Adjusting Immunity for Unconstitutional Torts

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ABSTRACT

Sovereign immunity protects the government from liability arising in suits brought against it by citizens. Though lacking a firm constitutional basis, sovereign immunity has been justified as protecting the public fisc and maintaining the sense of sovereign dignity. The Federal Tort Claims Act (FTCA) broadly waives sovereign immunity for tort claims against the United States. The discretionary function exception maintains immunity for tortious acts committed by employees acting within the valid bounds of their discretion. There is a circuit split about whether the discretionary function exception immunizes tortious conduct that is also unconstitutional. Circuits in the majority side of the split interpret the discretionary function to never immunize unconstitutional torts. Minority circuits understand the exception to apply to all covered tortious conduct on the part of governmental employees, even acts that violate the Constitution.

This Comment argues that the discretionary function exception should only immunize unconstitutional tortious conduct when the actions do not violate clearly established constitutional rights of which a reasonable officer would have known. This solution better serves the purposes of sovereign immunity and the discretionary function exception than either side of the existing circuit split.

I. INTRODUCTION

Sovereign immunity is a legal doctrine imported from England that prohibits private citizens from suing the federal government without its consent.[1] The Federal Tort Claims Act (FTCA), passed by Congress in 1946, waives sovereign immunity for certain tort claims and allows plaintiffs to sue the government itself.[2] Though the FTCA was enacted

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[1] *See generally* MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 1 (2023); *see also* Limone v. United States, 579 F.3d 79, 88 (1st Cir. 2009) ("Federal courts lack jurisdiction over tort actions against the United States except insofar as the sovereign has consented to be sued.").

[2] *See* 28 U.S.C. § 1346(b)(1).

to expand the government's liability to tort suits, the statute includes many exceptions that limit the waiver of sovereign immunity.[3]

Section 2680(a), known as the "discretionary function" exception, "preserves the federal government's immunity . . . when an employee's acts involve the exercise of judgment or choice."[4] Thus, when a government employee[5] has discretion to make a choice of action on the job, the discretionary function exception serves to protect the government from tort liability that may arise from the exercise of their employee's judgment.[6] Consequently, the discretionary function exception acts as a chokepoint through which all claims seeking to abrogate sovereign immunity and impose liability upon the government must pass.

Since the FTCA and the exception apply to a broad set of actions, the discretionary function exception has been invoked in many situations concerning national security.[7] Section 2680(a) has been invoked in military sexual assault cases, by Branch Davidians harmed during the federal siege of their Waco compound, against federal law enforcement officers,[8] and by Libyan citizens to recover from injuries caused by U.S. missile strikes under the Reagan administration.[9]

Reimagining the security of the United States must consider individuals' ability to recover from harms perpetuated by government actors. Without a rational remedial scheme for torts committed by the government, many citizens are left without redress. The discretionary function exception is central to the federal tort remedial scheme and is thus critical to broader national security discussions.

Circuit courts disagree over whether the discretionary function exception can be invoked to maintain sovereign immunity when the government's alleged tortious conduct is unconstitutional. The majority of circuits, including the First, Second, Third, Fourth, Fifth, Eighth, Ninth, and D.C. circuits, hold that the discretionary function exception cannot immunize the government from liability for the tortious constitutional violations of its employees.[10] The minority of circuits, chiefly the Seventh and Eleventh circuits, have held that § 2680(a) operates to

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[3] *See* 28 U.S.C. § 2680.

[4] Tsolmon v. United States, 841 F.3d 378, 380 (5th Cir. 2016) (citing United States v. Gaubert, 499 U.S. 315, 322 (1991)); *see also* 28 U.S.C. § 2680(a).

[5] *See* 28 U.S.C. § 2671 (defining "employee of the government" for purposes of the FTCA to include officers or employees of any federal agency, members of the military or naval forces of the United States, certain members of the National Guard, persons acting on behalf of a federal agency in an official capacity, and certain employees of federal public defender organizations).

[6] *See* § 2680(a).

[7] *See* Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1124–25 (2009) (collecting cases).

[8] Contino & Kuersten, *supra* note 1, at 2.

[9] Saltany v. Reagan, 886 F.2d 438, 439 (D.C. Cir. 1989).

[10] *See*, *e.g.*, Loumiet v. United States, 828 F.3d 935, 943 (D.C. Cir. 2016).

shield the government regardless of the conduct's constitutionality, in line with a more capacious understanding of the discretionary function exception.[11] The Sixth and Tenth circuits have not clearly expressed their stance on the split.[12]

Resolving the proper scope of the FTCA's waiver of sovereign immunity is important to ensure that plaintiffs wronged by the federal government or its employees can recover through a rational and comprehensive remedial system. This Comment proposes a novel solution to the circuit split: the FTCA's discretionary function exception should be understood to preserve sovereign immunity for discretionary government actions except those that violate clearly established constitutional rights that a reasonable person would have known. This solution, though not accepted by any circuit, better serves the purposes of sovereign immunity and the discretionary function exception itself.

This Comment proceeds in four parts. Section II reviews the origins and justifications of sovereign immunity. Section III introduces the FTCA and traces the development of the Supreme Court's discretionary function exception doctrine. Section IV provides an overview of the two sides of the circuit split regarding the exception's applicability to constitutional infractions. Finally, Section V argues that the proposed solution better serves the purposes of sovereign immunity and the discretionary function exception.

II. THE DEVELOPMENT OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity can more or less trace its lineage to the simple maxim "the king can do no wrong."[13] It seemed absurd to the British that there could be a legal right against the authority from which legal rights spring: the monarch.[14] Combined with the traditional association of earthly monarchs with divine right, challenging the king in court meant confronting an appointee of God.[15] As the doctrine of sovereign immunity developed, the blanket of immunity expanded from the king to the state.[16] In tort actions, sovereign immunity

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[11] *See, e.g.*, Shivers v. United States, 1 F.4th 924, 932 (11th Cir. 2021).

[12] *See* Daniel Raddenbach, *Unconstitutional but Authorized: The Federal Tort Claims Act Should Not Immunize the United States When Federal Officers Violate the Constitution*, 106 MINN. L. REV. 1119, 1146–47 (2021) (discussing the Sixth and Tenth Circuits' "wavering" regarding the split).

[13] George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 476 (1953).

[14] *See* Mark C. Niles, *"Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1283 (2002).

[15] *See* Pugh, *supra* note 13, at 478.

