eleventh Circuits stand out for their clear move toward the Seventh Circuit's interpretation of the discretionary function exception.

c. The Fifth Circuit and Eleventh Circuits: Reversing Course Toward the Seventh Circuit's Position

Between the Sixth and Tenth Circuits' vacillating positions and the explicit holding of the Seventh Circuit lie the Fifth and Eleventh Circuits, which initially sided with the circuit majority but have since reversed course. This Section describes the position of each circuit in turn, beginning with their previous stance in the circuit majority and then their move toward the Seventh Circuit's position.

Since the Fifth Circuit Court of Appeals overturned Ms. Castro's case,[189] the Fifth Circuit has transitioned away from the circuit majority's position, and its caselaw now very strongly implies that the discretionary function exception can protect unconstitutional conduct. For decades prior to Ms. Castro's case, the Fifth Circuit was squarely in the majority camp. A bedrock case by the Fifth Circuit Court of Appeals, *Sutton v. United States*, observed in 1987 that "we have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] . . . when governmental agents exceed the scope of their authority as designated by statute *or the Constitution*."[190] This decision was favorably cited by the Fifth Circuit Court of Appeals in Ms. Castro's first appeal, wherein the court held that her claim was not barred by the discretionary function exception because

violation are not persuasive").

188. No. 2:18-cv-00176-DME-MEH, 2020 WL 1955366, at *28–29 (D. Utah Apr. 23, 2020). Interestingly, Sixth Circuit district courts have not been as willing to side with the minority position. *See* Milligan v. United States, No. 3:07-1053, 2009 WL 2905782, at *8–9 (M.D. Tenn. Sept. 4, 2009) (favorably citing a Fifth Circuit decision that held that the discretionary function exception does not protect unconstitutional conduct); Angle by Angle v. United States, 931 F. Supp. 1386, 1393 (W.D. Mich. 1994) ("[W]hen the government performs a [statutory] function unique to its governing role, its conduct is controlled solely by *constitutional*, statutory and administrative mandates . . . ." (emphasis added)).

189. *See supra* note 14 and accompanying text.

190. 819 F.2d 1289, 1293 (5th Cir. 1987) (emphasis added).

"the Constitution limits the discretion of federal officials such that the [FTCA's] discretionary function exception will not apply."[191]

In a surprising reversal, Ms. Castro's win at the Court of Appeals was overturned by the Fifth Circuit sitting en banc, in a perfunctory decision that affirmed the district court's dismissal of her claim under the discretionary function exception without directly addressing her argument that federal officers violated the constitutional rights of her daughter by deporting her.[192] A scathing dissent to the opinion warned that "[t]he majority opinion weakens a critical, inherent safeguard of the discretionary function exception" by dismissing Ms. Castro's claims.[193]

Since the *Castro* reversal, the Fifth Circuit is, at the very least, impliedly in favor of the proposition that the constitutionality of federal officers' tortious acts is irrelevant to the discretionary function inquiry.[194] Several Fifth Circuit district courts have walked through the door opened by the *Castro* decision and explicitly embraced this principle. In *Patty v. United States*, a district court remarked that even if a plaintiff had adequately alleged a constitutional violation committed by a federal officer, it would fail because "[t]he Constitution is conspicuously absent"[195] from *Gaubert*'s list of "federal statute[s], regulation[s] or polic[ies]" which a federal officer has no discretion to violate.[196] And in *Lopez v. United States*, where the U.S. Marshals Service faced claims for alleged overcrowding and improper medical care at immigration detention facilities, a district court found the plaintiffs' claims that such acts violated the Constitution unpersuasive because the Fifth Circuit's first *Castro* opinion (in favor of Ms. Castro) was "unpersuasive as authority for the Plaintiffs' proposition that the discretionary function exception does not apply to the conduct at issue in this case since it . . . violated [the plaintiffs'] constitutional rights."[197]

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191. *Castro II*, 560 F.3d 381, 389 (5th Cir. 2009) (quoting Nurse v. United States, 226 F.3d 996, 1002 (9th Cir. 2000)).

192. *Castro III*, 608 F.3d 266, 268 (5th Cir. 2010) (en banc) (per curiam); *see supra* note 1 (outlining the procedural route of Monica Castro's case).

193. *Castro III*, 608 F.3d at 274 (Stewart, J., dissenting).

194. *See* Spotts v. United States, 613 F.3d 559, 569 (5th Cir. 2010) (noting that this issue has become an open question in the Fifth Circuit); Doe v. United States, 831 F.3d 309, 319 (5th Cir. 2016) ("Whether a properly pled constitutional violation allows a plaintiff to circumvent the discretionary function exception is an open question in this circuit.").

195. No. H–13–3173, 2015 WL 1893584, at *9 (S.D. Tex. Apr. 27, 2015).

196. United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

197. No. DR–08–CV–038–AML/VRG, 2010 WL 11506917, at *9 (W.D. Tex. Sept. 23, 2010).

Thus, in the post-*Castro* era, district courts in the Fifth Circuit generally hold, consonant with implied permission from the Circuit Court, that the discretionary function exception may expand further than ever before and even swallow up constitutional limits on federal officers' behavior. The Fifth Circuit remained the sole circuit to move from the circuit majority to this position until, very recently, the Eleventh Circuit joined it.

In June 2021, the Eleventh Circuit decided *Shivers v. United States* and became the second circuit to switch sides on this issue.[198] Before *Shivers*, courts in the Eleventh Circuit favored the majority position, as articulated by the Court of Appeals' decision in *Rosas v. Brock*.[199] In *Rosas*, the Eleventh Circuit Court of Appeals noted that "[t]here is no reason to believe that Congress ever intended to commit to an agency's discretion the question of whether or not to act constitutionally. . . . [A]dherence to constitutional guidelines is not discretionary; it is mandatory."[200] The Court of Appeals cemented this rule in *Denson v. United States*, explicitly stating—albeit in dicta—that the discretionary exception is only available as a defense for the United States, "if the government official's conduct does not violate the Constitution."[201] Following these precedents, district courts in the Eleventh Circuit consistently ruled in favor of the circuit majority's position.[202]

All this changed with the Eleventh Circuit Court of Appeals' 2021 *Shivers*[203] decision. In that case, a federal inmate who was stabbed in the eye by his cellmate while he slept alleged that U.S. prison officials were negligent in assigning a dangerous and mentally unstable inmate to his cell.[204] The plaintiff claimed that, because the decision to assign him a dangerous cellmate violated the Eighth Amendment, the discretionary function exception could not preclude his claim.[205] The court disagreed, arguing that the discretionary function exception could bar

198. 1 F.4th 924 (11th Cir. 2021).

