

## NOT FULLY DISCRETIONARY: INCORPORATING A FACTOR-BASED STANDARD INTO THE FTCA'S DISCRETIONARY FUNCTION EXCEPTION

*Daniel Cohen*

**ABSTRACT**—The Federal Tort Claims Act (FTCA) pulls back the curtain of sovereign immunity and allows private citizens to directly sue the federal government for damages resulting from negligence. Passed in 1946 and never amended, the statute carries no limit on potential damages, only prohibiting punitive damages and jury trials. Other than those procedural limitations, the potential liability of the government is unlimited—except for one single exception: the discretionary function exception. The discretionary function exception shields the government from liability for “the failure to exercise or perform a discretionary function or duty.” Congress failed to elaborate on the definition and scope of “discretionary” functions and has left this vague exception for the courts to interpret.

The Supreme Court has used a wide array of terms to describe the discretionary function exception and has intermittently revived and overruled prior language. The discretionary function exception has therefore rested entirely on judicial discretion in practice, changing in application based on the whims of the Court without any concrete factors on which to rely. This Note proposes that the Court formally adopt a factor-based standard in interpreting the discretionary function exception, based on five factors. By clearly articulating these factors, the Court can prevent future courts from abusing their discretion in applying the exception. This is especially important considering that such abuse could leave the government either largely immune from the consequences of its actions or open to crippling liability at every turn. The Federal Tort Claims Act was a pivotal step forward in solving this problem in 1946; clarifying the discretionary function exception today will be another crucial milestone.

**AUTHOR**—J.D. Candidate, Northwestern Pritzker School of Law, 2018. B.A., B.S., University of Illinois at Urbana-Champaign, 2011. I would like to thank everyone who helped this Note through the editing process; there are too many to name. Thank you to the entire *Northwestern University Law Review* community—this was truly a team effort. I would also like to thank Professor Marshall Shapo for providing the inspiration for this Note

and seeing it through its initial drafts. Finally, I want to thank my family for their constant love and support, especially my dog, Bamba.

INTRODUCTION .....	880
I. SOVEREIGN IMMUNITY AND THE FEDERAL TORT CLAIMS ACT .....	882
II. JUDICIAL INTERPRETATIONS OF THE DISCRETIONARY FUNCTION TEST OVER THE YEARS .....	884
A. <i>Early Interpretations</i> .....	884
B. <i>Toward a Pragmatic Approach</i> .....	888
C. <i>More Confusion</i> .....	889
III. ATTEMPTS TO STREAMLINE THE DISCRETIONARY FUNCTION EXCEPTION .....	891
A. <i>Inability to Keep Up with the Doctrine</i> .....	892
IV. A FACTOR-BASED STANDARD FOR THE DISCRETIONARY FUNCTION EXCEPTION .....	897
A. <i>Why Factors Are Necessary</i> .....	897
B. <i>The Excluded Factors</i> .....	898
C. <i>The Proposed Factors</i> .....	899
CONCLUSION .....	903

### INTRODUCTION

The United States has enjoyed full sovereign immunity for much of its existence, during which time private citizens could not sue the federal government.<sup>1</sup> This changed in 1946 when Congress passed the Federal Tort Claims Act (FTCA), which allowed private citizens to sue the federal government for tort damages. The text of the FTCA operated as a limited waiver of sovereign immunity, allowing citizens to sue the government “in the same manner and to the same extent as a private individual under like circumstances.”<sup>2</sup> In the seventy years since Congress passed the FTCA, the courts’ imprecise and meandering interpretations of the statute have caused no small amount of trouble.

This Note considers the FTCA’s discretionary function exception. The discretionary function exception exempts the government from liability for “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

---

<sup>1</sup> See, e.g., *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“The United States, as sovereign, is immune from suit save as it consents to be sued . . . .”); *United States v. Thompson*, 98 U.S. 486, 489 (1878) (“[The United States] cannot be sued without their consent.”). See generally Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946) (discussing the history of sovereign immunity in the United States).