[16] *See id.* at 478 n.11 (hypothesizing that "the downfall of the feudal system and the growth of the idea of the modern state, the old restraints upon the king vanished. The king himself became

forced individuals harmed by the state to petition the Crown or parliament for direct monetary relief.[17]

After shedding the former king in the eighteenth century, the incipient United States maintained the doctrine of sovereign immunity and seemingly switched the old maxim to "the government can do no wrong."[18] By the middle of the nineteenth century, American courts had firmly adopted the doctrine to protect the federal government from civil liability.[19] Potential plaintiffs unable to succeed in court because of sovereign immunity were forced to petition Congress for direct monetary aid for damages through private bills.[20] As the nation expanded, the defects and inefficiencies of funneling all tort claims against the government through the national legislature became apparent.[21] Sovereign immunity and a lack of a general avenue of relief meant that "for a substantial portion of this nation's history, persons injured by torts committed by the federal government's agents were generally unable to obtain financial compensation through the judicial system."[22]

Yet in *Marbury v. Madison*, Chief Justice Marshall asserted that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[23] The early Court appeared to acknowledge that rights without appropriate remedies risked being rendered hollow, deciding in *Chisholm v. Georgia* that injured individuals could sue the state of Georgia.[24] This posture did not hold. Soon after *Chisholm*, Congress

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the state.").

[17] *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871 n.36 (2010). There is debate over the extent of recovery available under historical British sovereign liability laws. *See*, *e.g.*, Pugh, *supra* note 13, at 479 ("Fortunately, however, the rigors of the doctrine were tempered by the genius of the English *homus politicus*, and gradually increasing relief was granted by the development of procedures for suits against the Crown . . . Unfortunately, however, the petition of right did not extend to the field of torts.").

[18] *See generally* Pugh, *supra* note 13 (discussing the historical basis of sovereign immunity and its maintenance from the colonial period to the United States legal order).

[19] *See*, *e.g.*, United States v. Clarke, 33 U.S. 436 (1834).

[20] *See* Niles, *supra* note 14, at 1298; *see also* Pfander & Hunt, *supra* note 17, at 1889–93 (describing the private bill system and the burdens to successfully receiving a monetary award through a bill).

[21] *See* Feres v. United States, 340 U.S. 135, 140 (1950) ("The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication.").

[22] Contino & Kuersten, *supra* note 1, at 1.

[23] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[24] *See generally* Chisholm v. Georgia, 2 U.S. 419 (1793). Justice Jay's opinion noted that "[i]t would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one State, a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them." *Id.* at 477.

passed the Eleventh Amendment[25] to restrict citizens' ability to sue states and the Court entrenched the doctrine of sovereign immunity.[26] Subsequent development of sovereign immunity has cemented its protections for the government despite its lack of a clear constitutional basis.[27]

The Supreme Court discusses sovereign immunity in "vague and generalized pronouncements that sovereign immunity is a doctrine of great importance" but offers "little guidance about what policy goals it is actually intended to serve."[28] However, despite this opacity, courts often reference two primary purposes.[29] The first is an argument of "sovereign dignity."[30] While justifying sovereign immunity by invoking the absolute wisdom of the government seems out of place in a democratic society, courts' application of sovereign immunity acknowledges that "sovereigns are not like other litigants and are entitled to a special deference and respect."[31] Indeed, sovereign immunity is maintained "to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."[32]

The second common justification for sovereign immunity is that it protects the government from significant financial liability from citizen suits. Concern with the financial implications of sovereign immunity appears throughout the history of sovereign immunity litigation in the United States.[33] There are many practical disagreements with sovereign immunity's financial justifications, as the doctrine may actually impose a monetary toll on the public.[34] But this argument can be expanded beyond sovereign immunity's direct costs. Courts may be skeptical of litigation against the government "because it allocates public

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[25] U.S. CONST. amend. XI (removing the judicial power in suits against states from citizens not of that state).

[26] *See* Cohens v. Virginia, 19 U.S. 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States.").

[27] *See* Nestor M. Davidson, Note, *Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments*, 96 COLUM. L. REV. 1203, 1218 (1996) (noting that the Court invokes the long tradition of sovereign immunity but rarely engages with its constitutional foundation).

[28] Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 768 (2008); *see also, e.g.*, Alden v. Maine, 527 U.S. 706, 802 (1999) (Souter, J., dissenting) (describing the *Alden* majority's assertion that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity" as "anomalous").

[29] *See* Florey, *supra* note 28, at 784.

[30] *See generally* Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003) (discussing the Supreme Court's use of the dignity rationale in sovereign immunity cases and tracing the origin of the justification to before the Founding).

[31] Florey, *supra* note 28, at 786.

[32] Ex parte Ayers, 123 U.S. 443, 505 (1887).

[33] Florey, *supra* note 28, at 788; *see also, e.g.*, Edelman v. Jordan, 415 U.S. 651, 662–63 (1974) (applying the monetary rationale for sovereign immunity's application to the states).

[34] Florey, *supra* note 28, at 788–89.

funds in a way that is primarily determined by the judiciary, not the democratic process."[35] The public fisc justification incorporates separation of powers concerns and a discomfort with expanding the role of judges in distributing public monies.

While sovereign immunity protects the government itself, qualified immunity—a related form of immunity—protects government agents from liability in their individual capacity. Qualified immunity applies "so long as [the government agent's] conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[36] To determine if the right in question is "a clearly established constitutional right, courts examine the factual context of the case to ascertain whether 'every reasonable official would have understood that what he is doing violates that right.'"[37] A clearly established right is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[38]

Qualified immunity reflects an attempt to balance competing values: "the importance of a damages remedy to protect the rights of citizens" and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[39] The question of whether a constitutional right was "clearly established" preserves official decision-making discretion within that boundary while recognizing that it is also "not unfair to hold liable the official who knows or should know he is acting outside the law."[40] By withholding immunity from officials who violate clearly established constitutional rights, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"[41]

III. REMEDIES: THE FEDERAL TORT CLAIMS ACT AND *BIVENS*

Recognizing the shortcomings of existing avenues for resolving tort suits against the government, and perhaps motivated by the threat of a deluge of claims after a B-25 Army bomber crashed into the side of the Empire State Building in 1945,[42] Congress passed the Federal Tort

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[35] *Id.* at 790.

[36] Mullenix v. Luna, 577 U.S. 7, 11 (2015) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

[37] Paul D. Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 670 (2019) (quoting *Mullinex*, 577 U.S. at 11 (2015)).

[38] *Mullinex*, 577 U.S. at 11.

[39] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

[40] *Butz*, 438 U.S. at 506.

[41] *Mullinex*, 577 U.S. at 12 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[42] *See* Niles, *supra* note 14, at 1279.

Claims Act (FTCA)[43] in 1946. The FTCA allows certain tort claims against the federal government with the possibility of monetary awards.[44] Specifically, the FTCA waives sovereign immunity for tort claims against the federal government when federal employees commit negligent or wrongful acts within the scope of their employment.[45] The FTCA does not establish a new cause of action against the United States but instead exposes the government to claims and damages that would be available against a private individual under state law.[46]

Congress deliberately limited the scope of the FTCA's waiver of sovereign immunity. The FTCA is pockmarked with a myriad of exceptions that retain much of the government's immunity. Some of these exceptions are narrow and rarely implicated, such as an exception for "[a]ny claim arising from the activities of the Panama Canal Company,"[47] while others are major and protect the government from exposure to significant liability, demonstrated by the recent importance of an exception for "[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States."[48] However, perhaps no exception enumerated in the FTCA is the source of as much debate as the discretionary function exception.

