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It's Time to Resolve the Circuit Split: Unconstitutional Actions by Federal Employees Should Not Fall Within the Scope of the Discretionary Function Exception of the FTCA

Laney Ivey*

I. INTRODUCTION

The Federal Torts Claims Act (FTCA) is an avenue for United States citizens to sue the federal government for torts committed by government employees within the scope of their work. Congress designed the FTCA to allow citizens to overcome the doctrine of sovereign immunity, which allows citizens to recover from injuries suffered at the hands of government agents. Under the FTCA, there are exceptions where recovery is not allowed; the most prominent exception is known as the discretionary function exception, under which discretionary actions by government employees are immune from liability under the FTCA.

The intent of the discretionary function exception is to keep the courts from second guessing discretionary actions by executive employees, and to keep executive employees from being hesitant to

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exercise discretion for fear of liability.¹ The scope of the discretionary function exception is much litigated and one legal issue that has arisen is whether unconstitutional actions by an executive official can ever fall within the exception. There is currently a circuit split regarding whether unconstitutional actions fall within the exception. The First, Third, Eighth, Ninth, and D.C. Circuits all believe unconstitutional actions should not fall within the exception, while the Seventh and Eleventh Circuits believe they should. The Supreme Court of the United States has yet to weigh in on the issue and has not commented on the ambiguity surrounding the exception in over twenty-five years. This Comment will argue that unconstitutional actions are outside the scope of discretion provided by the exception, and therefore should be excluded from the exception.

From the inception of the FTCA, the scope and implication of the discretionary function exception has been extensively litigated. Faced with a lack of clarity in the statute, courts have wrestled with articulating the functions that Congress intended to be “discretionary,” and thus prohibiting civil liability. The underlying theme throughout the cases debating the discretionary function exception is that the core purpose of the FTCA is to hold the Government responsible for the harm it causes.

The FTCA radically changed the way citizens seek relief for their claims against the government. Before the adoption of the FTCA, citizens could not sue the federal government for negligent acts committed by a government official. Sovereign immunity protected these officials, regardless of how egregious their actions were.² While there were options available to citizens seeking relief, they were limited to seeking a private action bill.³ Hoping to make a change, which would allow for Americans to seek redress for tortious actions by the government, Congress passed the FTCA.⁴

The goal of this Article is to expound on various courts’ interpretations of the discretionary function exception, and to offer an opinion on the current divide, as well as a workable test which would remedy the confusion surrounding the exclusion of unconstitutional actions from the exception. First, this Article discusses the history of sovereign immunity within the United States, and the process a citizen would have to undertake to seek redress in a suit against a government

1. KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORTS CLAIMS ACT (FTCA): A LEGAL OVERVIEW 18 (2019).

2. *Id.*

3. *Id.* at 4.

4. *Id.* at 4–5.

entity. Next, it will address the FTCA and its creation, along with Congress's considerations in their drafting of the legislation.

Following the background of the FTCA, the focus will shift to the discretionary function exception. This Comment will address the function and purpose of the exception, as well as the test commonly used in cases where sovereign immunity and a discretionary action are at play. This Comment will then turn to the different stances of the judicial circuits who have issued opinions regarding whether unconstitutional actions by a government employee fall within the scope of the discretionary function exception. Finally, this Comment will offer a solution to the split, commenting on the need for a Supreme Court opinion clarifying the discretionary function exception and highlighting the three main areas of contention and the concerns of those for the inclusion.

II. BEFORE AND AFTER THE FEDERAL TORTS CLAIMS ACT

A. *The History of Sovereign Immunity and Redress for Torts Claims Prior to the FTCA*

Sovereign immunity is a key foundation of the FTCA.⁵ The doctrine of sovereign immunity permits a sovereign state or entity to be sued only to the extent that it has consented to being sued, and such permission can only be given by the legislative branch.⁶ “Thus, except as Congress has consented to a cause of action against the United States, ‘there is no jurisdiction . . . in any . . . court to entertain suits against the United States.’”⁷ This body of law is the shield protecting the United States from suit.

Before the creation of the FTCA, or any other applicable waiver of sovereign immunity, Americans injured by torts of government officials could not sue the government for damages resulting from their injuries.⁸ However, this did not leave Americans without a remedy, as the First Amendment guaranteed their right to petition the government for redress.⁹ The issue of establishing an efficient way for Americans to seek redress is not new. Even in the beginning years of the country,

5. See Paul F. Figley, & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009).

6. Figley, Paul F., *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 1105, 1107 (2009).

7. *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 587–88 (1941)).

8. See generally *Cohens v. Virginia*, 19 U.S. 375, 411–12 (1821).

9. U.S. CONST. amend. I.

citizens petitioned Congress for special legislation which would grant an avenue for financial recovery for injuries caused by the federal government.¹⁰ However, time proved that the legislative process was ill-suited for resolving tort claims, with many leaders calling for a change.¹¹

Congress introduced and adopted a wide variety of remedies for a range of claims, however, none of them offered a remedy for tort actions. First, in 1855, Congress passed the Court of Claims Act,¹² however, it was interpreted to exclude torts.¹³ Next, in 1886, Congress enacted the Tucker Act,¹⁴ which explicitly excluded torts, as the government did not want to waive sovereign immunity.¹⁵ In the years following the Tucker Act, there were a number of statutes passed which offered a tort remedy for various claimants including “horse owners, oyster growers, and persons injured by operations of the Post Office.”¹⁶

From the early 1920s forward, pressure mounted for the enactment of a law that would more efficiently process tort claims against the government. Congress wrestled with the issue for over twenty years, which resulted in over thirty potential bills regarding tort claim redress.¹⁷ At this point in time, the only opportunity for a citizen to seek compensatory relief was through a private congressional bill.¹⁸ Private bills “impose[d] ‘a substantial burden on the time and attention of Congress,’ [and] some members of the public became increasingly concerned ‘that the private bill system was unjust and wrought with

10. Figley, *supra* note 6, at 1106–07.

11. Paul Figley, *Ethical Intersections & The Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 347 (2011). For example, John Quincy Adams complained about the inordinate time Congress spent on claims matters; Millard Fillmore urged that a tribunal be established to handle private claims; and Abraham Lincoln called for such a change in his first annual message to Congress.

12. Court of Claims Act, ch. 122, 10 Stat. 612 (1855).

13. The Court of Claims Act was enacted February 24, 1855, 10 Stat. 612, *Spicer v. United States*, 1 Ct. Cl. 316 (1865); *Pitcher v. United States*, 1 Ct. Cl. 7 (1863).

14. Tucker Act, ch. 359, 24 Stat. 505 (codified as amended at 28 U.S.C. §§ 1346(a), 1491 (1887)).

15. The Tucker Act “provides a remedy for actions ‘not sounding in tort,’ although the original House version had included torts. 18 CONG. REC. 622 (1887).” Figley, *supra* note 6, at n.22.

16. Figley, *supra* note 6, at 1107.

17. 2 Jayson & Longstreth, *Handling Federal Tort Claims* § 12.06 (2021).

