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# Government Discretion Advised (Even If It's Unconstitutional): How the Eleventh Circuit Has Expanded the United States's Immunity from Tort Suits

John Rodriguez\*

## I. INTRODUCTION

Mackie Shivers, a sixty-four-year-old man, was stabbed in the eye by his mentally-ill cellmate with a pair of scissors.<sup>1</sup> Although the attack left Shivers permanently blind, he received no legal remedy to compensate him for his injuries.<sup>2</sup> This result is due, at least in part, to the United States Court of Appeals for the Eleventh Circuit's decision to interpret the discretionary function exception to the Federal Torts Claim Act (FTCA)<sup>3</sup> in a broader way than virtually all of its sister circuits.<sup>4</sup> The holding by the Eleventh Circuit in *Shivers v. United States* bars FTCA claims under the exception even for unconstitutional conduct by government employees so long as the conduct was discretionary.<sup>5</sup>

Congress passed the FTCA in order to hold the government liable for the misconduct of government employees acting within the scope of their employment.<sup>6</sup> The discretionary function exception to the FTCA was

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1. *Shivers v. United States*, 1 F.4th 924, 927 (11th Cir. 2021).

2. *Id.* at 927, 936.

3. 28 U.S.C. § 1346(b)(1) (2013).

4. The only other circuit to hold that the discretionary function exception applies even when the action taken by a federal employee is unconstitutional is the Seventh Circuit. See *Linder v. United States*, 937 F.3d 1087, 1090 (7th Cir. 2019).

5. *Shivers*, 1 F.4th at 930.

6. *Dalehite v. United States*, 346 U.S. 15, 24 (1953).

intended to prevent judicial second-guessing of legislative decisions that have their roots in public policy.<sup>7</sup> By holding that this exception applies to even unconstitutional conduct, the Eleventh Circuit has left many future tort victims without a proper redress for injuries caused by the misfeasance of government employees and has implied that there is some kind of policy rationale for such employees to be given discretion to violate the Constitution.

Because the Supreme Court of the United States has yet to rule on whether unconstitutional conduct falls under the discretionary function exception, the circuit courts have been left to answer the question on their own. Virtually every circuit that has broached the issue presented in *Shivers* has held that unconstitutional conduct is not protected by the exception.<sup>8</sup> The Eleventh Circuit has now joined the United States Court of Appeals for the Seventh Circuit in holding the opposite.<sup>9</sup>

## II. FACTUAL BACKGROUND

Mackie Shivers was a sixty-four-year-old inmate at a federal prison in Florida.<sup>10</sup> Prison officials assigned Marvin Dodson, a twenty-six-year-old, mentally unstable inmate to share Shivers's cell. Both inmates were imprisoned for cocaine drug convictions. Eight months passed with no incident between the two cellmates until Dodson stabbed Shivers in the eye with a pair of scissors while Shivers was asleep. The attack left Shivers permanently blind in that eye.<sup>11</sup>

After the incident, Shivers pursued his available administrative remedies. Another inmate, Gordan Reid, helped him in this endeavor.<sup>12</sup> Both men agreed that Shivers completed the first three steps of the process—he informed the prison staff of the issue, submitted a written Request for Administrative Remedy (form BP-9) to the warden, and then submitted an Administrative Remedy Appeal (form BP-10) to the designated regional director. Shivers received denials at each stage. Shivers believed he had properly submitted an appeal to the General Counsel at Bureau of Prisons' (BOP) Central Office—the final step of the

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7. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

8. *See Loumiet v. United States*, 828 F.3d 935, 938–39 (D.C. Cir. 2016); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003).

9. *See Kiiskila v. United States*, 466 F.2d 626, 628 (7th Cir. 1972).

10. *Shivers*, 1 F.4th at 927.