The discretionary function exception, codified at § 2680(a), provides that the FTCA's waiver of sovereign immunity will not extend to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[49]

Unlike other exceptions enumerated in the FTCA, the discretionary function exception is notable for its expansive language.[50] The purpose of the discretionary function exception reflects the historical justifications for sovereign immunity: it protects "governmental decisions

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[43] 28 U.S.C. § 1346(b)(1); *id.* §§ 2671–2680.

[44] CONTINO & KUERSTEN, *supra* note 1, at 1.

[45] 28 U.S.C. § 1346(b)(1).

[46] *Id.* § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.").

[47] 28 U.S.C. § 2680(m).

[48] *Id.* § 2680(f).

[49] *Id.* § 2680(a).

[50] *See* CONTINO & KUERSTEN, *supra* note 1, at 18.

grounded in social, economic, and political policy from interference by courts through decisions in tort actions"[51] and insulates the government from "'liability that would seriously handicap efficient government operations.'"[52] The discretionary function exception narrows the FTCA's otherwise broad waiver of sovereign immunity and thus represents a bottleneck through which every claim against the government must pass.[53]

The Supreme Court addressed which government official actions are "discretionary" and are protected by sovereign immunity under § 2680(a) in *Berkovitz v. United States*.[54] In 1979, toddler Kevan Berkovitz contracted polio from a vaccine approved by the Food and Drug Administration.[55] In 1988, the Court considered if the plaintiff's claim—that the Administration tortiously neglected to test the polio vaccine's safety—alleged a "discretionary function or duty"[56] that would trigger the discretionary function exception.[57] In reaching its decision, the Court provided a two-step framework to determine whether the exception immunizes the governmental action. First, the court must "consider whether the action is a matter of choice for the acting employee . . . [as] conduct cannot be discretionary unless it involves an element of judgment or choice."[58] The exception's discretionary nature implies that the exception does not apply when a statute, regulation, or policy specifically prescribes the agent's actions.[59] The second step of the analysis—reflective of the purposivist nature of the exception—considers whether the action was "based on considerations of public policy."[60] If the challenged government act is discretionary, meaning that it involves an element of judgment or choice, and is based on considerations of public policy, then the discretionary function exception applies and will shield the government from liability.

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[51] Kevin E. Lunday, *Federal Tort Claims Act*, 64 GEO. WASH. L. REV. 1254, 1256 (1996); *see also* Cope v. Scott, 45 F.3d 445, 448 (D.C. Cir. 1995) ("[The discretionary function] exception was designed to prevent the courts from 'second guessing,' through decisions in tort actions, the way that government officials choose to balance economic, social, and political factors as they carry out their official duties.").

[52] United States v. Varig Airlines, 467 U.S. 797, 814 (1984) (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)).

[53] *See id.* at 808 ("The discretionary function exception . . . marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.").

[54] 486 U.S. 531 (1988).

[55] *Id.* at 533.

[56] 28 U.S.C. § 2680(a).

[57] *Berkovitz*, 486 U.S. at 546–47.

[58] *Id.* at 536.

[59] *Id.*

[60] *Id.* at 537.

Three years later in 1991, the Court added its final wrinkle to the discretionary function exception doctrine in *United States v. Gaubert*.[61] *Gaubert* affirmed the *Berkovitz* framework but added that when a government agent is permitted discretion by a statute, policy, or agency regulation, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion."[62] Courts are not to focus on the actor's intent, but rather "on the nature of the actions taken and on whether they are susceptible to policy analysis."[63] That is, a finding that the government agent's discretionary actions were merely susceptible to policy analysis could trigger the discretionary function exception, and sovereign immunity will preclude the plaintiff from initiating any tort suit against the government.

The *Gaubert* Court did not draw a bright line rule for when actions are susceptible to policy analysis. The case-by-case deliberation that *Berkovitz* and *Gaubert* require has drastically limited the availability of claims under the FTCA.[64] The discretionary function exception shields the government from "actions where the government official could have, but did not necessarily, take policy into account," greatly increasing the government's immunity.[65] Whenever a statute, regulation, or guideline allows discretionary conduct, the Court presumes that the government agent's actions are influenced by the policy choice established in that statute, regulation, or guideline.[66] The discretionary function exception after *Gaubert* will protect all discretionary governmental conduct—that is, conduct involving an element of judgment or choice that is merely susceptible to policy considerations.

While other causes of action against the government and its employees are generally outside of the scope of this Comment, the judicially recognized *Bivens* remedy is often intertwined with FTCA cases. The Constitution does not specify many remedies for constitutional violations.[67] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[68] the Supreme Court inferred a cause of action for Fourth Amendment violations committed by federal agents acting under the

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[61] 499 U.S. 315 (1991).

[62] *Id.* at 324.

[63] *Id.* at 325.

[64] *See* Niles, *supra* note 14, at 1329 ("The innovation of *Gaubert*'s 'susceptibility' analysis drastically limits the potential exposure of the United States to liability by making it easier to dispose of FTCA claims at an early stage of the proceedings, specifically, pursuant to a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.").

[65] *Id.* at 1332.

[66] *Gaubert*, 499 U.S. at 324.

[67] Habeas corpus is a notable exception. *See* Jeremy Travis, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 621–22 (1982).

[68] 403 U.S. 388 (1971).

color of law.[69] Unlike FTCA claims, which are brought against the tortious government agency, *Bivens* claims (often referred to as "constitutional torts") allege constitutional violations against individual government employees.[70] Constitutional torts are distinct from other torts because their cause of action arises from the Constitution itself, not state statutory or common law. However, "the interests of individual citizens recognized within the Bill of Rights probably encompass most, if not all, of tort law,"[71] which makes parsing constitutional tort claims from other claims difficult. The unease of categorization allows plaintiffs to label their tort claims as constitutional and directly sue the federal agent where qualified immunity would otherwise foreclose a suit.[72]

IV. THE CIRCUIT SPLIT OVER IMMUNIZING UNCONSTITUTIONAL TORTS

While all courts of appeals agree that the discretionary function exception immunizes the government from liability from certain tortious acts arising out of the violation of state statutes and regulations, the circuit courts disagree on whether the FTCA waives sovereign immunity for torts that violate the Constitution.

A. The Majority Position

The majority of circuits hold that the discretionary function exception does not immunize the government from tort suits alleging unconstitutional acts. Although not every circuit has made its stance on the issue clear, the First, Second, Third, Fourth, Fifth, Eighth, Ninth, and D.C. circuits hold the majority position. An emblematic case of this position is *Loumiet v. United States*.[73] Hamilton Bank hired the *Loumiet* plaintiff as outside counsel during a federal investigation of the bank by the Office of the Comptroller of the Currency (OCC).[74] The plaintiff wrote a series of letters to the U.S. Department of the Treasury to express concern regarding the OCC employees' conduct while

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[69] *Id.* at 389.