199. 826 F.2d 1004 (11th Cir. 1987).

200. *Id.* at 1008.

201. 574 F.3d 1318, 1337 n.55 (11th Cir. 2009).

202. *See* Natty v. United States, No. 2:12-CV-00027-RWS-JCF, 2013 U.S. Dist. LEXIS 149572, at *4 (N.D. Ga. Sep. 24, 2013) ("Nevertheless, if a federal official has violated the Constitution or a federal statute or regulation, the § 2680(a) exception may not apply."); Mancha v. ICE, No. 1:06-CV-2650-TWT, 2009 WL 900800, at *4 (N.D. Ga. Mar. 31, 2009) (holding that a warrantless—and thereby unconstitutional—search conducted by federal officers could not be protected by the discretionary function exception); O'Ferrell v. United States, 968 F. Supp. 1519, 1527 (M.D. Ala. 1997) ("Nor will the discretionary function exception apply if constitutional law specifically prohibits the challenged conduct.").

203. 1 F.4th 924 (11th Cir. 2021).

204. *Id.* at 927.

205. *Id.* at 928–29.

the FTCA claim because: (1): the text of the FTCA is unambiguous and does not carve out a constitutional exception for discretionary functions, so the only inquiry that matters for whether the defense applies is whether the officer's conduct was discretionary; (2) the Supreme Court's *Gaubert* test does not address constitutional consideration; (3) the Seventh Circuit's position is persuasive; (4) the plaintiff's position is unworkable in practice; and (5) the Eleventh Circuit's previous position outlined in *Denson* was merely dicta.[206] Through this decision, the Eleventh Circuit upset its previous position in favor of the circuit majority and explicitly held that the discretionary function exception analysis has nothing to do with constitutionality. This position is rife with problems—these are the subject of the next Section.

B. The Majority Approach Is Better Aligned with Congress's Intent and the Minority Approach Leads to an Absurd Result

The circuit majority's approach is far more compelling than the minority position. It is better aligned with Congress's intent that the FTCA's waiver of liability should be broadly construed.[207] Moreover, the minority approach buys into a logical absurdity by strictly applying the Supreme Court's *Gaubert* test, failing to recognize that if federal officers lack the discretion to violate federal rules, statutes, or policies, then by implication they lack the discretion to violate their source of authority—the U.S. Constitution.[208] The minority counterargues that the United States simply has not rendered itself liable for constitutional torts, but this argument critically misinterprets the central holding of *FDIC v. Meyer*, the seminal Supreme Court case on constitutional torts.[209] The following Section expands on these arguments in favor of the majority position.

1. The Majority Approach Is Better Aligned with Congress's Intent That the FTCA Should Be Broadly Construed

While constructing the two-part *Gaubert* test, the Supreme Court listed federal statutes, regulations, and policies as mandates that federal officers have no discretion to violate.[210] It did not list the Constitution as one of those mandates, but most federal circuit have since added it to the list.[211] This is a prudent act of interpretation given Congress's intent to create a broad waiver of sovereign immunity in

206. *Id.* at 930–35.
207. *See infra* Part II.B.1.
208. *See infra* Part II.B.2.
209. *See infra* Part II.B.3; FDIC v. Meyer, 510 U.S. 471 (1994).
210. United States v. Gaubert, 499 U.S. 315, 322 (1991).
211. *See supra* notes 161–67 and accompanying text.

enacting the FTCA and the limited purposes which it assigned to the FTCA's exceptions.

As previously discussed, Congress intended the FTCA to be a stark departure from the default of absolute sovereign immunity.[212] The FTCA generally provides that the United States is liable in tort to the same extent as private individuals,[213] and the legislative history of the legislation reflects Congress's intent that such a statement would have force and not be merely aspirational.[214] This general intent toward broad waiver provides a guiding light for courts when deciding whether one of the FTCA's provisions should be interpreted to provide more U.S. liability or less. In light of this intent, the circuit majority's limited construction of the discretionary function exception is reasonable.

Additionally, the Congressional intent underlying the discretionary function exception itself provides guidance. The discretionary function exception was designed to prevent tort suits from being used to test the legality of federal policies and to provide federal officers with a range of discretion while enacting such policies.[215] Essentially, it exists to allow federal officers to *carry out* laws and policies (even to the point of abusing their discretion), but it does not protect officers when they directly *violate* laws or policies. For example, consider a U.S. Forest Service official's decision to allow a wildfire on public land to burn freely, even though it risks damage to adjoining privately owned land—that decision might be very destructive and even constitute an abuse of discretion, but so long as the decision touches on federal policy (e.g., the government's strategy to allow some fires to burn freely to promote a forest's regrowth) and does not violate federal laws or rules, then it is likely protected. Conversely, a United States Post Office worker who—in violation of the Postal Service's safety policies—negligently leaves a heavy package in a position where it could fall and injure the recipient has probably opened the United States to FTCA liability and the discretionary function exception likely does not apply. Why the difference in result?

212. *See supra* Part I.A.

213. 28 U.S.C. § 1346(b)(1).

214. *See supra* Part I.A.3; *see also, e.g.*, *Tort Claims Against the United States: Hearings on H.R. 7236 Before the H. Comm. on the Judiciary*, 76th Cong. 16 (1940) (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen. of the United States) ("The basic principle on which this legislation is predicated is that of relief in respect of tort claims . . . ought not to be a matter of grace from the legislative branch, but it ought to be a matter of right, *just as it is between one private individual and another*." (emphasis added)).