18. See *Dalehite v. United States*, 346 U.S. 15, 25 n.9 (1953). A private bill is a bill which relates to the matter of personal or local interest. These bills are typically introduced by a member of the legislature, and at one point, were used as a way to seek redress against the government. If the bill did not pass, there would be no other way to seek redress. *Bill* (3), BLACK’S LAW DICTIONARY (11th ed. 2019).

political favoritism.”¹⁹ However, the administration of these claims became burdensome, as seen during the Seventieth Congress, where 2,268 private claim bills were introduced, totaling more than \$100 million in damages.²⁰ Of the 2,268 private claim bills that were introduced, only a 336 were enacted.²¹

The issue came to a head in 1945 when a B-25 bomber plane crashed into the Empire State Building.²² The crash, caused by a negligent United States Army Air Force pilot, left fourteen people dead and many others injured. Eight months after the crash, the U.S. government offered money to families of the victims. Some accepted, but others initiated a lawsuit that resulted in landmark legislation.²³

B. The FTCA is Born

Hoping to end the inefficient system and fueled by lawsuits following the 1945 Empire State Building crash, the 79th Congress set out to resolve the burden of a faulty remedy system for tort claims in 1946.²⁴ Thus the Federal Torts Claims Act was born. The purpose of this act is to give the general public an avenue by which they can pursue legal action (and financial compensation) against the federal government.²⁵ The drafters of the FTCA imagined an act where citizens could circumvent the doctrine of sovereign immunity and have their day in court for any nonfeasance or misfeasance created by the government or those acting on behalf of the government.²⁶

A person injured by the tortious activity of a federal employee commonly has two potential targets that he could name as a defendant in a tort lawsuit: (1) the federal employee who committed the tort and (2) the federal government itself.²⁷ In numerous cases, however, suing the employee is not a viable option.²⁸ The FTCA generally authorizes suits against the United States for damages arising out of:

19. Lewis, *supra* note 1, at 4.

20. *Dalehite*, 346 U.S. 15, 25 n.9 (1953) (discussing the haphazard operation of the private claim bill procedure).

21. *Id.*

22. Joe Richman, *The Day A Bomber Hit The Empire State Building*, NPR (July 28, 2008, 11:23 AM), <https://www.npr.org/transcripts/92987873>.

23. Richman, *supra* note 22.

24. Title IV of the Legislative Reorganization Act, ch. 753, §§ 401–24, 60 Stat. 842 (1946) (current version at 28 U.S.C. § 2671–80).

25. See *Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021).

26. See Paul Figley, *Ethical Intersections & The Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 351–52 (2011).

27. See *Harbury v. Hayden*, 522 F.3d 413, 417 (D.C. Cir. 2008).

28. *Id.*

[I]njury 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.²⁹

“Under the FTCA, the federal government acts as a self-insurer, and recognizes liability” for the tortious actions “of its employees acting within the scope of” their sanctioned duties.³⁰ “The United States is liable to the same extent” a private individual would be in similar circumstances.³¹ The FTCA does not itself create a new federal cause of action against the U.S.; instead, the FTCA waives the U.S.’s sovereign immunity from certain claims that exist under state tort law.³² Therefore, the liability of the United States in an FTCA case is typically determined by the substantive law of the state where the tort occurred.³³

The FTCA imposes significant substantive limitations on the type of tort claim an American may recover from the United States. At the time of enactment, Congress was concerned about “unwarranted judicial intrusion[s] into areas of government . . . policymaking[.]”³⁴ thus, Congress opted to explicitly protect the United States’ sovereign immunity for more than a dozen different claims.³⁵ Some of the exceptions are more notable than others. For example, the following exceptions prevent Americans from pursuing lawsuits against the United States: “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a

29. 28 U.S.C. § 1346(b) (1996).

30. *Federal Torts Claims Act*, UNITED STATES HOUSE OF REPRESENTATIVES, <https://www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act> (last visited October 29, 2021).

31. *Id.*

32. *Pornomo v. United States*, 814 F.3d 681, 687 (4th Cir. 2016) (“The FTCA does not create a new cause of action; rather, it permits the United States to be held liable in tort by providing a limited waiver of sovereign immunity.”); *Raplee v. United States*, 842 F.3d 328, 331 (4th Cir. 2016) (explaining that “the FTCA merely waives sovereign immunity to make the United States amenable to a state tort suit.”).

33. *Raplee*, 842 F.3d at 331.

34. *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983). The D.C. Circuit, in determining whether a claim of malicious prosecution was protected by sovereign immunity held that “[p]rosecutorial decisions . . . are quintessential examples of governmental discretion in enforcing the criminal law,” and have uniformly been protected under the discretionary function exception. *Id.* at 513.

35. *See generally* 28 U.S.C. § 2680(a)–(f), (h)–(n) (2021).

statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty;³⁶ certain claims arising from the actions of law enforcement officers administering customs and excise laws;³⁷ or certain claims predicated upon intentional torts committed by federal employees.³⁸ If a tort claim against the United States falls within any of the exceptions, then the court lacks jurisdiction to adjudicate it.

C. The Discretionary Function Exception

1. The Function and Purpose of the Discretionary Function Exception

The discretionary function exception is considered the most litigated exception to the FTCA.³⁹ When a court is determining whether the alleged tortious conduct is discretionary in nature, the court must assess “whether the conduct at issue involves ‘an element of judgment or choice’ by the employee.”⁴⁰ Generally, the conduct of a federal employee is considered to be discretionary absent any federal statute, regulation, or other policy.⁴¹ Without the presence of a discretionary action there is nothing for the exception to protect.⁴² Put another way, the discretionary function exception does not insulate the United States from liability when its employees “act in violation of a statute or policy that specifically directs them to act otherwise.”⁴³

Section 2680(a) of the United States Code is commonly referred to as the discretionary function exception.⁴⁴ This section preserves the immunity granted to the federal government whenever an employee’s

36. 28 U.S.C. § 2680(a) (2021).

37. 28 U.S.C. § 2680(c) (2021).

38. 28 U.S.C. § 2680(h) (2021).

39. *See, e.g.*, *Matthews v. United States*, No. 07-00030, 2011 Lexis 86282, at 2 (D. Guam Aug. 5, 2011), *aff’d*, 586 F. App’x 366 (9th Cir. 2014) (describing “the discretionary function exception” as “the most frequently litigated” statutory exception to the FTCA).

40. *Pornomo*, 814 F.3d at 687.

41. *Evans v. United States*, 876 F.3d 375, 381 (1st Cir. 2017) (quoting *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

42. *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

43. *Tsolmon v. United States*, 841 F.3d 378, 384 (5th Cir. 2016).

44. *See* 28 U.S.C. § 2680(a) (stating the FTCA’s waiver of sovereign immunity “shall not apply to . . . [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”).

acts involve the exercise of judgement or choice.⁴⁵ The discretionary function exception is often referred to as the broadest and most consequential exception to the FTCA.⁴⁶ The United States has successfully avoided tort liability via the discretionary function exception in cases involving exposures “to radiation, asbestos, Agent Orange, and . . . the human immunodeficiency virus (HIV).”⁴⁷

The discretionary function exception serves at least two different purposes. First, the exception “prevent[s] judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”⁴⁸ Some commentators presume that the Congress which enacted the FTCA viewed the “second-guessing” to be incongruous.⁴⁹ The dual reasoning behind this belief is that “(1) ‘such judgments are more appropriately left to the political branches of our governmental system;’ and (2) ‘courts, which specialize in the resolution of discrete factual and legal disputes,’ may not be ‘equipped to make broad policy judgments.’”⁵⁰

The second purported purpose of the discretionary function exception is to protect the government from any liability that would seriously hinder governmental operations.⁵¹ The insulating qualities of the discretionary function exception arguably decrease the likelihood that federal employees will “shy away from making sound policy decisions based on a fear of increasing the government’s exposure to tort liability.”⁵² On a similar note, the risk of exposure to liability for discretionary actions could cause the United States to expend an exorbitant amount of tax-payer money responding to frivolous lawsuits rather than allotting the money to worthwhile community issues.⁵³

45. *Tsolmon*, 841 F.3d at 380.