[70] Josh Hughes, *Rex Non Potest Peccare: The Unsettled State of Sovereign Immunity and Constitutional Torts*, 69 DRAKE L. REV. 949, 961–62 (2021); *see also, e.g.*, FDIC v. Meyer, 510 U.S. 471, 474 (1994) (recognizing a deprivation of a property right without due process in violation of the Fifth Amendment as a constitutional tort claim).

[71] William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1144 (1996).

[72] *Id.*; *see also* Butz v. Economou, 438 U.S. 478, 522 (1978) (Rehnquist, J., concurring) (noting "[t]he ease with which . . . a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment.").

[73] 828 F.3d 935 (D.C. Cir. 2016).

[74] *Id.* at 939.

investigating the bank.[75] The OCC then initiated an enforcement proceeding against the *Loumiet* plaintiff, alleging breaches of his fiduciary duty when preparing the audit.[76] The plaintiff then sued under the FTCA, alleging various torts as well as retaliatory prosecution: a constitutional claim under the First and Fifth Amendments.[77] On appeal, the D.C. Circuit considered whether the discretionary function exception shields the government from liability for discretionary conduct that allegedly exceeded constitutional bounds.[78]

The court ruled in the negative.[79] Recognizing that the majority of other circuits have also ruled that the discretionary function exception does not immunize discretionary constitutional violations, the court analogized to *Berkovitz*. Proceeding from *Berkovitz*'s holding that the government has no discretion to violate "a federal statute, regulation, or policy specifically prescrib[ing] a course of action for [its] employee to follow,"[80] the court held that the government also lacks discretion to violate the Constitution.[81] The opposition position is illogical: "the FTCA would authorize tort claims against the government for conduct that violates the mandates of a statute, rule, or policy, while insulating the government from claims alleging on-duty conduct so egregious that it violates the more fundamental requirements of the Constitution."[82] Thus, because no government employee has the discretion to violate the Constitution, the majority position interprets *Berkovitz* and its progeny to hold that the discretionary function exception cannot immunize the government from unconstitutional torts committed by its employees.

Other circuits in line with the majority position[83] have largely adhered to the argument presented in *Loumiet*. The First Circuit, when confronted with tort claims alleging constitutional violations under the FTCA, also held that tort claims with constitutional elements are not barred by the discretionary function exception.[84] The Second Circuit

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[75] *Id.*

[76] *Id.*

[77] *Id.* The district court dismissed most of the plaintiff's claims, holding that the "prosecutorial decision is a quintessential discretionary function." *Id.* at 940.

[78] *Id.* at 942.

[79] *Id.* at 944.

[80] Berkovitz v. United States, 486 U.S. 531, 536 (1988).

[81] *Loumiet*, 828 F.3d at 944.; *see also* Owen v. City of Independence, Mo., 445 U.S. 622, 649 (1980) (holding that a "municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative").

[82] *Loumiet*, 828 F.3d at 944–45.

[83] Circuits in the majority include the First, Second, Third, Fourth, Fifth, Eighth, Ninth, and D.C. circuits. Circuits in the minority include the Seventh and Eleventh circuits.

[84] *See* Limone v. United States, 579 F.3d 79, 101 (1st Cir. 2009) ("It is elementary that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statute or regulation . . . Nor does it shield conduct that transgresses the

went so far as to declare that "[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority."[85]

B. The Minority Position

The Seventh and Eleventh circuits disagree with the majority position that the discretionary function exception can never immunize the government from unconstitutional torts. The Seventh Circuit was the first to hold that the discretionary function exception can shield the government from liability arising from its employees' unconstitutional acts. In *Linder v. United States*[86], the U.S. Marshals Service placed the plaintiff, a Deputy Marshal, on leave after he was indicted for witness tampering and excessive use of force in an investigation.[87] The plaintiff later sued the Department of Justice under the FTCA, asserting that during prosecution, his treatment violated his Sixth Amendment rights.[88] In the subsequent case, the Seventh Circuit tightly adhered to the language of § 2680(a) and the doctrinal elaborations of *Berkovitz* and *Gaubert*. In doing so, the Seventh Circuit departed from the majority of its sister circuits by holding that claims of constitutional violations are not cognizable under the FTCA.

The Seventh Circuit's handling of constitutional questions under the discretionary function exception reveals a more limited understanding of the proper role of the FTCA. The court reasoned that the *Bivens* remedy available to plaintiffs alleging constitutional torts justifies the limited coverage of the FTCA. In *Bivens*, the Supreme Court recognized causes of action for damages arising from federal agents' constitutional violations.[89] The availability of *Bivens* remedies for constitutional wrongs "leaves the FTCA as a means to seek damages for common-law torts, without regard to constitutional theories."[90] This limited view of the FTCA's scope reflects the Supreme Court's understanding in *F.D.I.C. v. Meyer* that "the United States simply has not rendered itself

Constitution.") (citation omitted).

[85] Myers & Myers, Inc. v. U.S.P.S., 527 F.2d 1252, 1261 (2d Cir. 1975).

[86] Linder v. United States, 937 F.3d 1087 (7th Cir. 2019).

[87] *Id.* at 1088.

[88] *Id.* at 1090.

[89] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 395 (1971).

[90] *Linder*, 937 F.3d at 1090; *see also* Laney Ivey, *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*, 73 MERCER L. REV. 1351, 1378 (2022) (arguing that "[w]hile 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.").

liable under [the FTCA] for constitutional tort claims."[91] With *Bivens* providing plaintiffs damages remedies, or so the argument goes, the discretionary function exception of § 2680(a) is properly understood to bar liability for all government discretionary wrongs, including those that violate the Constitution.[92]

Meyer is an important case to understand the minority circuits' position because it is often used to justify limiting the scope of the FTCA's waiver of sovereign immunity. The plaintiff in *Meyer* sued his former government employer, the Federal Deposit Insurance Corporation, for property deprivation under the Fifth Amendment after his termination.[93] In consideration of whether the plaintiff could recover under an extension of the *Bivens* remedy, the Court first had to determine the scope of the FTCA. The Court considered the FTCA before *Bivens* because the FTCA is the *exclusive* remedy for claims cognizable under its statute, § 1346(b).[94] Claims are cognizable under § 1346(b) if they are against the United States, for money damages, based on harm to person or property from the negligent or wrongful act or omission by a government employee.[95] The Act only recognizes claims under circumstances where the United States would face liability if it were a private person under the "law of the place where the act or omission occurred."[96] All claims that meet the § 1346(b) standard must be litigated under the FTCA as their exclusive remedy and are subject to the FTCA's immunity waiver and its myriad exceptions, including the discretionary function exception of § 2680(a).[97]

The FTCA's reference to the "law of the place where the act or omission occurred" is critical because § 1346(b) only exposes the government to claims that would be available against a private individual under state law.[98] Federal law, not state law, is the basis for federal constitutional claims.[99] The *Meyer* plaintiff's constitutional tort claim alleging a taking of property without due process stems from the Constitution, not

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[91] 510 U.S. 471, 478 (1994). This language in *Meyer* is often martialed in dissenting opinions in majority circuit cases. *See* Castro v. United States, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting) ("If all violations of the federal constitution render the discretionary function exception inapt, *Meyer* is effectively voided.").