11. *Id.*

12. *Id.*

administrative process—but the government claimed at trial that the form was never received.<sup>13</sup>

Under the impression he had exhausted all administrative remedies, Shivers then brought a FTCA and a *Bivens* action<sup>14</sup> against the United States and five prison employees.<sup>15</sup> Shivers's complaint alleged that the prison officials knew or should have known that Dodson was showing violent tendencies toward other inmates and had a history of assaulting his cellmates before the man was assigned to Shivers's cell. Shivers's complaint also alleged that he informed prison officials, prior to the stabbing, that he was afraid for his safety. He claimed that the prison officials' choice to move Dodson into his cell was negligent and that his right to be free from cruel and unusual punishment was violated.<sup>16</sup>

The United States District Court for the Middle District of Florida dismissed Shivers's FTCA claim against the United States for lack of subject matter jurisdiction, concluding that the conduct exercised by the prison officials fell under the discretionary function exception, 28 U.S.C. § 2680(a), to the FTCA's waiver of sovereign immunity.<sup>17</sup> The court also dismissed, without prejudice, the *Bivens* claim against the five prison officials due to Shivers's failure to exhaust all his administrative remedies. Shivers appealed both dismissals, and on June 9, 2021, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court's dismissal of both claims.<sup>18</sup> Ultimately, the court's decision in this case allows the discretionary function exception to shield government employees who violate the Constitution from liability under the FTCA.

### III. LEGAL BACKGROUND

#### A. *The Federal Torts Claim Act*

The United States, as a sovereign entity, is immune from suit without the consent of Congress.<sup>19</sup> In 1946, Congress passed the FTCA as Title IV of the Legislative Reorganization Act, 60 Stat. 842.<sup>20</sup> Congress had

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13. *Id.*

14. A *Bivens* claim is a cause of action against a government employee for an alleged violation of the constitutional rights of another. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

15. *Shivers*, 1 F.4th at 927.

16. *Id.*

17. *Id.* at 928.

18. *Id.*

19. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

20. *Dalehite*, 346 U.S. at 24.

considered such an act for nearly thirty years as a mechanism to hold the government liable for the misfeasance of federal employees while acting in the scope of their duties.<sup>21</sup> Prior tort claim bills that Congress considered included waiver of sovereign immunity in specific realms of federal activity, such as “postal service, the activities of the Securities and Exchange Commission, or the collection of taxes.”<sup>22</sup> Two years earlier, Congress had drafted two exceptions to tort claims dealing with “the execution of a regulation or statute or on the exercise of a discretionary function.”<sup>23</sup> This was done to ensure the government would not be liable for torts arising from “errors in administration or in the exercise of discretionary functions.”<sup>24</sup> The necessity of these exceptions was clarified by an Assistant Attorney General who appeared before Congress to explain that legally authorized activities do not give rise to a tort action against the government “merely because ‘the same conduct by a private individual would be tortious.’”<sup>25</sup> The FTCA was not intended to allow the “constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act” to be second-guessed by the courts in a tort claim.<sup>26</sup>

When Congress passed the FTCA, it waived sovereign immunity for injury or loss caused by “the negligent or wrongful act or omission” of a government employee “while acting within the scope of [their] office or employment . . . .”<sup>27</sup> In a 1994 case, *FDIC v. Meyer*,<sup>28</sup> the Supreme Court held that constitutional tort claims are not cognizable under the FTCA when standing absent from a state tort claim. The Court stated that, in order for a claim to be actionable under the FTCA, a party must show that the United States would be liable to the plaintiff as a private person would be under the “law of the place where the act or omission occurred.”<sup>29</sup> The Court has continuously held that the “law of the place” language found in the statute means the law of the state in which the alleged injury occurred.<sup>30</sup> The Court in *Meyer* went on to say the source of liability for a claim alleging a breach of a federal constitutional right

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21. *Id.*

22. *Id.* at 26

23. *Id.*

24. *Id.* at 26–7.

25. *Id.* at 27 (quoting Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463, p. 6, 28).

26. *Id.* at 27.

27. 28 U.S.C. § 1346(b)(1).

28. 510 U.S. 471, 477–78 (1994).

29. *Id.* at 477.

30. *See United States v. Muniz*, 374 U.S. 150, 153 (1963).

is, by definition, federal law and not state law.<sup>31</sup> Thus, the FTCA was enacted to provide a remedy for those individuals injured by state torts committed by federal employees.<sup>32</sup> However, the FTCA was not intended as a route to enforce federal statutory duties.<sup>33</sup> Although the Supreme Court has held that constitutional tort claims are not actionable under the FTCA when standing alone, it has yet to decide on the actionability of FTCA claims which have their basis in state tort law and are paired with a violation of constitutional rights.