215. *See supra* Part I.C.1; *see also* H.R. REP. NO. 79-1287, at 5–6 (1945) (outlining the purposes of the discretionary function exception).

The Post Office worker did not make a substantively worse decision than the Forest Service official or somehow abuse their discretion more egregiously—the difference is that the Post Office worker violated a federal rule. While the discretionary function exception creates breathing space for federal officials to exercise discretion—even to the point of protecting officials' ability to make harmful decisions—the exception does not apply when the official violates a federal law, rule, or policy, because a federal official could never have the discretion to violate the government's mandates for how federal employees must act. Allowing the discretionary function exception to bar claims for constitutional violations runs directly against this purpose—after all, how could constitutional violations ever be among the acts contemplated by federal policy?

In sum, allowing the discretionary function exception to cover any kind of illegal activity by federal officers is contrary to Congress's intent. This is evidenced by Congress's intervention to amend the FTCA in 1974, after it was shocked to learn that the intentional torts exception protected federal officers for intentional abuse of power carried out during "no-knock" raids.[216] At the time, one of the amendment's sponsors noted that the legislation was only a "first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses" and that the amendment would "submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants" including in situations where the law enforcement commits "constitutional torts."[217] At the time, Congress was clearly concerned that tort suits alleging unconstitutional abuses of power by government agents might not be actionable under the FTCA.[218] The circuit majority's approach is a logical extension of Congress's attempt in 1974 to ensure that the FTCA could not be used to condone such behavior by federal law enforcement. Essentially, it is evident that the circuit majority, by effectively adding the Constitution to the list of directives that federal officers lack discretion to violate, has acted in line with Congress's intent. The circuit minority's approach ignores this intent and, as the next Section demonstrates, leads to an absurd result.

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216. *See supra* Part I.B.2; *see also* Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 500–02, 505–07 (1976) (describing the callous intrusiveness of the illegal raids and members of Congress's surprise on learning that the raids were protected by the FTCA).

217. S. REP. NO. 93-588, at 4 (1973).

218. *See id.*

2. The Circuit Minority's Approach Is Logically Absurd

The circuit minority's approach contradicts itself. As noted above, the circuit majority's approach to the discretionary function exception is based on the principle that if a federal officer lacks discretion to violate federal rules or directives, then they also lack the discretion to violate the Constitution—that is, the *source of authority* for those rules and directives.[219] The D.C. Circuit Court of Appeals articulated this argument in *Loumiet v. United States*:

> [T]he absence of a limitation on the discretionary-function exception for constitutionally ultra vires conduct would yield an illogical result: the FTCA would authorize tort claims against the government for conduct that violates the mandates of a statute, rule, or policy, while insulating the government from claims alleging on-duty conduct so egregious that it violates the more fundamental requirements of the Constitution.[220]

This argument is similar to courts' application of the absurdity doctrine in other legal contexts. The absurdity doctrine is a tool courts may use to interpret statutes that, by their plain language, seem to command a nonsensical result.[221] The premise of the doctrine is that courts, as the "faithful agents" of Congress, must follow Congressional intent as best as possible whenever the meaning of statutory text is unclear.[222] The absurdity doctrine maintains that when courts must decide on the meaning of a statutory text which commands a nonsensical or unthinkable result, "the federal courts may safely presume that legislators did not foresee those particular results and that, if they had, they could and would have revised the legislation to avoid such absurd results."[223] Essentially, "[i]f an application of plain statutory language would undermine sufficiently important values of the legal system, courts presume that the legislature would not have intended such a result," and they refuse to enforce that interpretation of the text.[224] The circuit majority is not truly applying the absurdity doctrine when it maintains the principle that federal officers lack discretion to violate the Constitution,[225] but the underlying logic is identical.

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219. *See supra* Part II.A and accompanying notes.

220. 828 F.3d 935, 944–45 (D.C. Cir. 2016).

221. Perhaps the most famous example of an absurd law was illustrated in the early Supreme Court case *United States v. Kirby*, which described: "[T]he Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity.'" 74 U.S. 482, 487 (1869). The Court noted with approval that it would be absurd for the law to "extend to the surgeon who opened the vein of a person that fell down in the street in a fit." *Id.*

222. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389 (2003).

223. *Id.* at 2394.

224. Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1007 (2006).

225. The absurdity doctrine is used by courts when a *statute's text* would command an absurd result. *See id.* The case of the discretionary function exception is

Essentially, analogous to courts' role in applying the absurdity doctrine, the circuit majority has avoided allowing the discretionary function exception to bar claims for unconstitutional conduct because it is absurd and unthinkable to allow the government to break its own, most fundamental rules.[226] This argument is compelling. To accept the circuit minority's position requires a kind of doublethink[227]—that is, it requires one who follows it to accept competing propositions without realizing they are at odds with one another. The circuit minority completely accepts the ideas that the Constitution provides an outer limit to federal officers' behavior and that the discretionary function exception, under the Supreme Court's test in *Gaubert*, does not protect officers' conduct that violates a federal directive, regulation, or law.[228] But it also holds, *at the very same time*, that the discretionary function exception, which lowers the barrier of immunity for violations of federal laws and rules, does not lower the barrier of immunity for acts that violate the Constitution. There is a logical disconnect in this approach—to avoid it, the circuit minority falls back on the default and total sovereign immunity of the United States, arguing that the United States has not rendered itself liable in tort for constitutional violations.

3. The Circuit Minority's Counterargument Critically Misinterprets Supreme Court Caselaw

The circuit minority's approach relies on the default sovereign immunity of the United States[229] and the argument that, in enacting the FTCA, Congress did not intend to render the Government liable for constitutional claims. In *Linder v. United States*, the Seventh Circuit Court of appeals held that "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort

different—the FTCA's text is vague, but the principle that federal officers lack discretion to violate federal rules or directives was a later addition by the U.S. Supreme Court. *See supra* Part I.C.2.a. The circuit majority is, therefore, not arguing that the FTCA's text commands an absurd result but that a refusal to extend the Supreme Court's logic in *Gaubert* to constitutional violations would be absurd.