[92] While *Linder* justified the FTCA's inapplicability to constitutional claims by reference to the availability of *Bivens*, *Bivens* claims are rarely successful outside of the specific circumstances presented in the *Bivens* case itself. *See*, *e.g.*, *Meyer*, 510 U.S. at 484–86 (declining to extend the *Bivens* remedy to a new factual context).

[93] *Meyer*, 510 U.S. at 474.

[94] 28 U.S.C. § 1346(b).

[95] *Id.*

[96] *Id.*

[97] *Meyer*, 510 U.S. at 478.

[98] *See supra* Part II.

[99] *Meyer*, 510 U.S. at 478.

state law. The *Meyer* Court ruled that the plaintiff's claim was not cognizable under § 1346(b) and thus that the FTCA was not his exclusive remedy because his constitutional tort claim did not arise under state law where the United States could face liability as a private individual.[100]

There have been two competing interpretations of the Court's holding in *Meyer* that track the circuit split over the discretionary function exception. The first is reflected by the minority circuits, like the Seventh Circuit in *Linder*. This approach understands *Meyer* to place claims with any constitutional element outside the FTCA.[101] Courts that adopt this argument emphasize the FTCA's text, which exposes the United States to torts it would face as "a private person."[102] Because the Constitution does not govern the conduct of private individuals,[103] the United States cannot be liable as a private person for tort claims that involve *any* constitutional element. Minority circuit courts argue that this is the correct understanding of *Meyer* in light of *Bivens*. The Court, recognizing that the FTCA does not apply to constitutional violations, created the *Bivens* remedy to fill a gap in the remedial scheme.[104]

The other approach, held by the majority of circuits, charges that *Linder* misinterprets *Meyer*. Specifically, courts in the majority of the split believe that *Meyer* "affirmed only that purely constitution-based claims are not actionable under the FTCA—but [maintained that] constitutional claims rooted in state tort law are perfectly valid."[105] Indeed, constitutional aspects in tort claims do not alienate the claims from their state law basis.[106] State law remains the substantive source of the claim, even if a plaintiff "identifies constitutional defects in the conduct underlying her FTCA tort claim."[107] Therefore, the majority of circuits

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[100] *Id.* at 478–79; *see also* Birnbaum v. United States, 588 F.2d 319, 328 (2d Cir. 1978) ("Since Congress restricted the basis for liability under the Act to the 'law of the place,' we think that it would be a *Tour de force* to consider direct violations of the federal constitution as 'local law' torts. Such a rule might be tantamount to a bypass of the sovereign immunity of the United States without the consent of Congress.").

[101] *See*, *e.g.*, Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

[102] *See id.* (recognizing that the FTCA "applies to torts, as defined by state law—that is to say, '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'") (quoting 28 U.S.C. § 1346(b)(1)).

[103] *Id.* ("The Constitution governs the conduct of public officials, not private ones.").

[104] *Id.* ("The limited coverage of the FTCA, and its inapplicability to constitutional torts, is why the Supreme Court created the *Bivens* remedy against individual federal employees.").

[105] Raddenbach, *supra* note 12, at 1158 (emphasis omitted).

[106] Loumiet v. United States, 828 F.3d 935, 945 (D.C. Cir. 2016) ("The state-law substance of an FTCA claim is unchanged by courts' recognition of constitutional bounds to the legitimate discretion that the FTCA immunizes.").

[107] *Id.*

consider claims based in state tort law that also allege constitutional infractions to nevertheless be cognizable under the FTCA.

In *Shivers v. United States*,[108] the Eleventh Circuit subscribed to the Seventh Circuit's reasoning and became the second circuit to rule that the discretionary function exception shields the government from constitutional violations. The plaintiff in *Shivers*, a federal inmate, sued the United States for tortiously assigning the plaintiff to a cell with a violent offender who later assaulted the plaintiff with a pair of scissors.[109] The court applied the two-pronged *Gaubert* test to the plaintiff's allegations of torts committed during his time as a federal inmate.[110] The prison officials' authority to house prisoners as they wish satisfied the first *Gaubert* prong's requirement that the actor's conduct be discretionary.[111] The "inherently policy-laden endeavor of maintaining order and preserving security within our nation's prisons"[112] satisfied *Gaubert*'s second prong, which requires that the action be susceptible to policy considerations. With both *Gaubert* prongs met, the Court found the alleged torts "fall squarely within the discretionary function exception."[113]

Even though *Gaubert*'s two-part test was satisfied and the discretionary function exception would shield the government from his claims, the *Shivers* plaintiff argued that the court should find liability because the government's alleged actions were tortious and violated the Eighth Amendment. The plaintiff argued that "even if the government can otherwise meet the requirements of *Gaubert*'s test, since the discretionary function exception does not immunize conduct that violates the Constitution"[114] the exception should not apply to his claims. The plaintiff, in effect, argued for an extra layer of exception: the government enjoys sovereign immunity, which is waived by the FTCA, retained by the discretionary function exception through the *Gaubert* test, and waived again by a "constitutional-claims exclusion" read into § 2680(a).[115]

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[108] 1 F.4th 924 (11th Cir. 2021).

[109] *Id.* at 927.

[110] *Id.* at 928–29. There is some debate about whether the *Shivers* court properly discussed the second prong of the *Gaubert* test that requires considerations of public policy. *See* Emily B. Garza, *Discretionary Disfunction and Shivers v. United States: Consequences of Assuming the Intent of Congress*, 10 TEX. A&M L. REV. 359, 380 (2023) (arguing that "[t]he Eleventh Circuit should have applied *Gaubert*'s second prong like the First Circuit applied the test in *Limone*, which found that unconstitutional conduct falls outside the scope of the discretionary function exception").

[111] *Shivers,* 1 F.4th at 929.

[112] *Id.* (quoting Cohen v. United States, 151 F.3d 1338, 1344 (11th Cir. 1998)).

[113] *Id.*

[114] *Id.* (quotation and emphasis omitted).

[115] *Id.* at 930.