46. Mark C. Niles, “*Nothing But Mischief: The Federal Tort Claims Act and the Scope of Discretionary Immunity*,” 54 ADMIN. L. REV. 1275, 1309 (2002).

47. Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 694 (1997).

48. *Berkovitz*, 486 U.S. at 536–37 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

49. Lewis, *supra* note 1, at 18.

50. *Id.* at 19.

51. *Varig Airlines*, 467 U.S. at 814 (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963)).

52. Lewis, *supra* note 1, at 18.

53. *Id.* at 19.

2. The *Gaubert* Test and the Discretionary Function Exception

The discretionary function exception is riddled with holes left by the courts. In *Gaubert v. United States*,⁵⁴ the Supreme Court of the United States attempted to remedy a portion of the confusion by outlining a test to determine whether an action is discretionary. The Supreme Court was aware of the issue of whether daily managerial and mandated actions were discretionary, and the arguments of both sides stating that:

If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.⁵⁵

While *Gaubert* only scratches the surface of actions that may or may not fall under the discretionary function exception, it provides relevant case law and background to guide courts.

The Supreme Court in *Gaubert* established a two-prong test aimed at governing the application of the discretionary function exception.⁵⁶ In the test, the Supreme Court expressly instructed courts how to determine whether challenged government conduct involves “a discretionary function or duty” for purposes of section 2680(a)’s exception.⁵⁷ First, a court must establish whether the conduct challenged by the plaintiff was “discretionary in nature”—that is, whether it involved “an element of judgment or choice.”⁵⁸ Citing *Schuler v. United States*,⁵⁹ the court stated that if an exercise of discretion is involved, then consistent with the last clause of the exception, “the discretionary function exception immunizes even government abuses of discretion.”⁶⁰ Thus, the exception does not apply to any claim where a government official failed to perform its clear duty, or to act in accordance with a specific mandate.⁶¹

54. 499 U.S. 315 (1991).

55. *Id.* at 324.

56. *Id.* at 322–23.

57. *Id.* at 322.

58. *Id.* (quoting *Berkovitz*, 486 U.S. at 536).

59. 531 F.3d 930 (D.C. Cir. 2008).

60. *Id.* at 935.

61. *Berkovitz*, 486 U.S. at 544.

Second, a court must evaluate “whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield.”⁶² Because Congress sought to prevent judicial second guessing of legislative and administrative decisions that are based on social, economic, and political policy through tort actions, when construed properly, the exception only protects governmental actions and decisions based on public policy.⁶³ In other words, courts should look at whether the tortious action complained of was that which Congress passed the FTCA to protect. Most FTCA cases involving the discretionary function exception hinge on the critical inquiry of whether the category or type of challenged government activity is discretionary under *Gaubert*.

III. THE CIRCUIT SPLIT ON THE EXCLUSION OF UNCONSTITUTIONAL ACTIONS FROM THE SCOPE OF THE FTCA

A. *The Discretionary Function Exception Excludes Immunity for Unconstitutional Actions*

1. The Third Circuit

The Third Circuit was one of the first to comment on unconstitutional actions falling outside the scope of the discretionary function exception. In *Pooler v. United States*,⁶⁴ the Third Circuit was faced with a dual issue of unlawful arrest and unlawful prosecution, yet it did not issue a ruling based off unconstitutional actions by a government defendant in an FTCA claim.⁶⁵ Instead, in dicta surrounding tortious actions by the government, the court reasoned that if the complaint in the case at hand were to have alleged that the agents of the government, in the course of their investigation, had in fact violated the constitutional rights or federal statutes, the outcome would have shifted because federal employees do not possess discretion to violate the Constitution or other regulations.⁶⁶

While the court did not base its decision on unconstitutional actions that did not occur, their comment as to what would happen if there were to be unconstitutional acts interwoven sheds light on the ongoing issue of defining the scope of the discretionary function exception. The court here took the time to explain the discretionary function exception,

62. *Id.* at 536.

63. *Shuler*, 531 F.3d at 933.

64. 787 F.2d 868 (3d Cir. 1986).

65. *Id.* at 871.

66. *Id.*

drawing a line between decisions that are made at a planning level in relation to those that are made at an operational level.⁶⁷ The court held that although the defendant is not a high-level official, he is still a government official who had to exercise judgment as to policy decisions and the extent of control needed in working with an informant.⁶⁸ Thus, the actions of the defendant fell under the discretionary function exception.⁶⁹

Judge Seitz, in his concurrence, focused on discussing the vague contours and wide breadth of the discretionary function exception.⁷⁰ This is a recurring issue that the unconstitutional actions question falls under. Judge Seitz turned to the Supreme Court of the United States' recent decision in *Dalehite*, where the court explained that “the basic inquiry concerning the application of the . . . exception is whether the challenged acts of the Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from liability.”⁷¹ In his discussion of *Dalehite*, Judge Seitz shed light on a crucial question: at the creation of the discretionary function exception, did Congress intend for it to apply to unconstitutional actions by federal employees? The Third Circuit answered this by holding that the discretionary function does not apply to unconstitutional actions, arguing there is no discretion in the violation of the law.⁷²

2. The Ninth Circuit

The Ninth Circuit, along with *Pooler*, helped to pave the way for sister circuits in holding that unconstitutional actions do not fall under the scope of the discretionary function exception of the FTCA. In the 2000 case *Nurse v. United States*,⁷³ the plaintiff traveled from Canada to the United States. Agents detained, arrested, and searched the plaintiff at both the Vancouver and the Los Angeles (LA) airports. Because he believed the search and arrest invaded his privacy, the plaintiff filed suit against the United States and others. The district court dismissed plaintiff's entire complaint.⁷⁴ On appeal, the court reversed in part holding that the plaintiff's complaint stated an

67. *Id.* at 870.

68. *Id.* at 871.

69. *Id.* at 872.

70. *Id.* at 873.

71. *Id.* (quoting *Varig Airlines*, 467 U.S. at 813).

72. *Id.* at 871.

73. 226 F.3d 996 (9th Cir. 2000).

74. *Id.* at 999–1000.

adequate FTCA claim based on the discretionary act of policymaking.⁷⁵ Typically, the discretionary function exception protects the promulgation and enforcement of rules and policies.⁷⁶

Here, the plaintiff alleged that the policymaking done by the defendants was discriminatory and unconstitutional in nature.⁷⁷ The court sided with the plaintiff, stating that “[i]n general, governmental conduct cannot be discretionary if it violates a legal mandate.”⁷⁸ Following these principles, the court stated that it could not determine at this stage in the proceedings whether the acts of the policymaking violated the constitution, and if they did, what constitutional mandates were violated.⁷⁹ Because the alleged policy-making decisions of the defendants could have been non-discretionary, the court reversed the district court’s dismissal of the plaintiff’s FTCA claims.⁸⁰ Thus, the Ninth Circuit set a precedent that unconstitutional actions would be barred from falling under the discretionary function exception of the FTCA.