*B. The Discretionary Function Exception and the Two-Part Test*

Although the FTCA provides a waiver of sovereign immunity, it is limited by exemptions that potentially deprive federal courts of subject matter jurisdiction over a plaintiff's claim.<sup>34</sup> Of relevance here is the FTCA's exemption of "[a]ny 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."<sup>35</sup> This exception is more commonly called the "discretionary function" exception.<sup>36</sup> The purpose of this exception is 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."<sup>37</sup> Congress intended to strike a balance between its "willingness to impose tort liability upon the United States" and its desire to allow the government to engage in certain activities without the threat of suit by private individuals.<sup>38</sup> Congress took steps to avoid subjecting the government to liability for its employees' discretionary acts that would seriously encumber efficient government operations.<sup>39</sup> The Supreme Court has concluded that it is impossible to define with infallible precision every aspect of the discretionary function exception.<sup>40</sup>

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31. *Meyer*, 510 U.S. at 478.

32. *Ochran v. United States*, 273 F.3d 1315, 1317 (11th Cir. 2001).

33. *Howell v. United States*, 932 F.2d 915, 917 (11th Cir. 1991).

34. 28 U.S.C. § 2680 (2006); *see* *Evergreen Marine, Ltd v. United States*, 789 F. App'x 798, 800 (11th Cir. 2019).

35. 28 U.S.C. § 2680(a) (2006).

36. *United States v. Gaubert*, 499 U.S. 315, 322 (1991).

37. *Varig Airlines*, 467 U.S. at 814.

38. *Id.* at 808.

39. *Id.* at 814.

40. *Id.* at 813.

There is, however, a way to determine if the exception applies in a specific case.<sup>41</sup> In *Gaubert*, the Supreme Court used a two-prong test to determine whether challenged conduct falls within the discretionary-function exception.<sup>42</sup> The court must first ascertain if the conduct is “discretionary in nature,” meaning it involves an “element of judgment or choice.”<sup>43</sup> This “nature of the conduct” is the controlling factor in determining whether the exception applies and not the status of the actor.<sup>44</sup> The requirement of judgment or choice is not met if there is a federal statute, regulation, or policy that details a course of action for an employee to follow, such as a case in which the employee has no other option but to follow the directive.<sup>45</sup> The inquiry further focuses on whether the controlling statute mandates a specific manner in which the government agent should perform their function.<sup>46</sup>

Once an act is found to involve an element of judgment or choice, the court must ask “whether that judgment is of the kind that the discretionary function exception was designed to shield.”<sup>47</sup> In light of the purpose of the exception, the Supreme Court has held that it protects only governmental actions and decisions that have some basis in public policy.<sup>48</sup> The discretionary function exception is intended to protect the government from liability if the conduct in question entails the permissible exercise of policy judgment.<sup>49</sup> When a government policy allows for its agents to exercise discretion, it is presumed that the agent’s actions are grounded in some sort of governmental policy rationale.<sup>50</sup> Indeed, in order to survive a motion to dismiss, a plaintiff must allege facts that the conduct in controversy is not grounded in the policy of a regulatory regime.<sup>51</sup> Overall, the second prong of the test looks at whether the challenged actions are susceptible of policy analysis.<sup>52</sup>

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41. *Id.*

42. *Gaubert*, 499 U.S. at 322–23.

43. *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

44. *Varig Airlines*, 467 U.S. at 813.

45. *Berkovitz*, 486 U.S. at 536.

46. *Hughes v. United States*, 110 F.3d 765, 768 (11th Cir. 1997).

47. *Gaubert*, 499 U.S. at 322–23.

48. *Berkovitz*, 486 U.S. at 537.

49. *Id.*

50. *Gaubert*, 499 U.S. at 324.

51. *Id.* at 324–25.

52. *Id.* at 325.