226. *See, e.g.*, Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Haw. 1977) ("[I]f this country has learned nothing else in the past decade, it has learned that no man . . . is above the law. The Government should not have the 'discretion' to commit illegal acts . . . . In this area, there should be no policy option.").

227. Doublethink, a term coined by George Orwell in his novel *1984*, refers to "the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them." GEORGE ORWELL, 1984, at 214 (Signet Classics ed., 1950).

228. *See* United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

229. As noted in Part I.A.1, there are reasons, based in democratic legitimacy, to scrutinize arguments relying on absolute sovereign immunity.

Claims Act, which does not apply to constitutional violations. It applies to torts, as defined by state law."[230] Similarly, one author, citing *FDIC v. Meyer*, argues that "there is no logical way to skirt Supreme Court precedent definitively stating that the United States has not consented with the FTCA to be sued for constitutional violations" and that the first prong of the *Gaubert* test conspicuously omits mentioning the Constitution.[231] Proponents of the circuit minority's position worry that, under the circuit majority's approach, any claim for a constitutional violation could easily transformed into a tort claim and thus slip by the FTCA's jurisdictional barriers, opening the United States up to liability for constitutional violations it never intended to allow.[232] In *Ramirez v. Reddish*, for example, a court ruling in favor of the circuit minority's position warned that "[g]iven the very broad language of the federal constitution's protections, it would be a simple matter for any FTCA plaintiff, in almost every case, to avoid the discretionary function exception by making a plausible allegation that a federal employee's tortious conduct was also unconstitutional."[233]

It is true that in *FDIC v. Meyer*, the Supreme Court confirmed that constitutional claims are not cognizable under § 1346(b)(1) of the FTCA.[234] In that case, a federal employee alleged that he was wrongfully terminated by the Federal Deposit Insurance Corporation, citing the deprivation of his property without due process of law under the Fifth Amendment.[235] The Court denied his due process claim, holding that a *Bivens*-type cause of action[236] for constitutional violations is not available against the government.[237] Its argument rested on the FTCA's main text, which provides that for any given tort, the United States is only liable to the same extent as "a private person."[238] The

230. 937 F.3d 1087, 1090 (7th Cir. 2019).

231. Shea, *supra* note 21 (citing FDIC v. Meyer, 510 U.S. 471, 478 (1994)).

232. *Id.* at 63–64. I would flip this argument around; in light of the original purpose of the FTCA to provide a broad waiver of immunity, it is more worrisome that "[v]iewed from 50,000 feet, virtually any action can be characterized as discretionary" and thus be barred. Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009).

233. No. 2:18-cv-00176-DME-MEH, 2020 WL 1955366, at *31 (D. Utah Apr. 23, 2020). The court cited the dissent in *Castro II*, wherein Justice Smith of the Fifth Circuit argued that "by a plaintiff's artful pleading, the United States can be liable whenever the Constitution is violated" even though *FDIC* precludes liability for constitutional torts. 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting).

234. 510 U.S. 471, 477 (1994).

235. *Id.* at 473–74.

236. *See infra* Part III.B (explaining the relationship of *Bivens* actions to FTCA claims).

237. *FDIC*, 510 U.S. at 484.

238. 28 U.S.C. § 1346(b)(1).

Court observed that because a private person cannot be liable for a constitutional violation, then neither can the United States.[239]

But the circuit minority's faith in *FDIC v. Meyer* is misplaced. Indeed, *FDIC v. Meyer* affirmed only that *purely constitution-based claims* are not actionable under the FTCA—but *constitutional claims rooted in state tort law* are perfectly valid.[240] Most courts recognize that claims alleging purely constitution-based conduct, such as Meyer's due process claim, are not actionable, but similar claims are actionable if the alleged unconstitutional conduct is also tortious under the law of the state.[241] A federal district court in Pennsylvania honed in on this distinction, ruling that the discretionary function exception could not bar a claim against federal law enforcement officers for unconstitutionally chaining the plaintiffs to beds and subjecting them to invasive searches because:

> While the FTCA does not waive the sovereign immunity of the United States for a claim based on conduct that violates *only* the Constitution, it clearly does waive that sovereign immunity for claims based on state law. [We have not found any authority] that would support a holding that claims which are otherwise actionable under state law are prohibited under the FTCA simply because the challenged conduct also violates the Constitution.[242]

In essence, the sort of claim contemplated in *FDIC v. Meyer* is one in which a federal officer does *no more* than violate constitutional rights. At issue, though, are the acts of federal officers that form the basis for a valid tort suit *and also* violate constitutional rights. Thus, the circuit minority cannot rely on *FDIC v. Meyer* and fall back on the default absoluteness of sovereign immunity law to support its position.[243]

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239. *FDIC*, 510 U.S. at 477–78.

240. In *Loumiet v. United States*, the D.C. Circuit Court of Appeals explained that, "[a] plaintiff who identifies constitutional defects in the conduct underlying her FTCA tort claim . . . does not thereby convert an FTCA claim into a constitutional damages claim" that would be invalid under *FDIC v. Meyer*; "state law is necessarily still the source of the substantive standard of FTCA liability." 828 F.3d 935, 945–46 (D.C. Cir. 2016).

241. The scholar Paul David Stern explains that the cognizability of a claim for a constitutional violation under the FTCA depends on whether it has a "common-law equivalent." Stern, *supra* note 21, at 677. He illustrates the distinction succinctly:

> A First Amendment chill on the freedom of speech and assembly often does not have a common-law tort analogue. Nor does the denial of due process as a result of discrimination. Some torts that are cognizable both in constitutional and common law, such as libel and slander . . . are not cognizable under the intentional tort exception to the FTCA. . . . Within the Fourth Amendment context, however, there exists a more symbiotic relationship between officer misconduct and traditional common-law jurisprudence.

Id. (footnotes omitted).