3. The Eighth Circuit

Raz v. United States,⁸¹ the Eighth Circuit’s 2003 opinion on the discretionary function exception and unconstitutional actions, serves as the beacon directing the circuit’s stance. While *Raz* has little detail of the reasoning behind the court’s decision, it does serve as the precedent for the circuit. *Raz* is based off the appellant’s contention that the FBI illegally shadowed and harassed said appellant for several years.⁸² The appellant contended that this stalking stemmed from his unpopular political opinions, thus leading him to sue the government under the FTCA, alleging the FBI’s conduct violated his First and Fourth Amendment rights.⁸³

The court did not dwell on the issue of whether unconstitutional actions fall within the scope of the discretionary function exception; instead, the court relied solely on *Pooler* in its decision.⁸⁴ The court ultimately held that the FBI’s alleged surveillance activities fall outside

75. *Id.* at 1005.

76. *Id.* at 1002.

77. *Id.* at 1001.

78. *Id.* at 1002.

79. *Id.*

80. *Id.*

81. 343 F.3d 945 (8th Cir. 2003).

82. *Id.* at 947.

83. *Id.*

84. *Id.* at 948.

the scope of the discretionary function exception.⁸⁵ Its reasoning behind this decision was that Raz alleged the FBI's actions violated his First and Fourth amendment rights, thus mooted the idea that the FBI was using any discretion in their choice of unconstitutional actions.⁸⁶

4. The First Circuit

The First Circuit in *Limone v. United States*⁸⁷ tackled whether unconstitutional actions, when coupled with a tortious action, constitute discretionary actions under the discretionary function exception of the FTCA. The plaintiffs in the case, former prisoners and the estates of two other prisoners, sued the United States under the FTCA.⁸⁸ The case was based principally on a cooperating witness's testimony, which allowed for the conviction of prisoners for murder, and resulted in stiff sentences for all the prisoners.⁸⁹ But as seen in the case, the basis for the FTCA claim was the FBI's failure to turn over exculpatory evidence and a claim of malicious prosecution, which were categorized as unconstitutional actions.⁹⁰

Three decades after the plaintiffs were convicted for murder, the FBI disclosed for the first time that it possessed reliable intelligence undercutting the witness's account of the murder and that it had suppressed this intelligence. The FBI further disclosed that it had this information throughout the trial proceedings. This information included the realization that the key witness was the man who committed the murder, not the other plaintiffs. Further, the FBI induced the witness to cooperate and testify against the plaintiffs, even though there was a strong belief that they were not the parties at fault for the murder.⁹¹

The resulting case addresses whether the actions of the United States and its employees are exempt from liability under the FTCA's discretionary function exception. The First Circuit looked specifically at the FBI's actions to assist the witness in framing the prisoner plaintiffs for a capital crime, and then further covering up the framing by withholding exculpatory information from state officials.⁹² The government argues that it possessed discretion to withhold exculpatory information from state prosecutors in order to protect the security of its

85. *Id.*

86. *Id.*

87. 579 F.3d 79 (1st Cir. 2009).

88. *Id.* at 83.

89. *Id.* at 86.

90. *Id.* at 89.

91. *Id.* at 86.

92. *Id.* at 101.

sources, asking the court to conclude their actions were discretionary. However, the First Circuit saw straight through their specious and self-serving argument.⁹³

The court considered the exclusion of unconstitutional actions from the discretionary function exception to be elementary in nature.⁹⁴ It is no secret that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statutes or regulations.⁹⁵ Further, the discretionary function exception does not shield conduct that transgresses the Constitution.⁹⁶ The district court in this case earlier determined that the FBI's conduct violated the Constitution as well as guidelines set by the Department of Justice.⁹⁷

Disregarding the government's generalized argument, and relying on *Berkovitz*, the court stated that “[v]iewed from 50,000 feet, virtually any action can be characterized as discretionary.”⁹⁸ But the discretionary function exception requires courts to focus on the specific conduct at issue, not a general belief that actions involving choice are discretionary.⁹⁹ Honing in on the action of the FBI, “warts and all,” there was no illusion left that the conduct of the FBI was discretionary in nature.¹⁰⁰ Settling the issue at hand once and for all, the court held that the FBI's conduct was unconstitutional and thus fell out of the sweep of the discretionary function exception.¹⁰¹ Much like in other circuits, this decision firmly standardized the First Circuit's precedent and belief that unconstitutional actions by the government will not fall within the discretionary function exception.

5. The United States Court of Appeals for the District of Columbia Circuit

The D.C. Circuit offers the most recent, as well as the most in-depth, analysis of the discretionary function exception and its applicability to unconstitutional actions by the government. The court in *Loumiet v. United States*,¹⁰² much like the Eighth Circuit in *Nurse*, faced the appeal of a district court's dismissal of a case on the pleadings. In the

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 102.

102. 828 F.3d 935 (D.C. Cir. 2016).

early 2000s, Loumiet was on a team of attorneys hired by Hamilton Bank to prepare an audit report during a securities-fraud investigation of the bank by the Office of the Comptroller of the Currency (OCC). The final audit report did not reach a conclusion as to whether the bank's executives engaged in wrongdoing. While the OCC contested these findings, Loumiet and his team declined to alter their conclusions.¹⁰³

Around that same time as the final report of the bank inspection, Loumiet sent the Treasury Inspector General a series of letters in which he expressed concern that "while on site at Hamilton Bank during the OCC's investigation, OCC employees had made racist remarks regarding the bank's Hispanic employees."¹⁰⁴ Following this statement, the bank filed suit against the OCC in 2002, alleging civil rights violations arising out of the investigation.¹⁰⁵ Shortly thereafter, the OCC closed Hamilton Bank for operating in a dangerous manner—a closure "Loumiet allege[d] was unjustified and incurred considerable unnecessary cost for the bank's receiver . . ."¹⁰⁶ What followed was an administrative proceeding brought by the OCC against Loumiet. These proceedings ended with OCC dismissing the action. However, Loumiet alleged in his complaint that they had a lasting effect on his life.¹⁰⁷

Loumiet brought this suit for common-law tort claims under the FTCA against the government for intentional infliction of emotional distress, invasion of privacy, abuse of process, malicious prosecution, negligent supervision, and civil conspiracy.¹⁰⁸ On appeal, the D.C. Circuit addressed whether the Constitution "places any limit on the government[] policymaking discretion immunized by the discretionary-function exception to the [FTCA]."¹⁰⁹ The court ultimately concluded, in line with the majority of other circuit courts, that the discretionary function exception does not bar FTCA claims where the government's tortious actions were outside of the government's constitutional authority to act.¹¹⁰

Delving into the court's reasoning behind their ultimate conclusion, the court first explained the process they followed in determining whether conduct is discretionary.¹¹¹ The court adhered to the test set up

103. *Id.* at 938–39.

104. *Id.* at 939.

105. *Id.*

106. *Id.*

107. *Id.* at 939–40.

108. *Id.* at 939.

109. *Id.* at 938.

110. *Id.* at 939.