*C. Bivens Claim*

In 1971, the Supreme Court held that a federal cause of action for damages could arise from the violation of a person's Fourth Amendment rights by a federal agent.<sup>53</sup> Such *Bivens*-type remedies were later recognized in a Fifth Amendment gender discrimination case<sup>54</sup> and in an Eighth Amendment cruel and unusual punishment case.<sup>55</sup> In each of those cases, the Court held that there was an implied damages remedy under the Constitution itself.<sup>56</sup> When such a claim is brought by a prison inmate, the Prison Litigation Reform Act of 1996 (PLRA) requires that prisoners exhaust all available administrative remedies.<sup>57</sup> Compliance with the prison grievance process is required in order to properly exhaust available remedies under the PLRA.<sup>58</sup>

The BOP has a three-level administrative remedy procedure.<sup>59</sup> The inmate must first make his issue known to the prison staff.<sup>60</sup> If the matter is not resolved, the inmate may submit a written Request for Administrative Remedy (form BP-9) to the warden.<sup>61</sup> If the inmate is not satisfied with the warden's response, he can submit an Administrative Remedy Appeal (form BP-10) to the designated Regional Director.<sup>62</sup> The final step is to appeal to the General Counsel at BOP's Central Office (form BP-11).<sup>63</sup>

The Eleventh Circuit has held that a failure to exhaust available administrative remedies under the PLRA should be treated as a matter of abatement as opposed to an adjudication on the merits.<sup>64</sup> Deciding on a motion to dismiss for failure to exhaust administrative remedies is a two-step process. The first step is to look at the factual allegations made by each party and if they conflict, take the facts in favor of the plaintiff. If in this light the defendant is entitled to dismissal for failure to exhaust, then the claim must be dismissed. If the complaint is not subject to

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53. *Bivens*, 403 U.S. at 389.

54. *Davis v. Passman*, 442 U.S. 228 (1979).

55. *Carlson v. Green*, 446 U.S. 14 (1980).

56. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017).

57. 42 U.S.C. § 1997e(a) (2013).

58. *Jones v. Bock*, 549 U.S. 199, 217 (2007).

59. See 28 C.F.R. §§ 542.10, 542.13(a), 542.14(a), 542.15(a).

60. 28 C.F.R. § 542.13(a) (2006).

61. 28 C.F.R. § 542.14(a) (2018).

62. 28 C.F.R. § 542.15(a) (2018).

63. *Id.*

64. *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008).

dismissal, the court must make specific findings to resolve the factual issue.<sup>65</sup>

#### IV. COURT'S RATIONALE

In *Shivers*, the Eleventh Circuit reviewed, as a matter of first impression, whether the FTCA's discretionary function exception protects a government employee from liability if they violate the Constitution.<sup>66</sup> In its interpretation of the FTCA and the discretionary function exception, the court held that even unconstitutional conduct by government employees can be protected by the exception, with one judge concurring in part and dissenting in part.<sup>67</sup>

##### A. *The Court Tackles the Federal Tort Claim Act*

The court began its discussion of the FTCA claim by mentioning that the United States is immune from suit unless Congress consents to suit.<sup>68</sup> It then looked at the language of the statute and referenced the *Meyer* case, emphasizing the Supreme Court's holding that the FTCA addresses violations of state law by federal employees and not constitutional claims.<sup>69</sup>

Shivers argued that, due to the violation of his Eighth Amendment rights, the discretionary function exception does not apply to the prison employees' decision to house him with Dodson.<sup>70</sup> On that point, Shivers contended that prison officials do not have the discretion to act unconstitutionally and therefore the action taken in this case falls out of the scope of the exception. Further, Shivers stated that the underlying law for his FTCA claim was Florida law and the unconstitutional conduct by the prison officials only served to negate the government's discretionary function defense.<sup>71</sup>

Rejecting Shiver's claim, the court stated that an FTCA claim cannot be used to circumvent the limitations on constitutional tort claims under *Bivens*.<sup>72</sup> Such circumvention would happen by recasting the same allegations "(1) as a common-law tort claim under the FTCA that is not subject to the discretionary function exception or (2) as negating the

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65. *Id.*

66. *See Shivers*, 1 F.4th at 924.