242. Garcia v. United States, 896 F. Supp. 467, 474–75 (E.D. Pa. 1995) (emphasis added).

243. *See supra* Part I.A.1 (explaining sovereign immunity's default and absolute

Additionally, the circuit minority's concern that the circuit majority's approach will enable plaintiffs to smuggle constitutional claims into the FTCA disguised as tort claims is misguided. It is important to remember that the issue of constitutionality is *only* relevant for the discretionary function analysis, which is a preliminary matter raised on a motion to dismiss.[244] If a claim gets past this stage, then the constitutional issues surrounding it fall away and all that remains are the merits of the underlying tort claim, which are resolved based on the law of the state in which the tort occurred.[245] Essentially, in the majority of circuits, where unconstitutional conduct may preclude the application of the discretionary function exception, claims that successfully surpass the discretionary functions analysis must *still* be weighed according to their merits as tort claims, no matter their constitutional elements. And the circuit minority's warning that a plaintiff could transform a constitutional claim into a tort claim "by artful pleading"[246] makes little sense—after all, if a given constitutional claim could easily be framed as a tort claim, then in fact it *is* a valid tort claim under the FTCA provided it meets the requisite elements under the law of the state in which it occurred.[247] The circuit minority's argument is therefore inaccurate so far as it claims that the circuit majority's approach somehow allows plaintiffs to impermissibly disguise constitutional claims as tort claims.

In sum, to hold that federal officers have discretion to violate the Constitution is an absurd interpretation of the discretionary function exception and the first prong of the *Gaubert* test, and it is misaligned from Congress's intent to provide a broad waiver of sovereign immunity in the FTCA. Further, the circuit minority cannot fall back on the absoluteness of sovereign immunity and Congress's refusal to waive liability for tort claims to support its argument. To foreclose the circuit minority's approach, Congress should intervene, as it did in 1974, to amend the discretionary function exception provision in the FTCA and ensure that unconstitutional acts of federal officers are not protected by sovereign immunity.

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position in American law); *see, e.g.*, Ramirez v. Reddish, No. 2:18-cv-00176-DME-MEH, 2020 WL 1955366, at *30 (D. Utah Apr. 23, 2020) (falling back on the default position of sovereign immunity to defend the minority approach, noting that "Congress has absolute authority to retain sovereign immunity for the unconstitutional acts of its agents or to waive sovereign immunity only according to the terms it has chosen, no matter how repugnant that unconstitutional conduct might be to the courts").

244. *See supra* Part I.C.3.

245. *See* 28 U.S.C. § 1346(b)(1).

246. *Castro II*, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting).

247. *See supra* notes 240 and 241 (explaining that tort claims and constitutional claims are not mutually exclusive but may overlap).

III. CONGRESS MUST INTERVENE TO AMEND THE DISCRETIONARY FUNCTION EXCEPTION

To remedy the split in federal circuit caselaw and dispel the circuit minority's influence, Congress should intervene to amend the FTCA. This Note argues that Congress should incorporate the Supreme Court's *Gaubert* test into the FTCA, with the caveat that conduct is not a matter of discretion if a federal statute, regulation, policy, *or the United States Constitution* prescribes a course of action for the employee to follow.[248] The immediate benefit of this approach, beyond curing the logical defects of the circuit minority's approach, is that it will enable plaintiffs with meritorious claims to recover against the United States for tort violations that also implicate constitutional rights.[249] The downside to this pragmatic approach is that, by incorporating the Supreme Court's test, the expansiveness of the discretionary function exception will be cemented—this cost is outweighed, however, by the immediate benefits of enabling recoveries via a practical solution and providing at least an outer limit to the discretionary function exception.[250]

A. THE SOLUTION: CONGRESS MUST AMEND THE FTCA

Congress should intervene in favor of the circuit majority's position. This would not be a new or radical move. Congress intervened similarly in 1974 to amend the intentional torts exception after it learned, to its horror, that the FTCA barred claims for intentional abuses of power by federal law enforcement.[251] In light of this past intervention, this Note recommends a similar intervention to complete Congress's 1974 attempt to ensure "a remedy against the Federal Government for innocent victims of Federal law enforcement abuses."[252]

Currently, the FTCA's definitions provision[253] does not define discretionary functions. Congress should insert *Gaubert*'s two-part test into this provision, with an added caveat about the Constitution, so that the definition would read:

> A discretionary function is one that (a) involves an element of judgment or choice, and (b) is susceptible to policy analysis. Conduct is not a matter of discretion under subsection (a) if a federal statute, regulation, policy, or the

248. *See infra* Part III.A.
249. *See infra* Part III.B.
250. *See infra* Part III.C.
251. *See supra* Part I.B.2.
252. S. REP. NO. 93-588 (1973).
253. 28 U.S.C. § 2671.

> United States Constitution prescribes a course of action for the employee to follow.

By enacting this legislation, Congress would harmonize a significant circuit split[254] and cure a mangled interpretation of the FTCA's discretionary function exception.[255]

Congress is better positioned to enact this type of change to the FTCA than the Supreme Court. Ultimately, problems with the discretionary function exception stem from the statute's vagueness about what conduct is actually discretionary.[256] The Supreme Court has attempted, since the FTCA was enacted, to craft a clear test for discretionary functions and has been unable to do so.[257] While the specific problem that this Note focuses on (whether officers have discretion to violate the Constitution) stems from the circuit minority's misapplication of a Supreme Court test, the underlying problem is that the Supreme Court, in crafting the test, did not precisely and accurately articulate Congress's intent.[258] The best way to fix this is for Congress to articulate the provision's meaning more precisely, not for a court to once again try to unravel Congress's intent.

If Congress does not act, it is entirely possible that the U.S. Supreme Court could take up the issue and revisit its holding in *Gaubert*, expanding the definition of acts that are not discretionary to include constitutional violations. Whether the Supreme Court would do so, though, is currently unclear. While several members of the current majority on the court have expressed their willingness to abandon *Bivens* (the traditional cause of action for constitutional violations brought directly against federal officers)[259] as a remedy for constitutional tort violations,[260] this does not imply that they would be willing to replace it with the FTCA.[261] Moreover, the Supreme Court has

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254. *See supra* Part II.A (describing the circuit split).

255. *See supra* Part II.B (arguing that the minority position is deficient).