Among the reasons that the *Shivers* court rejected the plaintiffs' arguments, two stand out. The first is that the Eleventh Circuit recognized that Congress was "unambiguous and categorical" in leaving no room for an extra-textual "constitutional-claims exclusion."[116] Congress could have included a constitutionality cabin to the exception but did not. The *Gaubert* 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."[117] The discretionary function exception does not apply and will not shield the government from claims when a government agent acts contrary to a specific prescription of a "federal statute, regulation, or policy."[118] *Gaubert* reminds us that when a government agent acts contrary to such concrete law, the action cannot be considered discretionary and the discretionary function exception will not apply. The *Shivers* court held that the prison officials' conduct was discretionary because the Eighth Amendment "itself contains no such specific directives as to inmate classifications or housing placements."[119] With *Gaubert* satisfied, the plaintiff's claims were immunized by the discretionary function exception.[120]

The second reason for rejecting the *Shivers* plaintiff's argument to permit constitutional claims under the discretionary function exception reveals the influence of *Meyer*. Like many who bring claims under the FTCA, the plaintiff also brought *Bivens* constitutional claims against the government.[121] *Shivers*, citing *Meyer*, notes that "Congress did not create the FTCA to address constitutional violations at all but, rather, to address violations of *state tort law* committed by federal employees."[122] Accordingly, the Eleventh Circuit insisted that the plaintiff's constitutional claims be litigated under *Bivens*, not the FTCA.[123] Concern that clever plaintiffs, armed with tort claims that would otherwise be barred by the discretionary function exception, could circumvent the FTCA's retention of sovereign immunity by also alleging some

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[116] *Id.*

[117] *Id.* at 931 (emphasis omitted).

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

[119] *Shivers*, 1 F.4th at 931.

[120] *Id.*

[121] *Id.* at 933.

[122] *Id.* at 930 (citing F.D.I.C. v. Meyer, 510 U.S. 471, 477–78 (1994)).

[123] *Id.* at 933 ("Prisoners can and should bring constitutional claims against individual prison officials under *Bivens* . . . [b]ut a prisoner's FTCA tort claim based on the government's tortious abuse of that function—even unconstitutional tortious abuse—is barred by the statutory discretionary function exception.").

constitutional deprivation underlies *Shivers*.[124] While such gamesmanship risk voiding *Meyer*'s holding that the government "has not rendered itself liable under [the FTCA] for constitutional tort claims,"[125] it would also require litigating both claims—state tort claims and federal constitutional claims—in a single case under the FTCA. The Eleventh Circuit was concerned that requiring jury instructions on state tort claims that would be valid only if the jury first found that the plaintiff successfully argued their constitutional claims would be administratively difficult.[126]

V. THE DISCRETIONARY FUNCTION EXCEPTION SHOULD NOT IMMUNIZE VIOLATIONS OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS

Borrowing from the doctrine of qualified immunity, this Comment argues that the discretionary function exception should immunize constitutional violations committed by government agents, but only when the constitutional rights are not so clearly established such that a reasonable official would understand that their actions violate that right. This proposal resolves the circuit split and ensures that tort plaintiffs have the same chance in federal court to recover from the government no matter which circuit hears their case.

Examining *Limone v. United States*[127] offers a chance to understand the function of this proposed solution. *Limone* was prefaced by a previously unsolved 1965 gang murder.[128] In 1967, FBI agents trying to find an informant in the Italian Mafia began to lure a mafioso named Barboza into cooperation.[129] The agents cajoled Barboza with promises of relaxed sentencing for his prior criminal activity and threats against refusal, and he eventually implicated the *Limone* plaintiff as a perpetrator of the 1965 murder.[130] The FBI, through other investigative avenues, "possessed reliable intelligence undercutting Barboza's account of the murder" to the extent that the FBI knew that the *Limone* plaintiff was not involved in the crime.[131] But the FBI did not reveal this

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[124] *Id.* ("Shivers cannot back-door into this case his constitutional claim on the theory that the discretionary function defense is precluded as to *his FTCA state-law tort claim* simply because he alleges the prison employees' tortious acts were also unconstitutional.").

[125] FDIC v. Meyer, 510 U.S. 471, 478 (1994).

[126] *Shivers*, 1 F.4th at 934.

[127] 579 F.3d 79 (1st Cir. 2009).

[128] *See id.* at 84.

[129] *See id.*

[130] *Id.*

[131] *Id.* at 83.

information to the government prosecutors.[132] Instead, the government prosecuted the *Limone* plaintiff using Barboza's undermined account alone and secured a guilty verdict.[133]

In 2000, thirty-three years after the verdict and sentence of life imprisonment, documentary requests to the FBI uncovered the information that undercut Barboza's testimony and exculpated the *Limone* plaintiff.[134] The plaintiff then filed *Bivens* claims against the individual agents responsible for his prosecution and FTCA claims against the government.[135] The First Circuit recognized that his claims of malicious prosecution under *Bivens* and the FTCA contained a constitutional element.[136] The court adhered to the majority circuits' position and rejected the government's argument that the discretionary function exception should maintain sovereign immunity despite the unconstitutional conduct of the officials.[137] In light of available exculpatory evidence, the prosecution violated the *Limone* plaintiff's constitutional due process rights.[138] The federal employee's conduct, was consequently "unconstitutional and, therefore, not within the sweep of the discretionary function exception."[139]

Limone reaffirms the basic logic of the majority circuit position. If the plaintiff successfully alleges a constitutional element to their FTCA tort claims, the discretionary function exception cannot immunize the government from liability.

Applying the solution this Comment proposes achieves the same outcome, but through a different analysis. Because the plaintiff alleged a constitutional tort, malicious prosecution without due process of law, the proposed discretionary function test will first apply *Berkovitz* and *Gaubert* and then will consider whether the constitutional rights in question were clearly established such that a reasonable federal employee would understand their actions to violate that right. The court established that the *Berkovitz* and *Gaubert* tests, requiring that the

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[132] *Id.* at 85.

[133] *Id.* at 86.

[134] *Id.*

[135] *Id.*

[136] Limone v. Condon, 372 F.3d 39, 44–45 (1st Cir. 2004) ("[I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit . . . [a]ctions taken in contravention of this prohibition necessarily violate due process."). *Limone v. Condon* preceded *Limone v. United States* and rejected the plaintiff's *Bivens* claims regarding the murder and his prosecution. *Id.* at 52. *Limone v. United States* adjudicated the plaintiff's FTCA claims. *See Limone*, 579 F.3d at 86–87 (tracking the entire course of the *Limone* litigation).

[137] *Limone*, 579 F.3d at 101 (holding that the discretionary function exception does not "shield conduct that transgresses the Constitution").

[138] *Id.* at 102.