67. *Id.* at 936.

68. *Id.* at 928.

69. *Id.* (citing *Meyer*, 510 U.S. at 477–78).

70. *Id.* at 929.

71. *Id.*

72. *Id.* at 931.

discretionary function exception.”<sup>73</sup> To support its reasoning, the court cited two cases from the Seventh Circuit that ruled on the issue at hand.<sup>74</sup> One of these Seventh Circuit cases, *Linder*, stated that the limited scope of the FTCA and its inapplicability to constitutional torts was partially the reason the Supreme Court created *Bivens* actions against individual government employees.<sup>75</sup>

*B. The Discretionary Function Exception and the Two-Part Test*

Next, the court discussed the intent behind the discretionary function exception and how to apply the *Gaubert* test. The court started its analysis of the discretionary function exception by looking at the plain language of FTCA. It drew special attention to the language that states the FTCA “shall not apply to . . . [a]ny claim” that originates from a discretionary function or duty exercised by government employees, “whether or not the discretion involved be abused.”<sup>76</sup> The court reasoned that the language Congress chose is unqualified, and nothing in the statute limited the exception based on the degree of the abuse of the discretion. It pointed out that Congress could have used language that would state what kinds of abuse would not fall under this exception, such as grossly negligent behavior or behavior that is unconstitutional. However, Congress did not include such language, and Congress alone decides what should fall within its waiver of sovereign immunity. The crucial question for the court in respect to the plaintiff’s FTCA claim was whether the government activity being challenged in the case was discretionary under *Gaubert*.<sup>77</sup>

The court used the term “constitutional-claims exclusion” to refer to Shivers’s argument for why this claim should be actionable under the FTCA.<sup>78</sup> It opined that Congress did not leave room for this extra-textual exclusion.<sup>79</sup> It then cited *Millbrook v. United States*,<sup>80</sup> in which the Supreme Court read the plain language of the FTCA and refused to read a limitation into unambiguous text.<sup>81</sup> The court pointed to the remedial scheme of the FTCA and claimed that it is incompatible with Shivers’s proposed exception, which is reinforced by Congress’ intent when

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73. *Id.*

74. *Id.* at 932.

75. *Id.* at 933 (quoting *Linder*, 937 F.3d at 1090).

76. *Id.* at 930 (quoting 28 U.S.C. § 2680(a)).

77. *Id.* at 930.

78. *Id.*

79. *Id.*

80. 569 U.S. 50 (2013).

81. *Shivers*, 1 F.4th at 930; *Millbrook*, 569 U.S. at 57.

creating the Act. The court reasoned that the purpose behind the Act is to address violations of state law torts by federal employees and not constitutional violations.<sup>82</sup>

To illustrate why there is no “constitutional claims exclusion,” the court referenced two Seventh Circuit cases, *Kiiskila* and *Linder*.<sup>83</sup> In both *Kiiskila* and *Linder*, a claim under the FTCA was brought for a state tort claim that involved an alleged violation of federal constitutional rights.<sup>84</sup> Both claims were dismissed by the Seventh Circuit based on the discretionary function exception.<sup>85</sup> The Seventh Circuit in both *Kiiskila* and *Linder* concluded that, even when a government employee uses their discretion in a way that violates another’s constitutional rights, the plain language of the FTCA does not waive the government’s immunity to suit.<sup>86</sup>

The court in *Shivers* then analyzed the two-prong test seen in *Gaubert*.<sup>87</sup> Applying *Gaubert*, the court held that in this case, the conduct in controversy—inmate classification and housing placement decisions—was “discretionary in nature” and therefore met the first prong.<sup>88</sup> The court reasoned that only when a federal employee violates a specific prescription in federal law does the discretionary function exception not apply.<sup>89</sup> After making this point, the court explained how *Shivers* did not name a federal statute, regulation or policy that specifically prescribed a course of action that the prison employees here failed to follow.<sup>90</sup>

Moving on to the second prong of the *Gaubert* test, the court referenced a prior decision in the Eleventh Circuit in which inmate classification and housing placement decisions were held to be “part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation’s prisons.”<sup>91</sup> In *Cohen*, this type of conduct was held to meet both prongs of the test set out in *Gaubert*.<sup>92</sup> The court in *Cohen* reasoned that while there was a statute that imposed a general duty of care to protect prisoners on the BOP, it left the BOP personnel with discretion about how that duty was to be accomplished and therefore

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82. *Shivers*, 1 F.4th at 930.