256. *See supra* note 241 and accompanying text.

257. *See supra* Part I.C (describing the evolution of the discretionary function exception).

258. *See supra* Part.I.A.3 (describing Congress's intent behind the FTCA); Part I.B.1 (describing the purposes underlying the discretionary function exception).

259. *See infra* Part III.B (explaining the relationship between *Bivens* and FTCA claims).

260. In *Hernandez v. Mesa*, Justice Gorsuch joined Justice Thomas in a concurrence to a case limiting the application of *Bivens*, arguing that "[t]he analysis underlying *Bivens* cannot be defended. We have cabined the doctrine's scope, undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether." 140 S. Ct. 735, 752–53 (2020) (Thomas, J., concurring).

261. *See* Cassandra Robertson, *SCOTUS Sharply Limits* Bivens *Claims—and Hints at Further Retrenchment*, A.B.A. (Apr. 14, 2020), https://www.americanbar.org/groups/

signaled its unwillingness to take up the issue by denying a writ of certiorari in Ms. Castro's case in 2011,[262] denying certiorari in a Fourth Amendment violation case in 2019,[263] and by denying a similar petition alleging unconstitutional conduct by the U.S. Marshals Service in 2020.[264] In light of these uncertainties, it would be best for Congress to take up the issue and amend the FTCA to ensure that the circuit minority's mangled interpretation does not continue and that meritorious claims are not precluded on grounds that federal officials possess discretion to violate the Constitution.

B. This Solution Would Enable Tort Recoveries for Meritorious Claims Against the United States

This solution's immediate benefit is that it would enable plaintiff's recoveries in many constitutional violation cases that would otherwise be precluded by the discretionary function exception. Potential recoveries in these actions can be significant, contrary to the common conception of a constitutional claim as one with more symbolic value than monetary significance. In the prototypical example of the overzealous officer who breaks through the plaintiff's door without a warrant, for example, the amount of recovery is only the cost of replacing the door.[265] But this image is misplaced; tort recoveries can be potentially enormous for plaintiffs, even for constitutional violations. In

litigation/committees/civil-rights/practice/2020/scotus-sharply-limits-bivens-claims-and-hints-at-further-retrenchment [https://perma.cc/CQN4-Y2WK] (noting that the Supreme Court's potential willingness to overturn *Bivens* may simply leave plaintiffs without a remedy).

262. *See supra* note 1 (listing the procedural history of the *Castro* case, including the Supreme Court's certiorari denial of Ms. Castro's case).

263. *See* Campos v. United States, 139 S. Ct. 1317 (2019) (denying certiorari). The United States Solicitor General filed a brief opposing the writ that focused in part on the plaintiff's argument that a Fourth Amendment violation precluded application of the discretionary function exception. *See* Brief for the Respondent in Opposition at 13–17, Campos v. United States, 139 S. Ct. 1317 (2019) (No. 18-234) ("Petitioner misconstrues this Court's precedent . . . in contending that a federal officer's conduct cannot fall within the discretionary function exception whenever it is alleged to be unconstitutional . . . ." (citation omitted)).

264. Linder v. United States, 141 S. Ct. 159 (June 29, 2020) (mem.) (denying certiorari). The Court denied a writ of certiorari appealing the Seventh Circuit's determination that unconstitutional conduct by the U.S. Marshals Service would not preclude application of the discretionary function exception. *See* Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

265. *See Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcomm. on Agency Admin. L. & Gov't Rels. of the H. Comm. on the Judiciary*, 95th Cong. 77 (1978) (statement of Barbara Allen Babcock, Assistant Att'y Gen.) ("The example that we always offer is a fourth amendment violation where a door is broken down. The damages are the costs of the door and whatever disruption was done in the apartment. That does not amount to very much money when you start adding it up.").

Limone v. United States, for example, the First Circuit Court of Appeals affirmed a jury's award of $100 million against the United States for the FBI's suppression of exculpatory evidence that would have prevented the plaintiff from spending thirty-five years on death row.[266] And Ms. Castro claimed $5 million in damages for herself and R.M.G. for the unconstitutional acts of federal officers that resulted in the loss of seeing her daughter for three years and her daughter's own trauma caused by the separation.[267] Nullifying the circuit minority's approach would have great significance for plaintiffs like Ms. Castro who have suffered real harm and deserve recompense.

Proponents of the circuit minority's approach counter that disallowing claims for constitutional violations under the discretionary function exception does not preclude plaintiffs' recoveries because plaintiffs can bring a *Bivens* action alongside their FTCA claims for constitutional violations.[268] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court considered whether a plaintiff had a valid cause of action against federal narcotics agents who entered his house and searched it in violation of the Fourth Amendment.[269] In affirming that the plaintiff had a valid cause of action, the Supreme Court created the *Bivens* claim, a cause of action for damages caused by a constitutional violation when the plaintiff has no other means of recovery.[270] The circuit minority is correct that plaintiffs may bring *Bivens* claims alongside FTCA claims for constitutional violations.[271]

Bivens claims, however, suffer from two major drawbacks that make them a poor substitute for recovery under the FTCA. First, *Bivens* claims may *only* be brought against the individual agent who harmed the plaintiff—the United States is not vicariously liable for any damages awarded, which decreases the possibility of large-value

266. 579 F.3d 79, 102–04 (1st Cir. 2009).

267. Complaint at 13–14, Castro v. United States, No. C-06-61 (S.D. Tex. Feb. 10, 2006), 2006 WL 815707.

268. *See Castro II*, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting) (noting that the majority's decision to bar the discretionary function defense for a constitutional tort claim "turns *Bivens* on its head").

269. 403 U.S. 388, 389 (1971).

270. *See id.* at 397 (creating a cause of action for plaintiffs whose constitutional rights have been violated); Gabriella A. Orozco, Note, Bivens *and Constitutional Integrity at the Border:* Hernandez v. Mesa *&* Rodriguez v. Swartz, 51 LOY. U. CHI. L.J. 245, 251 (2019) (explaining the impact of *Bivens*).