<sup>2</sup> 28 U.S.C. § 2674 (2012).

the discretion involved [can] be abused.”<sup>3</sup> In other words, the government cannot be sued if it is performing a “discretionary” function. The word “discretionary” does not appear anywhere else in the text of the statute; this requires the courts to define exactly what constitutes a “discretionary function or duty.” The language of the statute’s discretionary function exception has remained surprisingly unchanged to the present day. This legislative silence is not helpful in clarifying the scope of the discretionary function exception.<sup>4</sup>

The Supreme Court has interpreted and reinterpreted the discretionary function exception since 1946, yet it has failed to provide a consistent standard.<sup>5</sup> Since the core purpose of the Act is to provide an avenue for private citizens to seek recourse against the federal government, this vague exception to the FTCA poses a continuing risk of swallowing the rule entirely and shielding the government from all forms of liability. This would take all of the bite out of the Act. Moreover, the stakes are high: courts are balancing an important private right to sue the government for tort damages against an equally important sovereign immunity protecting vital government operations. With that much at stake, consistent and prudential judicial decisionmaking requires more concrete guidance than the Court’s interpretations of “discretionary” to date. Thus, the Supreme Court should clarify the scope of the discretionary function exception by articulating a factor-based standard that draws from its prior precedent.

This Note proceeds in four parts. Part I describes the FTCA’s text and legislative history. Part II then summarizes shifting judicial interpretations of the exception. Next, Part III examines the quixotic seven-decade attempt by scholarly literature to either delineate the meaning of the discretionary function exception or cure the exception’s inherent ambiguity. Lastly, Part IV proposes a five-factor standard for the discretionary function exception that includes (1) whether the government employee exercised a choice, (2) whether the choice related to policy considerations, (3) whether the government employee’s conduct, if performed by a private person, would violate state law, (4) practical concerns over inhibiting essential government functioning, and (5) a desire to minimize sovereign immunity and allow private citizens to sue the government for wrongful or negligent

---

<sup>3</sup> *Id.* § 2680(a).

<sup>4</sup> This is partly because statutory silence can be interpreted in various ways. *See, e.g.*, YULE KIM, CONG. RES. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 16 (2008) (describing different possible interpretations of statutory silence).

<sup>5</sup> *See, e.g.*, *Payton v. United States*, 679 F.2d 475, 479 (5th Cir. 1982) (describing the courts’ failure to define the discretionary function exception); *see also* *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984) (claiming it is impossible to fully define the discretionary function exception).

acts by its agents, officers, or employees. This standard provides a sturdy framework for future judicial application by combining the wisdom and consistency of precedent with cabining the exception to ensure that it does not swallow the rule.

### I. SOVEREIGN IMMUNITY AND THE FEDERAL TORT CLAIMS ACT

The FTCA was born from a combination of a longstanding need to reform a burdensome private bill system and a freak accident on July 28, 1945, which began as a foggy Saturday morning in New York City. Shortly before 10:00 AM, a U.S. Army pilot flying a routine transport mission in a B-25 bomber ignored a low-visibility warning from air traffic control and flew the plane straight into the Empire State Building.<sup>6</sup> The accident killed fourteen people and caused damage estimated at \$1 million (\$13 million adjusted for inflation<sup>7</sup>).<sup>8</sup> Following the accident, the U.S. government offered reparations to the victims' families; some, but not all, families accepted.<sup>9</sup> In the same year, Congress hastened to pass the landmark FTCA, giving ordinary citizens (such as the remaining victims' families) the ability to file a lawsuit against the federal government.<sup>10</sup>

Versions of the FTCA that would pull back the curtain of sovereign immunity had been languishing in Congress for twenty years.<sup>11</sup> For example, Congress debated the first seedling of the FTCA on February 5, 1925; this debated bill, House Bill 12,179, sought to replace the burdensome existing private bill system in which Congress voted on individual small claims.<sup>12</sup> It proposed to instead “create a ‘cause of action for compensation in damages for injuries sustained and death resulting from injuries to any person through the wrongful act or omission by an

<sup>6</sup> Jennifer Latson, *When an Army Plane Crashed into the Empire State Building*, TIME (July 28, 2015), <http://time.com/3967660/army-pilot-crash-empire-state-building> [https://perma.cc/7EMD-S5VU].