111. *Id.* at 941–42.

in *Gaubert*, looking at whether there were judgment choices involved, and whether the judgment choice was of the kind that the discretionary rule was designed to protect.¹¹² Following the precedent from other circuits, the court reasoned that “[e]ven a discretionary act within the scope of a federal official’s employment is not within the exception if it ‘cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.’”¹¹³

The court also wrestled with whether the discretionary function exception protects the United States from tort liability under the FTCA even when the otherwise discretionary conduct by the government exceeds constitutional limits on the government’s authority to act.¹¹⁴ The parties disagreed on how the court should answer the question, with plaintiff alleging that the defendant violated his First and Fifth Amendment rights, thus relinquishing any right to the defense of discretionary actions. The United States on the other hand, argued that the FTCA does not waive sovereign immunity for constitutional torts; thus, there can be no unconstitutional-discretion limitation on the exception.¹¹⁵

The D.C. Circuit Court held that “the FTCA’s discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription.”¹¹⁶ The court noted that at least seven circuits, including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, have either held or stated in dicta that the discretionary-function exception does not protect federal employees from FTCA liability when they exceed the scope of their constitutional authority.¹¹⁷ Reviewing the case law from other circuits, the court outlined previous decisions that also held that unconstitutional actions do not fall under the discretionary function exception, as well as the Seventh Circuit decision that goes against precedent from other circuits.¹¹⁸

The court dwelled on the idea that there is no blanket exception for discretion that exceeds constitutional bounds.¹¹⁹ Restating this concept in multiple different ways, and applied to different circumstances, the court explained that when a government official acts outside of the

112. *Id.*

113. *Id.* at 942.

114. *Id.*

115. *Id.* at 942–43.

116. *Id.* at 943.

117. *Id.*

118. *Id.* at 943–44.

119. *Id.* at 944.

authority granted to him, he is not exercising the type of discretion Congress intended the discretionary function exception to protect.¹²⁰ The court ended its analysis by presenting the question of specificity of constitutional mandates when determining the bounds of the discretionary function exception in terms of unconstitutional actions.¹²¹

After a brief explanation of the government's argument, the court refused to set any type of test or limit when applying the exception to unconstitutional actions, citing the lack of any similar case law in other jurisdictions.¹²² Thus, the final outcome of the case upheld the FTCA claims, with the court barring the generalized argument of the government and focusing the ruling on the inapplicability of the discretionary function exception to unconstitutional actions.¹²³ The court made it clear that barring an FTCA claim on the ground that, as a general rule, "even constitutionally defective" exercises of discretion are within the scope of the FTCA's discretion, was an error by the lower court.¹²⁴

6. The Fifth Circuit's Indecisiveness

The Fifth Circuit is unique in the sense that it issued an opinion regarding unconstitutional actions not falling within the discretionary function exception, then later vacated the decision. The Fifth Circuit did not shy away from the issue in *Sutton v. United States*,¹²⁵ where it boldly held that "action does not fall within the discretionary function of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."¹²⁶ Over twenty years later, the court relied on *Sutton* to hold the discretionary function exception inapplicable to conduct of a government official that was alleged to have violated the Fourth and Fifth Amendment rights of the plaintiff.¹²⁷

Castro v. United States,¹²⁸ is considered the Fifth Circuit's opinion regarding the discretionary function exception and unconstitutional actions, in which the court sided with its sister courts in holding that the discretionary function barred claims involving unconstitutional

120. *Id.*

121. *Id.* at 946.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987).

126. *Id.* at 1293.

127. *Loumiet*, 828 F.3d at 943 n.2.

128. 560 F.3d 381, 389–90 (5th Cir. 2009).

actions.¹²⁹ However, the en banc Fifth Circuit summarily vacated the previous *Castro* panel decision, but in so doing, specifically did not address the interplay between constitutional allegations and the discretionary function exception.¹³⁰ Instead, the court adopted the prior opinion of the district court, which was notably silent on the weight and significance of the constitutional allegations brought by the plaintiff.¹³¹ Since this overruling, there has been little change in the court's take on the discretionary function exception. The court in *Loumiet* specifically noted in a footnote that "[n]otwithstanding *Sutton*, the Fifth Circuit has since observed that the circuit has 'not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception.'"¹³²

The Fifth Circuit's stance on not issuing an opinion in the debate over whether unconstitutional actions fall within the discretionary function fits well with the state of the issue. Without a decision from the Supreme Court clarifying the rules and creating a uniform standard, circuits are going to interpret the exception in a broad manner, seeking to stretch the truth and gain a stronger sense of immunity.

B. The Discretionary Function Exception Includes Immunity for Unconstitutional Actions

There are currently only two circuits that have ruled that unconstitutional actions by government employees still fall within the scope of the discretionary function exception.¹³³ The Seventh Circuit in *Linder v. United States*,¹³⁴ and *Kiiskila v. United States*,¹³⁵ vaguely defined its reasoning for straying from its sister courts. On the other hand, the Eleventh Circuit in *Shivers v. United States*,¹³⁶ went into detail as to the justifications of their ruling.

129. *Id.* at 392.

130. *Loumiet*, 828 F.3d at 943 n.3.

131. *Id.*

132. *Id.* (quoting *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010)).

133. See *Linder v. United States*, 937 F.3d 1087 (7th Cir. 2019); *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972); *Shivers*, 1 F.4th 924 (11th Cir. 2021).

134. 937 F.3d 1087 (7th Cir. 2019).

135. 466 F.2d 626.

136. 1 F.4th 924 (11th Cir. 2021).

1. The Seventh Circuit

Kiiskila, decided in 1970, preceded many of the above-mentioned cases where the courts held that unconstitutional actions do not fall within the scope of the discretionary function exception of the FTCA.¹³⁷ In *Kiiskila*, the plaintiff was a civilian office manager of a credit union located on a military base. After allegations surfaced that the plaintiff violated a base regulation, the base's commanding officer permanently barred the plaintiff from entry onto the base, thereby costing the plaintiff her job.¹³⁸ In an earlier appeal in the case, the Seventh Circuit held that the exclusion of the plaintiff from the base and the resulting loss of her job violated the First Amendment.¹³⁹

On remand, the plaintiff amended her complaint to add a claim for damages under the FTCA.¹⁴⁰ The Seventh Circuit affirmed the lower court's ruling, holding that "her exclusion from Fort Sheridan was based upon Colonel Nichols' exercise of discretion, albeit constitutionally repugnant, and therefore excepted her claim from the reach of the [FTCA] under 28 U.S.C. § 2680(a)."¹⁴¹ The court further noted that the officer's actions were both discretionary in nature, and stated:

Of course, this is not to say the Colonel could not, through negligence or wrongful exercise, have abused his discretion by enforcing the regulation against activity "too far removed in terms of both distance and time" to pass constitutional muster; we have already determined the constitutional infirmity of the Colonel's exclusion. But 28 U.S.C. § 2680(a) precludes action for abuse of discretionary authority whether through negligence or wrongfulness. Since Colonel Nichols had discretion in choosing to apply the regulation, the Government remains immune from liability under 28 U.S.C. § 2680(a).¹⁴²

Turning to the second case in the circuit, *Linder*, the court faced the question of whether a plaintiff's plausible allegation of unconstitutional conduct deprives the United States of its sovereign immunity, which is otherwise preserved by the discretionary function exception.¹⁴³ This suit stemmed from the plaintiff, a deputy marshal, punching a fugitive's father in the face during an interrogation. This incident was

137. 466 F.2d 626 (7th Cir. 1972).

138. *Id.* at 626–27.

139. *Id.* at 627.

140. *Id.* at 627.

141. *Id.* at 627–28.

142. *Id.* at 628.