[139] *Id.*

conduct involve an element of judgment or choice and be susceptible to policy considerations, was met.[140] Here, the constitutional rights in question are clear. Individuals possess the right to not have the government manufacture evidence against their innocence in criminal trials.[141] The second inquiry considers whether the violated right would have been clear to reasonable FBI agents. The plaintiff offered strong evidence showing that the agents knowingly coaxed Barboza into false testimony and knew that the false testimony would be used to prosecute the *Limone* plaintiff.[142] It is not reasonable for law enforcement officers to frame the innocent and the officers would have known that they were doing so. Under the proposed solution, the discretionary function exception would also not immunize the government because the federal employee's actions met both *Gaubert* prongs: (1) the constitutional rights in question were clearly established, and (2) a reasonable federal employee would have known that they were violating a constitutional right.

In the following sections, this Comment will argue that the proposed solution better services the purposes of sovereign immunity that undergird the FTCA and the purposes of the discretionary function exception itself.

A. The Solution Better Serves the Purposes of Sovereign Immunity

Allowing governmental liability only when the rights were reasonably clear better addresses the two primary aims of sovereign immunity.[143] First, permitting liability only in clear cases helps ensure that sovereign immunity insulates the government from liability in suits it did not consent to. *Berkovitz* held that the discretionary function exception does not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[144] While *Berkovitz* did not place the Constitution alongside statutes, regulations, or policies as a source of federal employee guidance, allowing liability for constitutional violations that were only reasonably clear mirrors the logic that animated the *Berkovitz* Court. Clearly established constitutional rights resemble instances where "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[145] When a federal employee violates a clearly established

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[140] *See id.* at 101.

[141] *See Limone*, 372 F.3d at 44–45.

[142] *Id.* at 48–49.

[143] *See* discussion *supra* Part II (identifying regard for the sovereign's "dignity" and concern about liability's effect on the public fisc as the two primary justifications for sovereign immunity).

[144] Berkovitz v. United States, 486 U.S. 531, 536 (1988).

[145] *Id.*

constitutional right that a reasonable employee would have known, their conduct cannot be understood to be discretionary under the discretionary function exception and should not be immunized. But if the right was not clearly established or no violation occurred, there is no specific statute, regulation, or policy that specifically prescribes a course of action, and the official's discretion should be protected.

Second, the proposed change to the courts' application of the discretionary function exception would better protect the public fisc and promote accountability. Though absolute sovereign immunity best protects the public from litigation expenses, the minority courts' interpretation removes sovereign immunity's potential as an accountability mechanism. Tort liability, including liability for constitutional torts, can be wielded as an incentive mechanism to properly allocate compensation and enhance deterrence.[146] Allowing liability in cases where the constitutional right violated was clearly established ensures that the government faces financial penalties only when its officers' conduct was clearly wrong. This constraint limits the volume of superfluous cases that drain the public fisc while increasing the certainty that when the government faces liability, it was earned. Rather than using sovereign immunity to shield all discretionary constitutional violations or removing immunity for such claims, tailoring the exception in this way repositions sovereign immunity as a legitimate "coordinating mechanism for facilitating legislative decisions about who bears the ultimate monetary burdens of unconstitutional conduct."[147]

B. The Solution Better Serves the Purposes of the Discretionary Function Exception

The discretionary function exception presents a significant obstacle for plaintiffs seeking redress. The *Gaubert* test's broad understanding of discretionary conduct[148] protects most federal agents' discretionary acts from the FTCA's waiver of sovereign immunity.[149] Indeed, one Sixth Circuit judge decried that the modern discretionary function exception doctrine "means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act."[150] The proposed solution better serves the discretionary function's goals of waiving immunity for

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[146] Davidson, *supra* note 27, at 1242–43.

[147] Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 Duke L.J. 1701, 1748 (2022).

[148] *See* United States v. Gaubert, 499 U.S. 315, 322–23 (defining discretionary acts as those that involve an element of judgment or choice and are based on considerations of public policy).

[149] *See* discussion *supra* Part III.

[150] Rosebush v. United States, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting).

meritorious tort claims while limiting judicial second guessing of government actors, and more clearly comports with the *Gaubert* test for discretionary conduct.

The proposed solution addresses the expansiveness of the discretionary function exception while still adhering to its purpose. Allowing FTCA suits for constitutional torts when the rights were clear will allow more meritorious plaintiffs to recover than minority circuits currently allow. Minority circuits preclude all constitutional suits under the exception. Conversely, the majority circuits' position permits more suits than a solution that immunizes constitutional violations when the rights were not reasonably clear. However, applying a reasonableness constraint to the discretionary function exception achieves a balance between allowing suits of merit when the violated rights were clear, and reducing the risk that courts will second guess the conduct of government agents and impose liability too frequently.

Allowing government officials discretion in the execution of their official conduct has long undergirded sovereign immunity and the discretionary function exception. Circuits on the majority side of the split recognize the need for officials to have flexibility but believe that it cannot justify allowing constitutional wrongs.[151] The reasoning in minority circuits often reflects this concern as well.[152] Adding a reasonableness constraint to the discretionary function exception's application to constitutional wrongs ameliorates, in part, the concerns of both sides of the split. Although most majority-aligned circuits hold that no one has the discretion to violate the Constitution,[153] the established doctrine of qualified immunity regularly immunizes unconstitutional conduct by government actors. Moreover, minority circuits which limit the discretionary function exception's application may appreciate this proposed option's more constrained approach, as compared to the extra-textual constitutionality condition imposed by majority circuits.

The proposed solution also faithfully adheres to the existing discretionary function exception test enumerated in *Gaubert*. *Gaubert*, citing *Berkovitz*, holds that the exception only immunizes discretionary acts

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[151] *See*, *e.g.*, Loumiet v. United States, 828 F.3d 935, 944 (D.C. Cir. 2016) ("Although the discretionary-function exception shields government policymakers' lawful discretion to set social, economic, and political policy priorities from judicial second-guessing via tort law, there is no blanket exception for discretion that exceeds constitutional bounds.").

[152] *See*, *e.g.*, Shivers v. United States, 1 F.4th 924, 928 (11th Cir. 2021) ("[T]he purpose of the exception is to prevent judicial second-guessing of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.") (quoting *Gaubert*, 499 U.S. at 323).

[153] *See*, *e.g.*, Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001) (quoting United States Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988)) (noting that, in "determin[ing] the bounds of the discretionary function exception . . . we begin with the principle that '[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes.'").

that "involve an element of judgment or choice."[154] Only when a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" such that the "employee has no rightful option but to adhere to the directive" is the action considered not discretionary and the government is exposed to liability.[155] When a government actor violates someone's clearly established constitutional right, it is recognizable that a source of federal law specifically prescribes a course of action, namely to not violate the clearly established right. But when the government employee violates a constitutional right that is not clearly established, there is no single course of action that the actor must follow. The lack of clarity deprives the official of any clear course of action. The discretionary function exception only looks to the discretionary nature of the offense "whether or not the discretion involved [was] abused."[156] When a government actor violates clearly established rights, the clarity of those rights ensures that the official has no discretion to abuse them. When the actor violates rights that are not clearly established, there is no statute, regulation, or policy specifically prescribing action. In those circumstances, absent clearly established rights, the agent has the discretion to act, even if their action abuses the Constitution.