<sup>7</sup> To determine this amount, an inflation calculator was used. See *Inflation Calculator*, DOLLARTIMES, <http://www.dollartimes.com/calculators/inflation.htm> [http://perma.cc/9L2N-DC2S].

<sup>8</sup> *Empire State Building Withstood Airplane Impact*, JOM (Dec. 2001), <http://www.tms.org/pubs/journals/JOM/0112/News/News8-0112.html> [https://perma.cc/3ZZX-X78K] (monthly publication of The Minerals, Metals & Materials Society).

<sup>9</sup> Joe Richman, *The Day a Bomber Hit the Empire State Building*, NPR (July 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=92987873> [https://perma.cc/ZXZ9-YLAC].

<sup>10</sup> 28 U.S.C. § 2674 (2012) (“The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.”).

<sup>11</sup> See Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 699–700 (describing the debate over the 1925 Public Vessels Act as an “ambitious rejection of sovereign immunity in torts”).

<sup>12</sup> *Id.*

agent, officer, or employee of the United States government and to provide the procedure therefor.”<sup>13</sup> This bill would have shifted the responsibility for determining compensation for private victims of government negligence from Congress to the courts, providing a judicial check on sovereign immunity.<sup>14</sup> The bill died in committee,<sup>15</sup> but it spawned over thirty proposed bills in the following years,<sup>16</sup> culminating in the passage of the FTCA.

Congressional debates in this period weighed the arbitrary<sup>17</sup> and burdensome<sup>18</sup> existing private bill system with practical<sup>19</sup> and precedential concerns<sup>20</sup> in allowing citizens to directly sue the government. The discretionary function exception was meant to address the latter pair of concerns, as Assistant Attorney General Francis Shea described at a hearing on January 29, 1942:

[The discretionary function exception] is a highly important exception, designed to avoid any possibility that the act may be construed to authorize damage suits against the government growing out of legally authorized activity, such as a flood-control or irrigation project . . . . *It is neither desirable nor intended that the constitutionality of legislation, the legality of regulation, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort.*<sup>21</sup>

While the FTCA originated with Congress’s desire to at least slightly draw back the curtain of sovereign immunity, the discretionary function exception kept the curtain in place to protect certain essential government

<sup>13</sup> *Id.* at 700 (quoting 66 CONG. REC. 3090 (1925)).

<sup>14</sup> *Id.* (“Claims could be handled administratively by an executive branch agency or by a court.”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 700 n.84 (citing 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 59, at 2-54 to -67 (1989)).

<sup>17</sup> For example, Representative Underhill noted that under the existing private bill system, “one objecting Member of the House can strike the bill off the calendar and he need give no reason therefor. He may not like the Member who introduced the bill because he wears a red necktie.” 67 CONG. REC. 10034 (1926).

<sup>18</sup> Representative Stafford, for instance, wondered, “Why should Congress be concerned with these little petty claims . . . . We want to be relieved of this distasteful and most disagreeable work.” 76 CONG. REC. 4836 (1933). His question was followed by applause. *Id.*

<sup>19</sup> Representative Ramseyer in particular was concerned with the prospect of the government being liable for “billions of dollars, which might threaten the life of the sovereign and the very existence of the government.” Zillman, *supra* note 11, at 702 n.94.

<sup>20</sup> On this issue, Attorney General Sargent wrote that “any acknowledgement by the Government of liability for torts is a dangerous precedent and a radical departure from the long-established principles of our law and Government.” 67 CONG. REC. 5688 (1926).

<sup>21</sup> Zillman, *supra* note 11, at 706–07, 707 n.119 (emphasis added) (quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the Comm. on the Judiciary H.R.*, 77th Cong., 2d Sess. 1, 28 (1942) (statement of Francis Shea, Assistant Att’y Gen. of the United States)).

functions.<sup>22</sup> Other provisions of the FTCA reflected this protective intent: for example, neither jury trials nor punitive damages were permitted against the government,<sup>23</sup> and Congress mandated a one-year statute of limitations.<sup>24</sup> But the broad language of the discretionary function exception largely served as the primary mechanism to protect vital functions of government from a potential cascade of private litigation. In both the legislative history and the text of the statute, Congress avoided discussing the nuances of the term “discretionary,” leading to continuously shifting judicial interpretations that persist today.<sup>25</sup>

## II. JUDICIAL INTERPRETATIONS OF THE DISCRETIONARY FUNCTION TEST OVER THE YEARS

The Supreme Court attempted to define the discretionary function exception in myriad ways in the seventy years after the FTCA was passed. Unfortunately, the oft-conflicting judicial interpretations only added to the initial confusion over how to apply the exception.