271. The Supreme Court has affirmed that *Bivens* and the FTCA are parallel causes of action that may be brought in the same lawsuit. *See* Carlson v. Green, 446 U.S. 14, 20 (1980).

recoveries.[272] And second, federal officials who face personal liability in *Bivens* actions have potent defenses which are not present in FTCA actions—namely, the "good faith" or "qualified immunity" defense, which precludes claims for constitutional violations if the right is not clearly established.[273] Because of these provisions, it is very hard for plaintiffs to win on a *Bivens* action, and even if they do, their recovery will be practically limited because of the limited assets of the individual federal officer. Fundamentally, the problem with *Bivens* is that it is not designed, like the FTCA, to provide a mode of recovery; it is designed to deter officer misconduct, so it is inadequate at awarding money damages for constitutional violations.[274] These problems have made *Bivens* a nearly-unworkable path to recovery for plaintiffs.[275]

The *Bivens* remedy's inadequacy is evident in the many attempts (albeit, failed attempts) that Congress made in the 1970's and 1980's to end the dual existence of FTCA and *Bivens* claims, and to make the FTCA the exclusive remedy for constitutional violations.[276] During the development of these planned pieces of legislation, there was a great deal of testimony by officials in the Department of Justice that *Bivens* remedies were not up to the task of remedying plaintiffs' injuries. In one statement, Assistant Attorney General Barbara Allen Babcock testified to the unfairness inherent in the:

> [I]nability of truly aggrieved plaintiffs to recover any substantial monetary awards. Although federal employees are no longer accorded the degree of absolute immunity from civil liability once offered, *they are still able to avoid liability, even if they acted tortiously*, so long as they can demonstrate a reasonable good faith belief in the propriety of their conduct."[277]

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272. *See* Loumiet v. United States, 828 F.3d 935, 945 (D.C. Cir. 2016) ("Federal constitutional claims for damages are cognizable only under *Bivens*, which runs against individual governmental officials personally. The FTCA, in contrast, provides a method to enforce state tort law against the federal government itself." (citation omitted)); Janell M. Byrd, Comment, *Rejecting Absolute Immunity for Federal Officials*, 71 CALIF. L. REV. 1707, 1711 (1983) ("A cause of action [under *Bivens*] may, however, be brought against *the responsible federal official*." (emphasis added)).

273. *See* Byrd, *supra* note 272, at 1713–14.

274. *See* FDIC v. Meyer, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."); *Carlson*, 446 U.S. at 21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States.").

275. *See* Byrd, *supra* note 272, at 1716.

276. *See id.* at 1707–08 (noting numerous proposals brought in the 1970's and 1980's by Congress to amend the FTCA and make the United States the sole defendant for constitutional violations committed by federal officers).

277. *See Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcomm. on Agency Admin. L. & Gov't Rels. of the H. Comm. on the Judiciary*, 95th Cong. 76 (1978) (statement of Barbara Allen Babcock, Assistant Att'y Gen.) (emphasis added). Irving Jaffe expanded on the reason that the proposed bill omitted a good faith defense for the United States: "[I]f it were a defense, we would perhaps lose very few cases. The

And in similar testimony before a Senate committee, Assistant Attorney General J. Paul McGrath observed that:

> The citizen has no adequate remedy. The United States cannot be sued for a constitutional tort. The modest assets of the public servant are the only available resource . . . . Of the thousands of cases, there have been very few judgments and very few of those have, in turn, actually been paid . . . . [T]he current system is self defeating for all concerned.[278]

The testimony presented by Department of Justice officials demonstrates that the current system, in which *Bivens* and FTCA claims are complementary causes of action, runs contrary to the broad purposes of the FTCA. Indeed, this Note has observed that the original purpose of the FTCA was to provide a broad waiver of the United States' sovereign immunity and to enable plaintiffs' recoveries by rendering the United States liable in tort to the same extent as a private individual.[279] Thus, the circuit minority's position goes beyond dealing theoretical damage to the principle that federal officials cannot act outside constitutional bounds. It harms plaintiffs' potential real recoveries by limiting them to thoroughly inadequate *Bivens* actions, a state of affairs that stands in contrast to the FTCA's original purpose of creating a broad waiver of sovereign immunity for tort violations.[280] Amending the FTCA would help to fix this problem.

C. THIS APPROACH'S COSTS ARE OUTWEIGHED BY THE BENEFITS

This Note's recommendation for incorporating the Supreme Court's discretionary function test is pragmatic and not without costs. Indeed, it would be ideal for Congress to entirely overhaul the discretionary function exception, creating a new test that would greatly curb its applicability and ensure that it is *only* used to protect federal policy independence, in line with Congress's original intent for the exception.[281] After all, the discretionary function exception has been expanding dangerously for decades, and its over-breadth exists independently of whether it can protect the United States from constitution-based claims.[282] But the likelihood that Congress would

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individual employees have lost very few cases over the years, because the good-faith defense is one which is predicated upon the employee's good-faith belief that what he was doing was lawful and proper, and that is invariably the case." *Id.* at 81 (statement of Irving Jaffe, Assistant Att'y Gen.).

278. *Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. 160–61 (1982) (statement of J. Paul McGrath, Assistant Att'y Gen.).

279. *See supra* Part I.A.3.

280. *See supra* Part II.B.1.

281. *See supra* Part I.C.1 (explaining the purposes of the discretionary function exception).

282. *See supra* Parts I.C.2, I.C.3 (demonstrating the expanse of the exception).

pass such an ambitious overhaul of sovereign immunity law, given the razor thin margin held by the majority party[283] and the general trend in the last several decades away from congressional overrides[284] due to increased partisanship,[285] is slim. Moreover, Congress might be reluctant to intervene in the FTCA if doing so would involve entirely toppling the Supreme Court's jurisprudence on discretionary functions,[286] which has been slowly crystallizing since the FTCA's inception and its inaugural *Dalehite* decision.[287] This could open the United States to an entirely unknown amount of liability—while that is worth exploring theoretically, it is unlikely Congress would be willing to undertake it.