Although the proposed solution is novel, this sort of judicial adjustment of the immunity and remedial scheme against the government is not uncommon. The "coterminous symmetry between constitutional and common-law tort jurisprudence"[157] cannot be ignored when considering either sovereign or qualified immunity. Sovereign immunity serves "as a background assumption against which the entire framework of constitutional-tort law, including but not limited to qualified immunity, rests."[158] Justice Scalia's treatment of immunity cases reflects this interconnection. Though Justice Scalia was concerned that qualified immunity may be illegal, he justified it as addressing the more pressing problem of there being too many suits against the United States.[159] However, Justice Scalia accepted qualified immunity as a "fair enough" response to an overly permissive remedial scheme that needed recalibrating.[160] The restrictions of the modern *Gaubert* test

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

[155] *Id.*

[156] 28 U.S.C. § 2680(a).

[157] Stern, *supra* note 37, at 677.

[158] Crocker, *supra* note 147, at 1740.

[159] *See* Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting).

[160] William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 62–63 (2018). Professor Baude also offers the characterization of Scalia's understanding of judicial corrections to immunity doctrine as "[t]wo wrongs . . . can make a right." *Id.* at 63.

should motivate the Court to reassess the content of the doctrine and readjust the equilibrium by following this Comment's proposed solution.

C. The Solution Addresses the Recent *Xi v. Haugen*[161] Decision

On May 23, 2023, the Third Circuit decided *Xi v. Haugen*, a case regarding appellant Xioxing Xi's *Biven* and FTCA claims. Xi is a physicist working in superconductor technology at Temple University.[162] In the middle of the night, Xi's home was raided by the FBI and Xi was interrogated by federal agents for over two hours.[163] Prosecutors charged Xi with four counts of wire fraud involving technology patents until events undermined the FBI investigator's credibility and questioned the trustworthiness of the evidence against Xi.[164] Xi and his co-appellants brought *Bivens* and FTCA claims against the government, including malicious prosecution and invasion of privacy claims.[165]

The district court dismissed Xi's *Bivens* claims because the constitutional rights the FBI investigator violated were not "clearly established."[166] The court then considered whether Xi's remaining FTCA claims were subject to the discretionary function exception.[167] The district court concluded that Xi's FTCA claims "fall squarely within the discretionary function exception" because the agent acted within his discretion as an FBI investigator and the court had already decided that the agent did not violate Xi's clearly established constitutional right.[168] The discretionary function exception, by the district court's understanding, immunized the FBI agent's tortious conduct.[169]

On appeal, the Third Circuit criticized the district court's analysis of Xi's FTCA claims. The Third Circuit, in line with the majority circuit position and with the district court in *Xi*, affirmed that "because government officials never have discretion to violate the Constitution, unconstitutional government conduct is per se outside the discretionary

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[161] 68 F.4th 824 (3rd Cir. 2023).

[162] *Id.* at 830.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 831 n.4.

[166] *Id.* at 837.

[167] *Id.*

[168] Xi v. Haugen, No. CV 17-2132, 2021 WL 1224164, at *29 (E.D. Pa. Apr. 1, 2021), *aff'd in part, rev'd in part*, 68 F.4th 824 (3d Cir. 2023). The court acknowledged that no one has the discretion to violate the Constitution, but noted that "since we have determined that [the FBI agent] did not violate Xi's clearly established constitutional rights, it is unnecessary to address this authority further." *Id.* at *29 n.29.

[169] *Id.* at *29.

function exception."[170] All unconstitutional conduct, whether violating clearly established constitutional rights or not, is outside the discretionary function exception. To the Third Circuit, any reading of the exception to immunize constitutional violations runs against the maxim that no one has the discretion to violate the Constitution. The Court of Appeals also argues that the "clearly established" requirement in qualified immunity reflects the belief that "it would be unfair to hold individual officers liable for 'conduct not previously identified as unlawful'" [171] and uncertainty of the "chilling effect and 'social costs' of that liability."[172] However, in the context of the FTCA and suits against the government itself, protecting against these social costs are less of a concern and cannot justify the importation of the "clearly established" requirement.

The rejection of a "clearly established" requirement in *Xi* does not undermine the solution proposed by this Comment. First, the district court did not apply the proposed solution. After considering whether the FBI investigator acted with an element of judgment or choice as required by *Gaubert*, the court simply referenced its conclusion that the FBI agent did not violate any of Xi's clear constitutional rights.[173] The court did not consider what the outcome of the FTCA claims would be if the FBI agent had violated Xi's clear constitutional right. Under the proposed solution, if the government actor's conduct was discretionary and violated a clear constitutional right, the discretionary function exception would not immunize the government.

Second, the Third Circuit's purposivist reason for rejecting a "clearly established" requirement is unsatisfying. The Court of Appeals notes that qualified immunity does not protect violations of clearly established constitutional rights to avoid unfairly imposing liability on government officials for conduct they had previously not known were unlawful.[174] The court argues that such "concerns are absent in the FTCA context, where only the federal government—not individual officers—can be liable." [175] However, the discretionary function exception was included in the FTCA to preserve the discretion and official flexibility of individual government agents. Even if the disincentives created by tort liability through the FTCA are not directly felt by the government officials, the discretionary function exception's goal of protecting official decision-making flexibility echoes the concerns mentioned by the *Xi* court. Allowing tort suits regarding the tortious and

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[170] *Xi*, 68 F.4th at 839.

[171] *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[172] *Id.* (citing *Harlow*, 457 U.S. at 813–15).

[173] *Id.* at 139.

[174] *Id.*

[175] *Id.* at 839-40.

unconstitutional conduct of government employees when rights were not clearly established would have a chilling effect on conduct, as officials conscribe their actions to avoid causing their employing agency liability—the very effect § 2680(a) was intended to prevent.

VI. CONCLUSION

Congress enacted the FTCA to address the checkerboard process of tort recovery that forced injured individuals to petition Congress for private bills. While the FTCA succeeded in exposing the federal government and its employees to tort liability, its myriad exceptions immunized the government in many cases where its employees may otherwise have faced liability. The circuit split over whether the FTCA's discretionary function exception immunizes unconstitutional torts further complicates plaintiffs' recovery under the FTCA. This Comment proposes a solution to the circuit split: that the discretionary function exception should immunize the government from liability arising from unconstitutional torts, but only when the constitutional rights in question were not clearly established.

The proposed solution to the circuit split will leave some plaintiffs whose constitutional rights were violated by a government employee without recovery. However, if their constitutional rights were clearly established then courts applying the proposed solution should permit the plaintiff to recover from the government. Considering whether rights in question were clearly established introduces a much-needed element of predictability to a remedial system that is pockmarked with exceptions and inconsistent circuit applications.