### A. Early Interpretations

The Court interpreted the FTCA in *Dalehite v. United States*,<sup>26</sup> which followed the Texas City disaster in 1947 in which 2,300 tons of fertilizer stored aboard a French cargo ship exploded and killed over 581 people.<sup>27</sup> Families of the victims filed hundreds of lawsuits against the government alleging negligence under the FTCA, totaling over \$200 million in personal and property claims (over \$2.2 billion adjusted for inflation<sup>28</sup>).<sup>29</sup> The Supreme Court ultimately interpreted the discretionary function exception as protecting the government from liability for alleged negligent acts and omissions in storing the fertilizer on the cargo ship.<sup>30</sup>

The majority stated that “[w]here there is room for policy judgment and decision there is discretion,” and that “acts of subordinates in carrying

<sup>22</sup> See *id.* at 711.

<sup>23</sup> See Federal Tort Claims Act, ch. 753, § 410, 60 Stat. 842, 843–44 (1946) (codified as amended in scattered sections of 28 U.S.C.).

<sup>24</sup> See *id.* § 420, 60 Stat. at 845.

<sup>25</sup> See, e.g., *Wood v. United States*, 845 F.3d 123, 128–29 (4th Cir. 2017) (explaining the current messy state of the discretionary function exception).

<sup>26</sup> 346 U.S. 15 (1953).

<sup>27</sup> *Texas City, Texas, Disaster*, FIRE PREVENTION & ENG’G BUREAU OF TEX. (Apr. 29, 1947), <http://www.local1259iaff.org/report.htm> [<https://perma.cc/Z7X2-PHUN>].

<sup>28</sup> Again, an inflation calculator was used to determine this amount. See *Inflation Calculator*, *supra* note 7.

<sup>29</sup> *Dalehite*, 346 U.S. at 17.

<sup>30</sup> *Id.* at 41 (“In short, the alleged ‘negligence’ does not subject the Government to liability.”).

out the operations of government in accordance with official directions cannot be actionable.”<sup>31</sup> The Court also opined that any alleged government negligence because of its safety standards was a result of decisions “responsibly made in the exercise of judgment at a planning, rather than an operational level,”<sup>32</sup> and it “refused to question the judgments on which they are based.”<sup>33</sup> These distinctions concerning the status of the actor and planning versus operational decisions were the first examples of the Court creating its own language to interpret the discretionary function exception.<sup>34</sup>

The *Dalehite* Court’s inventive language hid the pragmatic and constitutional concerns underlying the Court’s strong deference to the government’s activities, of which there are at least two. First, a \$2.2 billion award was exceptionally large, and the Court was likely hesitant to impose such a heavy burden on the government.<sup>35</sup> Second, constitutionally imposing liability on the government’s activities would have essentially substituted the appointed Court’s policy judgments for those of elected legislators, raising separation of powers concerns because the Court would then arguably be instructing the government how to allocate its resources.<sup>36</sup> It is unclear why the Court did not simply explain these real practical and constitutional concerns upfront, rather than couch them in artificial distinctions between the status of the actor and operational versus planning decisions. *Dalehite* began a trend in which the Court relied upon these practical and constitutional concerns without explicitly saying so.

Two years after the *Dalehite* decision, the Court again addressed the discretionary function exception when the Indian Towing Company sued the government for the Coast Guard’s allegedly negligent maintenance of a

---

<sup>31</sup> *Id.* at 36.

<sup>32</sup> *Id.* at 42.

<sup>33</sup> *Id.* at 43.