In light of these considerations, this Note's solution presents Congress with a much more manageable, targeted, and pragmatic option. As partisanship increases while congressional overrides of Supreme Court decisions designed to restore Congress's statutory intent have declined,[288] it is best to present Congress with the most non-controversial reform option available that would still effectively address the problem at hand. This Note's solution is crafted to resemble

283. Susan Cornwell, Trevor Hunnicutt & James Oliphant, *Analysis - Narrow Democratic Majorities in Congress Could Limit Ambitious Biden Agenda*, REUTERS (Jan. 6, 2021), https://www.reuters.com/article/uk-usa-biden-senate-analysis-idINKBN29B2GY [https://perma.cc/N44N-2URZ]; Norman Ornstein, *Democrats' House Majority Is Razor-Thin. Any Glitch Could Spell Disaster*, WASH. POST (Dec. 16, 2020), https://www.washingtonpost.com/opinions/2020/12/16/democrats-house-majority-is-razor-thin-any-glitch-could-spell-disaster [https://perma.cc/LM6G-57GK].

284. *See* Adam Liptak, *In Congress's Paralysis, a Mightier Supreme Court*, N.Y. TIMES (Aug. 20, 2013), https://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html [https://perma.cc/4FRN-QAAA] (observing that congressional overrides have slowed since 1991, and almost stopped since 2009).

285. *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013) (explaining the decline of nonpartisan overrides, and the rise of rarer, partisan overrides "which appear[] to require conditions of near-unified control of both branches of Congress and the presidency").

286. A study by Professor William Eskridge and Matthew R. Christiansen found that Congress tends to exercise its override authority when it can reverse or clarify a single decision and that decision is closely divided among justices, invites Congress to override it, relies too heavily on plain meaning, narrows a federal regulation, or rejects an interpretation from a federal agency. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1321 (2014). None of these factors in favor of congressional overrides indicates a congressional willingness to tackle an entire line of Supreme Court decision-making.

287. *See supra* Part I.C.2.a (describing the beginning of Supreme Court discretionary functions jurisprudence).

288. Christiansen & Eskridge, *supra* note 286, at 1319–20.

Congress's intervention in 1974 into the intentional torts exception, which did not seek a total overhaul of Supreme Court jurisprudence but only to remedy a very specific evil—the extension of sovereign immunity over grave abuses of power committed by law enforcement.[289] By incorporating the *Gaubert* test and only narrowly modifying it, this tailored solution presents an amendment that is practicable to enact in exchange for the cost of cementing the expansive test for discretionary functions into the FTCA itself. Any more idealistic solution is not realistic for the current Congress, and it is better to provide a slight improvement than to provide none at all. This Note's solution will provide for more recoveries for plaintiffs with meritorious claims, and it will set an outer boundary to the discretionary function exception's expansion. It will signal that, no matter the breadth of the exception, it cannot be used to provide federal officials with discretion to violate the Constitution.

CONCLUSION

Monica Castro's one-year-old daughter was taken away from her by federal officers, unconstitutionally deported, and separated from her for three years.[290] By the time they were reunited, her daughter did not even recognize her.[291] Monica Castro and her daughter suffered an enormous injury, but they will never recover damages against the United States for the unconstitutional acts of federal law enforcement who forcibly separated them. Ms. Castro's claim fell victim to the harsh realities of United States sovereign immunity law. The default position of the United States is that it is immune from suit except to the extent it has consented to be sued.[292] Congress has enacted specific waivers to this absolute immunity, including through the FTCA, which generally renders the United States liable in tort to the same extent as private individuals.[293]

The FTCA's waiver is not so broad as its original proponents expected or hoped.[294] The FTCA provides a means of crossing the barrier of sovereign immunity,[295] but a network of exceptions greatly limit the

289. *See supra* Part I.B.2.
290. *See* Liptak, *supra* note 4.
291. *Id.*
292. *See supra* Part I.A.1 (describing the origins of this idea in English common law).
293. *See supra* Part I.B.1; 28 U.S.C. § 1346(b).
294. *See supra* Part I.A.3 (describing the legislative history of the FTCA and hopes, at its enactment, for a broad waiver).
295. *See supra* Part I.B.1.

FTCA's effectiveness as a vehicle for plaintiff recovery.[296] The most powerful is the discretionary function exception, which precludes claims against the United States if the tortious act of the federal officer was within the officer's valid range of discretionary choices.[297] The exception is so expansive that it has clashed with the Constitution, generating a circuit split on the question of whether the discretionary function exception may bar claims that allege constitutional violations.[298]

A majority of circuits answer this in the negative,[299] but a significant and growing minority hold that the discretionary function analysis is entirely separate from a constitutional analysis, and thus the exception can bar claims which credibly allege that a federal officer violated the plaintiff's rights.[300] The circuit majority's position is better aligned with Congress's intent to provide a broad waiver in the FTCA and the limited purposes it ascribed to the discretionary function exception.[301] Additionally, the minority's position buys into a logical absurdity—after all, how can federal officers lack the discretion to violate federal law (which the circuit minority easily accepts) but remain free to violate the Constitution, i.e., the source of all federal law?[302] In essence, the circuit minority favors a very expansive sovereign immunity, which does not give way even when federal officers violate the most fundamental rules underlying our republican system.

Congress must step in to remedy this circuit split and amend the FTCA in favor of the circuit majority.[303] Congress should insert the Supreme Court's two-part test into the FTCA itself, with the caveat that conduct is not a matter of discretion if a federal statute, regulation, policy, *or the United States Constitution* prescribes a course of action for the employee to follow.[304] Without this solution, a significant circuit minority will continue to buy into an absurd interpretation of the FTCA and preclude meritorious claims like Monica Castro's. This logically disconnected and harmful state of affairs must not be allowed to continue—the United States is not above the law, and its officers should not be free to violate the United States Constitution.

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296. *See supra* Part I.B.2.
297. *See supra* Part I.C.
298. *See supra* Part II.
299. *See supra* Part II.A.1.
300. *See supra* Part II.A.2.
301. *See supra* Part II.B.1.
302. *See supra* Part II.B.2.
303. *See supra* Part III.A.
304. *See supra* Part III.A.