143. *Linder*, 937 F.3d at 1090–91.

investigated by the Marshals Service and the Inspector General of the Department of Justice, and resulted in Linder being indicted on federal felonies. The indictment was eventually dismissed as a sanction, and Linder returned to work as a deputy marshal. Linder later filed a suit against the United States under the FTCA, which the district court dismissed, citing the discretionary function exception as its reason.¹⁴⁴

The court of appeals agreed with the district court, first establishing that the actions by Linder were discretionary.¹⁴⁵ Next, the court attempted to debunk the idea that no one has the discretion to violate the Constitution.¹⁴⁶ The court reasoned that the FTCA does not apply to constitutional violations as those violations are not related to the FTCA or its function.¹⁴⁷ Instead, the court explains that the FTCA applies only to state law torts, which is the reason the Supreme Court created the *Bivens* remedy, which is a lawsuit for damages when federal officers, acting under color of federal authority, allegedly violate the Constitution in their employment.¹⁴⁸

Despite the court's position, Linder argued that no one has the discretion to violate the Constitution or the discretion to commit a malicious tort such as intentional infliction of emotional distress.¹⁴⁹ The court acknowledged this as true, stating that nobody should commit a civil wrongdoing.¹⁵⁰ However, the court qualified this by stating that:

unless §2680(a) is to be drained of meaning, it must apply to discretionary acts that are tortious. That's the point of an *exception*: It forecloses an award of damages that would otherwise be justified by a tort. Nothing in subsection (a) suggests that some discretionary but tortious acts are outside the FTCA while others aren't.¹⁵¹

The court concluded with the notion that just because legally created discretion is misused, and a tort action created, does not mean the United States is automatically liable.¹⁵²

144. *Id.* at 1088.

145. *Id.* at 1090.

146. *Id.*

147. *Id.*

148. *Id.*; *See also* *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). While the FTCA explicitly provides a statutory cause of action for tort claims, *Bivens* actions provide an implied cause of action for violations arising directly under the Constitution.

149. *Linder*, 937 F.3d at 1091.

150. *Id.*

151. *Id.*

152. *Id.*

2. The Eleventh Circuit

The Eleventh Circuit is the most recent court to deviate from the other circuits with established precedent regarding the discretionary function exception.¹⁵³ Mackie Shivers, an older, and vulnerable federal inmate, sued the United States after his cellmate attacked him. Shivers's cellmate stabbed him in the eye with a pair of scissors while he was sleeping, leaving him permanently blind in that eye. Following the attack, Shivers exhausted his administrative remedies before bringing this FTCA suit. Shivers alleged that prison officials knew or should have known before assigning the assailant to the cell with Shivers that he was aggressive and had violent tendencies toward other prisoners, specifically cellmates. Shivers claimed that the government was negligent and that the government violated his right to be free of cruel and unusual punishment.¹⁵⁴

The court did not agree with Shivers's arguments. Instead, the district court dismissed Shiver's FTCA claim,¹⁵⁵ with the court of appeals following suit and affirming the dismissal citing the discretionary function exception as the reason for the dismissal.¹⁵⁶ The court's reasoning behind its unpopular decision was rooted in the idea that the FTCA and FTCA claims are not based on alleged constitutional violations, as those are typically addressed under *Bivens*.¹⁵⁷ Further, the court stated that "[t]he inquiry is not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one."¹⁵⁸

In its analysis, the court focused on *Gaubert* and *Berkovitz*, deducing that because there was no specific source of law guiding the prison guards, and because they were not acting contrary to any law or regulation, their actions were discretionary in nature, whether they were acting unconstitutionally or not.¹⁵⁹ The court then focused on the Seventh Circuit's decisions in *Linder and Kiiskila*.¹⁶⁰ In these two cases, the court reasoned that the limited coverage of the FTCA meant it was not designed to apply to constitutional torts.¹⁶¹ While the majority held

153. *Shivers*, 1 F.4th 924.

154. *Id.* at 927.

155. *Id.* at 928.

156. *Id.* at 935.

157. *Id.* at 931.

158. *Id.*

159. *Id.*

160. *Id.* at 932.

161. *Id.*

that unconstitutional actions fall within the scope of the discretionary function exception, Judge Wilson dissented, arguing that the FTCA claim should not have been dismissed as the actions of the prison officials did not fall within the discretionary function exception.¹⁶² His dissent focused on the above-mentioned cases that fall within circuits disproving unconstitutional actions falling within the discretionary function exception.¹⁶³

IV. ANALYSIS

There are two distinct routes this issue could go in, with one being the obvious direction it *should* go in. First, the issue could simply stand as is, with the Supreme Court of the United States or Congress opting out of clarifying whether unconstitutional actions fall within the scope of the discretionary function exception of the FTCA. Second, the Supreme Court or Congress could elect to further define and standardize what actions, specifically unconstitutional actions, fall within the exception, and which actions fall outside the exception.

Taking both options into consideration, as well as the case law above which defines the circuit split, and the current sociopolitical climate in the United States, it is apparent the Court should act. The Court should clarify whether unconstitutional actions by government officials should be held to the same standard as unconstitutional actions of citizens, or whether government officials will be shielded under the blanket of sovereign immunity. Further, in its clarification of the standard, the Court should in fact deem unconstitutional actions as nondiscretionary, and therefore actions which fall outside the scope of the discretionary function of the FTCA.

As discussed above, Congress created the FTCA to offer citizens a way to seek damages from the government for tortious actions by government officials.¹⁶⁴ If the statute was amended or interpreted to include unconstitutional actions within the exception, it would allow for government employees to act both tortiously and unconstitutionally with little to no path for a citizen to seek relief.¹⁶⁵ Although the court has wavered in its interpretation of the exception, including at times extending it to government activity which would be inexcusable today,

162. *Id.* at 936 (Wilson, J., dissenting).

163. *Id.*

164. Lewis, *supra* note 1, at 1.

165. Brief for Stephen I. Vladeck et al. as Amici Curiae Supporting Plaintiff, D.J.C.V., minor child, and G.C., his father v. United States of America, 2020 WL 10867966, 14 (1:20-cv-05747-PAE).

the court has never extended the discretionary function exception to cover unconstitutional conduct.¹⁶⁶

There are three reasons why unconstitutional actions should be excluded from the scope of the discretionary function exception. First, it was never the intention of Congress to excuse the government from unconstitutional actions, or allow illegal actions to be deemed policymaking discretionary actions, thus excusing liability.¹⁶⁷ Second, there are no other avenues for a citizen to seek redress from the government for tortious actions by employees that violated their constitutional rights.¹⁶⁸ And lastly, the exclusion of unconstitutional actions from the discretionary function exception of the FTCA would be feasible with a workable test.¹⁶⁹ Each of these points are easily dissectible and on their own would not prevent the Court from clarifying that unconstitutional actions have no place within the discretionary function exception.

A. The Language of the Statute and the Intent of the Lawmakers

1. The Current Test is No Longer Enough

The Court has limited the discretionary function exception to include only actions which involve an element of judgement or choice (the exercise of discretion).¹⁷⁰ The *Gaubert* test is the standard used by most courts to determine whether actions were discretionary.¹⁷¹ The two prong test requires that: (1) the action in question is one which requires an element of judgment or choice, and (2) that the action was one which the exception was designed to protect.¹⁷² The Court, through *Gaubert* and *Berkovitz*, clearly delineates that the discretionary function exception must be based on situations concerning true discretion and authentic public policy interests.¹⁷³ But the government, just as it did

166. *Id.* at 11.

167. Niles, *supra* note 46, at 1300.

168. *Shivers*, 1 F.4th at 939 (Wilson, J., dissenting).

169. Daniel Cohen, *Not Fully Discretionary: Incorporating a Factor-Based Standard into the FTCA's Discretionary Function Exception*, 112 NW. U. L. REV. 879, 897 (2018).

170. *Berkovitz*, 486 U.S. at 546–47. *See also Gaubert*, 499 U.S. at 322–23 (the discretionary function exception applies when the challenged government action involves “an element of judgment or choice” and when the complained-of choice is “the kind that the discretionary function exception was designed to shield”).