<sup>34</sup> The Court later rejected both distinctions. *See, e.g.*, *United States v. Gaubert*, 499 U.S. 315, 325–26 (1991) (“Discretionary conduct is not confined to the policy or planning level . . . . There [is] no suggestion that decisions made at an operational level could not also be based on policy.”); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984) (“[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies . . . .”).

<sup>35</sup> Indeed, the dissent noted this latent concern. *See Dalehite*, 346 U.S. at 54 (Jackson, J., dissenting) (“It is obvious that the Court’s only choice is to hold the Government’s liability to be nothing or to be very heavy, indeed.”).

<sup>36</sup> *Id.* at 43 (“The power to adopt regulations or by-laws . . . are generally regarded as discretionary, because, in their nature, they are legislative.” (quoting *Weightman v. Corp. of Wash.*, 66 U.S. (1 Black) 39, 49 (1861))). Fortunately, both the practical and constitutional concerns in *Dalehite* were later avoided when Congress provided nearly \$17 million in compensation for the victims through legislation. *See* MELVIN M. BELLI, “READY FOR THE PLAINTIFF!” 83–85 (1965) (discussing the passing of “special acts” under the Federal Torts Claims Act to compensate the victims).

lighthouse that caused cargo damage.<sup>37</sup> The Court, drawing on *Dalehite*'s operational versus planning distinction, held that this negligence involved the operational level of government, not the planning level; it thus found the government liable for damages under the FTCA.<sup>38</sup> Notably, this case only involved damages of \$62,659.70 (\$566,593.88 adjusted for inflation<sup>39</sup>),<sup>40</sup> so the practical concerns of holding the government liable were not as serious as in *Dalehite*, where the claim was worth \$2.2 billion.<sup>41</sup> Similarly, the constitutional separation of powers concerns were not as prevalent in this case, as it involved routine maintenance.<sup>42</sup> Thus, the lurking practical and constitutional concerns that seemingly persuaded the Court not to find liability in *Dalehite* were weaker in *Indian Towing Co.*

The *Indian Towing Co.* Court consequently cabined the discretionary function exception for the first time. The government argued that because the FTCA allowed for governmental liability “in the same manner and to the same extent as a private individual,”<sup>43</sup> the government could not then be liable for “uniquely governmental” activities like the Coast Guard’s maintenance of a lighthouse for which private individuals could not be liable.<sup>44</sup> The Court rejected this argument, reasoning that it would be “bizarre” to find government liability based on whether private individuals would be liable because the nature of the government’s activity would be the same regardless.<sup>45</sup> Further, the Court reasoned that if the government eventually allowed private operation of lighthouses (which it eventually did<sup>46</sup>), the “uniquely governmental” distinction would disappear and the alleged negligence would become actionable, even though the action itself had not changed.<sup>47</sup>

Then, two years after the Court limited the exception in *Indian Towing Co.*, the Court again revisited the discretionary function exception. *Rayonier, Inc.*, sued the government under the FTCA for its alleged

---

<sup>37</sup> See *Indian Towing Co. v. United States*, 350 U.S. 61, 61 (1955).

<sup>38</sup> *Id.* at 64.

<sup>39</sup> An inflation calculator was again used to calculate this figure. See *Inflation Calculator*, *supra* note 7.

<sup>40</sup> *Indian Towing Co.*, 350 U.S. at 62.

<sup>41</sup> See *supra* text accompanying notes 28–29.

<sup>42</sup> See *Indian Towing Co.*, 350 U.S. at 69 (“The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance . . . it was obligated to use due care to make certain that the light was kept in good working order . . .”).

<sup>43</sup> 28 U.S.C. § 2674 (2012).

<sup>44</sup> *Indian Towing Co.*, 350 U.S. at 64.

<sup>45</sup> *Id.* at 67.

<sup>46</sup> The National Historic Lighthouse Preservation Act of 2000 (NHLPA) created a process for transferring ownership of federal lighthouses to private owners. See 54 U.S.C. §§ 305101–06 (2012).