83. *Id.* at 932 (citing *Kiiskila*, 466 F.2d at 626; *Linder*, 937 F.3d at 1087).

84. *Kiiskila*, 466 F.2d at 626–27; *Linder*, 937 F.3d at 1088.

85. *Kiiskila*, 466 F.2d at 628; *Linder*, 937 F.3d at 1092.

86. *Kiiskila*, 466 F.2d at 628; *Linder*, 937 F.3d at 1090.

87. *Shivers*, 1 F.4th at 931.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Cohen v. United States*, 151 F.3d 1338, 1344 (11th Cir. 1998).

92. *Id.*

warranted the applicability of the discretionary function exception.<sup>93</sup> The court in *Shivers* explained that the actions by the government employees in the case at hand, being of the same type, also fell within the discretionary function exception.<sup>94</sup>

Finally, the Eleventh Circuit criticized the way in which Shivers argued his constitutional claim exclusion would work in practice.<sup>95</sup> The court seemed to take issue with two types of claims, state tort law and federal constitution law, being tried in a single FTCA claim. The plaintiff in such a case would have to show negligence under state law and then defeat the discretionary function exception by proving the same conduct also breached a constitutional right. The district court in a case like this would have to instruct the jury that, even if the defendant in such a case were found to be negligent under state law, the government is still immune to suit unless the plaintiff also proves a federal constitution claim.<sup>96</sup>

### *C. Bivens Claim*

The court's analysis of the *Bivens* claim in *Shivers* began with it expressing the need under the PLRA for an inmate to exhaust all administrative remedies before bringing such a claim.<sup>97</sup> The court then explained the two-step process that should be applied when deciding on a motion to dismiss for failure to exhaust.<sup>98</sup> Next, the court went into detail about the relevant grievance process to be followed in this case. As explained above, these steps include the filing of BP-8, BP-9, BP-10, and BP-11 forms.

At issue in this case was whether the appeal to the General Counsel (form BP-11) was filed.<sup>99</sup> The court disagreed with Shivers's claim that the district court clearly erred in finding that he failed to submit his BP-11 form.<sup>100</sup> Instead, the court held that the district court had substantial evidence to support its finding.<sup>101</sup> This evidence submitted by the government included a declaration by a BOP paralegal stating that Shivers had not submitted the form to the Central Office level and an exhibit that showed no entry of the form into the BOP's SENTRY system.

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93. *Id.*

94. *Shivers*, 1 F.4th at 929.

95. *Id.* at 934.

96. *Id.*

97. *Id.* at 935 (citing 42 U.S.C. § 1997e(a)).

98. *Id.* at 935.

99. *Id.*

100. *Id.* at 936.

101. *Id.*

The court then pointed to Shivers's declaration that had a BP-11 form attached, in which Shivers stated was a "true and correct copy" of the form he submitted, was unsigned.<sup>102</sup> Therefore, the court found no error in the dismissal of Shivers's *Bivens* claim by the lower court.<sup>103</sup>

*D. Concurrence in Part, Dissent in Part*

Circuit Judge Wilson concurred in the majority's judgment affirming the district court's dismissal of Shiver's *Bivens* claim.<sup>104</sup> Wilson, however, dissented from the majority's decision on whether the discretionary function exception applies to government employees who violate the Constitution. According to Wilson, because government employees do not have discretion to violate the Constitution, the exception cannot apply. Wilson then pointed to the fact that most other circuits that have encountered this issue have held that the discretionary function exception does not shield the government from liability under the FTCA when the conduct is also unconstitutional.<sup>105</sup>