171. *Shivers*, 1 F.4th at 928–29.

172. *Id.*

173. *See* Petition for a Writ of Certiorari, *Patty v. United States*, No. 15-1361, 2016 WL 2621681 (2015).

before *Berkovitz*, continues to argue for an overly broad application of the exception “that is tantamount to swallowing the rule.”¹⁷⁴

Concentrating on the first prong, the Supreme Court has long held that actions which call for transgressing the Constitution are outside the scope of discretion.¹⁷⁵ Under common law, a citizen who acts unconstitutionally toward another is bound to be held liable for their actions.¹⁷⁶ This is no different for the actions of federal officials who act unconstitutionally within the scope of their official duties.¹⁷⁷ When a citizen commits unconstitutional tortious abuse upon another person, they are likely to be held liable.¹⁷⁸ The creators of the discretionary function exception did not intend for the government to be able to excuse unconstitutional actions.¹⁷⁹ An intent of that nature would have rendered moot any need for the discretionary function exception. While the argument for the inclusion of unconstitutional actions within the scope of the discretionary function exception has merit, it disregards the fundamental reasoning behind the FTCA and the exception.¹⁸⁰

When considering the policy-protecting exception to the FTCA, all discretionary function exception immunity is inhibited when a federal government official crosses constitutional lines.¹⁸¹ Just as a federal official does not “possess discretion to violate constitutional rights,”¹⁸² the discretionary function exception “does not shield conduct that transgresses the Constitution.”¹⁸³ However, there is a difference between the constitutional barrier against claims of policymaking discretion and the Supreme Court precedent that discretion is not present when a federal employee neglects to follow a regulation or statute that specifically prescribes a course of action.¹⁸⁴

The difference hinges on the residual authority a federal government employee possesses.¹⁸⁵ Even if a statute or regulation does not offer

174. *Id.* at 5.

175. *See generally Shivers*, 1 F.4th at 924.

176. *Lewis*, *supra* note 1, at 1.

177. *Id.*

178. *Id.*

179. *Lewis*, *supra* note 1, at 18.

180. Amy M. Hackman, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411, 445 (1997).

181. *See Shivers*, 1 F.4th at 937 (Wilson, J., dissenting).

182. Gregory Sisk, *Federal Courts, Practice & Procedure: Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1828 (2021) (quoting *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001)).

183. *Id.* (internal quotes omitted)

184. *Id.*

185. *Id.*

specific instructions for employees, the employee continues to retain residual authority as an executive branch officer.¹⁸⁶ On the other hand, “when the Constitution precludes the action, whether or not that constitutional command is precisely ascertained prior to application in the particular case, the discretion is removed entirely, and no remnant of general executive authority remains.”¹⁸⁷ The authority of the government and its officials is not infinite.¹⁸⁸ It is much like a rubber band which has an eventual breaking point.¹⁸⁹ Thus, sometimes the government takes actions that are beyond the scope of its authority.¹⁹⁰

Addressing the unreliability of the *Gaubert* test, the Ninth Circuit in *Nurse* serves as a valuable example of the need for unconstitutional actions to be barred from the exception.¹⁹¹ The government employees in *Nurse* were alleged to have developed unconstitutional policies which discriminated on the basis of race.¹⁹² Because these regulations required the weighing of policy matters, and because they involved a judgement call, they passed the test with gusto and would have allowed the government to employ the discretionary function exception.¹⁹³ However, the court acknowledged the inability of federal employees to be discretionary in their actions if they violate a legal mandate and instead held that on its face, the complaint alleged actions that could have been unconstitutional, thus opting to disqualify the use of the discretionary function exception.¹⁹⁴

2. Sovereign Immunity Was Never Intended to Include Unconstitutional Actions

Along with the cases that fall within the majority umbrella above, the opinion in *Castro* and dissent in *Shivers* offer further assurance that unconstitutional actions should not be included under the discretionary function exception.¹⁹⁵ The prominent argument against this is that an FTCA tort claim based on a tortious discretionary action by a government figure is barred by the exception because the plain

186. *Id.* at 1828–29.

187. *Id.*

188. *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978).

189. *Id.*

190. *Id.*

191. *See generally Nurse*, 226 F.3d at 996.

192. *Id.* at 1000.

193. *Id.* at 1001–02.

194. *Id.* at 1002.

195. *See Castro*, 560 F.3d at 390; *Shivers*, 1 F.4th at 936.

language of the statute said so.¹⁹⁶ Those arguing would go so far as to say that even unconstitutional tortious abuse is excused under the exception.¹⁹⁷ But the case law says otherwise.

Further, in other instances, the Supreme Court has held that unconstitutional actions do not fall within the scope of immunity.¹⁹⁸ The Court was faced with a similar situation in *Owen v. Independence*,¹⁹⁹ where it addressed municipal immunity.²⁰⁰ “There, the Supreme Court evaluated whether a common-law immunity for ‘discretionary’ functions could protect municipalities against 42 U.S.C. § 1983 claims where the municipalities’ employees acted in good faith.”²⁰¹ The Court explained that the immunity doctrine was rooted in the separation of powers principles; “it served to ‘prevent courts from substituting their own judgment on matters within the lawful discretion of the municipality.’”²⁰²

The FTCA and the discretionary function exception are similarly based on separation of powers principles.²⁰³ The exception serves to prevent “judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy . . .”²⁰⁴ Much like the contexts in *Owens*, when addressing actions under the FTCA, there is no discretion to violate the Constitution.²⁰⁵ Judge Wilson, in explaining the comparison of *Owens* to *Shivers* stated that

[U]nconstitutional conduct is necessarily outside the scope of the discretionary function exception, just like it is outside the scope of discretionary function immunity at common law. Therefore, the discretionary function exception likewise cannot shield the United States in an FTCA case where the tortious conduct at issue also allegedly violates the Constitution.²⁰⁶

In his dissent, Judge Wilson provides it was never the intent of Congress or of the Court to allow the government to commit tortious

196. *Shivers*, 1 F.4th at 936 (Wilson, J., dissenting).

197. *Id.* at 937

198. See generally *Pooler*, 787 F.2d at 868; *Nurse*, 226 F.3d at 996; *Raz*, 343 F.3d at 945; *Limone*, 579 F.3d at 79.

199. 445 U.S. 622 (1980).

200. *Id.* at 657.

201. *Shivers*, 1 F.4th at 938 (Wilson, J., dissenting).

202. *Id.* (quoting *Owens*, 445 U.S. at 649).

203. *Shivers*, 1 F.4th at 938 (Wilson, J., dissenting).

204. *Id.* at 937 (quoting *Varig Airlines*, 467 U.S. at 814).

205. *Shivers*, 1 F.4th at 937 (Wilson, J., dissenting).