Although Wilson agreed with the majority that the conduct in this case met the first prong of the *Gaubert* test—that it involved an element of judgment—he disagreed that it met the second prong. Wilson did not believe that the discretionary function exception was only inapplicable in cases in which a federal employee acts contrary to a specific prescription in federal law, as the majority had reasoned.<sup>106</sup> Instead, Wilson argued that this inquiry is only relevant when considering the first prong of the *Gaubert* test. Wilson then distinguished this case from *Cohen*, stating that the case at hand asked a different question: Does a prison official's decisions about the placement of inmates fall under the discretionary function exception when the plaintiff alleges that the decision was not only tortious but also violated a constitutional right? Wilson's answer to this question was no. Ultimately, for Wilson, the problem with the majority's opinion is that the government "has no discretion to violate the Federal Constitution [,]"<sup>107</sup> and unconstitutional action does not involve a permissible exercise of policy judgment.<sup>108</sup>

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102. *Id.*

103. *Id.*

104. *Id.* (Wilson, C.J., concurring in part)

105. *Id.*

106. *Id.* at 937.

107. *Id.* (quoting *Owen v. City of Independence*, 445 U.S. 622, 649 (1980)).

108. *Id.* at 937.

## V. IMPLICATIONS

Through *Shivers*, the Eleventh Circuit became the second appellate court to hold that the discretionary function exception shields a government employee from liability under the FTCA when they violate the Constitution.<sup>109</sup> The circuit's reasoning was contrary to the one applied by the Supreme Court in *Berkovitz*. In *Berkovitz*, the Supreme Court held that the discretionary function exception does not apply if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."<sup>110</sup> This is due to the employee lacking a rightful option but to adhere to the directive, and therefore there is no discretion for the exception to protect.<sup>111</sup>

If the same logic is applied to the circumstances of the current case, then it follows that the exception would not shield government conduct that violates the Constitution. Indeed, the Supreme Court has noted that the government "has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."<sup>112</sup> Holding the discretionary function exception applies to unconstitutional conduct leads to an illogical result: government employees that violate the mandates of a statute, rule, or policy are liable under the FTCA but those whose "on-duty conduct [is] so egregious that it violates the more fundamental requirements of the Constitution" are protected from suit.<sup>113</sup>

The decision in *Shivers* limits the remedy available to those whose constitutional rights are violated by the negligence of government employees. Such a claim is no longer actionable under the FTCA and must be brought as a *Bivens* claim. The problem with this outcome is that the two claims come from different sources of law. The basis of an FTCA claim is state law, while the basis for a *Bivens* action is constitutional law.<sup>114</sup> A *Bivens* action is also fairly limited. This may result in many deserving state tort victims being barred from recovery and not being made whole.

This decision may also encourage more discretion to be given to government officials. This outcome seems more likely because if there is no specific policy on a given matter and decisions are increasingly left up

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109. *Id.* at 936; *Loumiet*, 828 F.3d at 939; *Limone*, 579 F.3d at 102; *Raz*, 343 F.3d at 948 (holding that the discretionary function exception does not shield government employees who violate the constitution from liability under the FTCA). *But see Kiiskila*, 466 F.2d at 628 (holding the opposite).

110. *Berkovitz*, 486 U.S. at 536.

111. *Id.*

112. *Owen*, 445 U.S. at 649.

113. *Loumiet*, 828 F.3d at 944–45.

114. *Id.* at 945–46.

to their employees' discretion, then the government can evade suit under the FTCA. An increase in the amount of discretion given to government employees will lead to a less precise standard of conduct. Such an outcome would be bad for the public. For example, without a clear standard of how prison officials should handle inmates, inmates may not know when they have been legally wronged. Federal prisoners in the Eleventh Circuit would be treated differently and most likely with less care than those in other circuits. Members of the public should have a general idea of what is and is not appropriate conduct from government employees. Federal employees also deserve to have a clear standard to abide by so they can avoid suit themselves.

Left to the discretion of the individual employee, there could be different treatment and ways of conducting business in multiple aspects of government, leading to an unclear standard for government conduct. The decision in *Shivers* seems to only benefit the federal government by protecting it from suit for the misfeasance of its employees. Meanwhile, many torts victims are left without a possible redress, and both liability and responsibility are shifted to federal employees.