206. *Id.* at 938.

actions, unchecked.²⁰⁷ When a person violates the Constitution, they forfeit their right to immunity as their actions were not prescribed in the discretion authorized by Congress or the Court.²⁰⁸ Therefore, when a government employee, acting on behalf of the government, violates the Constitution through a tortious action, the government should forfeit its right to immunity.²⁰⁹

B. Constitutional Claims Under the FTCA are Unique

The FTCA should include language, or be interpreted to explicitly exclude unconstitutional actions, as other remedies for government officials who violate constitutional rights are inadequate. As evidenced above, the First, Third, Eighth, Ninth, and D.C. circuits have confirmed the discretionary function exception does not extend to unconstitutional actions. Further even in circuits where the majority held that unconstitutional actions fall within the exception, there were judges who wrote lengthy dissents outlining the faults within the view of the majority.²¹⁰ Judge Wilson of the Eleventh Circuit walked through the above-mentioned hurdles in his dissent in *Shivers*.²¹¹

While a claim of constitutional transgressions alone are not enough to trigger the FTCA, when there is a state tort claim coupled with unconstitutional conduct, an FTCA claim exists.²¹² The constitutional defect does not itself trigger or sustain the FTCA claim, instead it merely serves to negate a discretionary function exception defense.²¹³ Thus, the FTCA claim still only addresses the violations of state tort law, not the alleged constitutional violations.²¹⁴ For example, when there are allegations that a prison official was negligent in discretionary inmate housing, additional allegations of an Eighth Amendment violation would be sufficient to preclude the application of the discretionary function exception.²¹⁵

A claim of unconstitutional action coupled with an FTCA claim is uniquely different than a *Bivens* claim or a section 1983 claim.²¹⁶ In an FTCA claim, a party is attempting to hold the government liable for a

207. *Id.*

208. *Id.* at 937.

209. *See Shivers*, 1 F.4th at 936 (Wilson, J., dissenting).

210. *See Id.*; *Castro*, 560 F.3d at 392–93 (Smith, J., dissenting).

211. *Shivers*, 1 F.4th at 936 (Wilson, J., dissenting).

212. *Id.* at 939.

213. *Id.* at 940.

214. *Id.* at 939.

215. *Id.* at 939–40.

216. *Id.* at 940.

tortious action committed within the scope of their federal employment.²¹⁷ In *Bivens*, the Supreme Court recognized the availability of damages and injunctive relief for constitutional violations committed by federal officers acting under color of federal law or authority.²¹⁸ Unlike the FTCA, which explicitly provides a statutory cause of action for tort claims, *Bivens* actions provide an implied cause of action for violations arising directly under the Constitution.²¹⁹ Contrasting a claim under the FTCA, *Bivens* suits are filed against federal officers in their individual capacities, not against the United States.²²⁰ While certain aspects of FTCA and *Bivens* litigation overlap, constitutional claims brought against individual defendants in a *Bivens* action are beyond the scope of the FTCA.²²¹ Claims against state and local entities and officials under 42 U.S.C. § 1983 or state law also are not covered in the interpretation or application of the FTCA.²²²

C. A Proposed Test to Exclude Unconstitutional Actions by Federal Employees

Excluding unconstitutional actions from the discretionary function exception of the FTCA would be feasible with a workable test. A factors-based test would be the clearest way for the Supreme Court to clarify that unconstitutional tortious actions are not protected under the discretionary function exception.²²³ The three proposed factors would be (1) whether the government employee exercised a choice, (2) whether the choice related to policy considerations, and (3) whether the government employee's conduct if performed by a private person would be considered unconstitutional.²²⁴

The first factor, whether the government employee exercised a choice, stems from the *Berkovitz* requirement that the government employee must have had a choice in their tortious action.²²⁵ This broad requirement focuses on the general concept of the word "discretionary," and looks at whether the employee had any discretion.²²⁶ The first question looks at whether the employee was performing a ministerial

217. Lewis, *supra* note 1, at 5.

218. See *Bivens*, 403 U.S. at 388.

219. *Shivers*, 1 F.4th at 940 (Wilson, J., dissenting).

220. Lewis, *supra* note 1, at 5, n.44.

221. *Id.*

222. *Shivers*, 1 F.4th at 938 (Wilson, J., dissenting).

223. Cohen, *supra* note 169, at 881–82.

224. *Id.* at 899.

225. *Id.*

226. *Id.*

action, where they would lack discretion, or whether they were acting in a way that allowed discretion.²²⁷ The adoption of this factor brings the concern that if courts were to strictly apply the choice requirement, governmental entities would provide less guidance and regulations, “because fewer directives will mean less potential liability.”²²⁸ However this concern is misplaced as “the government does not decide on policy as a means of avoiding liability—government functions to help resolve collective action problems.”²²⁹ Thus, incorporating the “choice” requirement from *Berkovitz* would, “do nothing more than align the discretionary function exception with existing precedent; fear of unintended consequences should not outweigh the judiciary’s duty to clarify the scope of the law.”²³⁰

The second proposed factor revolves around “the nature of the choice; the employee’s choice must be related to policy considerations.”²³¹ Policy considerations can be social, political in nature, or economic.²³² This requirement is broad, yet it tethers the employee’s decision to a broader system that excludes employee decisions not reflective of the larger organization.²³³ For example, choosing not to work is not protected under the discretionary function exception because it is not a policy-related choice, but deciding how to allocate sparse resources would be protected by the exception because the allocation would pertain to social, political, or economic considerations.²³⁴ The policy-related choice requirement balances competing concerns behind the FTCA through ensuring the government is liable for actions which fall outside the line of its official duties, while protecting necessary government operations.²³⁵

The third and last factor would deny coverage by the discretionary function exception for tortious actions which violate the Constitution. This added factor would allow the Supreme Court to clarify and enforce the notion that the discretionary function exception was not created to shield the government from all liability, including liability for tortious actions which are unconstitutional. The discretionary function

227. *Id.*

228. *Id.* at 900.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 901; *See Varig Airlines*, 467 U.S. at 814 (“Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”).

233. Cohen, *supra* note 169, at 901.

234. *Id.* at 900.

235. *Id.*

exception should perform much like the discretionary function immunity at common law. “Therefore, the discretionary function exception likewise cannot shield the United States in an FTCA case where the tortious conduct at issue also allegedly violates the Constitution.”²³⁶ Further, this factor would not limit the intended purpose of the FTCA because the goal “of the FTCA was to pull back the curtain of sovereign immunity as long as it did not impair the essential government functioning.”²³⁷ The third factor is consistent with the precedent in the First, Third, Eighth, Ninth, and D.C. Circuits, and would offer a firm rule to end the current circuit split regarding unconstitutional, tortious actions and the government’s liability.²³⁸

V. CONCLUSION

The Supreme Court should revisit its interpretation of the exception to untangle the confusion surrounding the current test and should clarify that unconstitutional tortious actions fall outside the scope of the discretionary function exception. The current wait-and-see tactic employed by the Court is no longer working. Courts are becoming increasingly split on the vague interpretations of the discretionary function. Likewise, the silence by Congress over revisiting the statute likely signals their approval of the judicial interpretation of the discretionary function exception. It is time for the Court to break its more than twenty-five-year silence regarding the discretionary function exception. Further, the Court should restore the true intent of the FTCA, holding the government liable for all actions by government employees that fall outside the exception, including unconstitutional actions. Thus, a clearer standard preventing unconstitutional actions in a state tort claim against the government should be introduced. This standard would hold the government to the same standard as citizens under common law. Without a clear rule, courts will continue to rule as the wind changes, with the government being liable in some instances, but not others.

As shown through the divisive circuit split and the years of silence on the issue, it is time for the Court to speak up about whether unconstitutional actions should be interpreted to fall within the exception. This split offers the Supreme Court of the United States the opportunity to set clear precedent on the types of actions the government will be held liable for, ending the seventy-six-year debate

236. *Shivers*, 1 F.4th at 938 (Wilson, J., dissenting).

237. Cohen, *supra* note 169, at 902.

238. *Id.*

on whether unconstitutional actions fall within the exception, and to establish a clear test for when the discretionary function applies, and to what type of actions.