<sup>47</sup> *Indian Towing Co.*, 350 U.S. at 66.

negligence in failing to timely extinguish a fire, which eventually spread and damaged Rayonier's property.<sup>48</sup> The Court concluded that the government could be liable if Washington law would impose liability "on private persons or corporations under similar circumstances."<sup>49</sup> In other words, the Court considered how state law would apply to determine government liability under the FTCA. The Court justified this liability on the basis of loss spreading, reasoning that when everyone benefits from government activities, it is unfair to leave people to fend for themselves when they are injured by such activities rather than holding the government accountable.<sup>50</sup> This reasoning illuminates another lurking practical concern: whether loss spreading is fair and will help the afflicted parties.<sup>51</sup>

Lower court decisions emulated this type of ad hoc interpretation of the discretionary function exception, deliberately avoiding articulating a more exacting definition. In fact, courts recognized the futility of trying to define the exception. For example, in *Payton v. United States*,<sup>52</sup> an FTCA lawsuit against the federal government involving a federal prisoner who killed three people after being released, the Fifth Circuit opined:

The drafters of the Act . . . failed to define the term "discretionary function." This omission is understandable in light of the fact that the courts have struggled for nearly three decades to provide such a definition, with limited success. *We will not pretend to succeed where our predecessors for thirty years have failed in providing succinct definition of the term.*<sup>53</sup>

This was a rare upfront acknowledgement that the courts had failed to provide a more precise definition of the discretionary function exception. So when it came to the defining the right of citizens to sue the government, the Fifth Circuit was limited to ever-evolving and increasingly convoluted precedent.<sup>54</sup>

---

<sup>48</sup> *Rayonier, Inc. v. United States*, 352 U.S. 315, 316–17 (1957).

<sup>49</sup> *Id.* at 318.

<sup>50</sup> *See id.* at 320 ("Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed.").

<sup>51</sup> Notably, the Court also cited *Indian Towing Co.* in rejecting immunity for "uniquely governmental" activities like firefighters' conduct. *Id.* at 319 ("[A]n injured party cannot be deprived of his rights under the [FTCA] by resort to an alleged distinction . . . between the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity.").

<sup>52</sup> 679 F.2d 475 (5th Cir. 1982).

<sup>53</sup> *Id.* at 479 (emphasis added).

<sup>54</sup> *See id.* ("We will, however, review the guidelines presented by prior decisions and apply them to the facts before us.").

*B. Toward a Pragmatic Approach*

The next major development in Supreme Court jurisprudence came in the 1984 case of *United States v. Varig Airlines*.<sup>55</sup> Varig Airlines sued the government for the Federal Aviation Administration's (FAA) allegedly negligent "spot check" program after passengers on a Varig Airlines airplane certified by that agency were killed because of a fire in its bathroom trash bin.<sup>56</sup> The Supreme Court was remarkably transparent in its opinion, beginning with the admission that "it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception."<sup>57</sup> Ultimately, the Court found that the FAA employees' actions in performing spot checks were protected by the discretionary function exception.<sup>58</sup>

The Court explicitly justified its decision in *Varig* on the basis of the same lurking constitutional and practical concerns from *Dalehite*. First, on a constitutional level, the Court emphasized the goal of preventing "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy."<sup>59</sup> This statement mirrored dicta in *Dalehite*, in which the Court "refused to question the judgments on which [policy decisions] are based."<sup>60</sup> Second, on a practical level, the Court noted the discretionary function exception's purpose in "protect[ing] the Government from liability that would seriously handicap efficient government operations."<sup>61</sup> Hence, the Court had appeared to turn the corner in openly discussing the broader practical and constitutional concerns motivating its application of the discretionary function exception.

Such transparency did not come without cost; the Court broke with prior precedent in *Varig*. For example, the *Varig* Court necessarily had to break with *Dalehite*'s artificial distinction regarding the actor's status.<sup>62</sup> The Court in *Varig* underscored that "it is the nature of the conduct, rather than the *status of the actor*, that governs whether the discretionary function exception applies in a given case."<sup>63</sup> This statement directly rejected the Court's language in *Dalehite*, which claimed the "acts of *subordinates* in carrying out the operations of government in accordance with official

---

<sup>55</sup> 467 U.S. 797 (1984).

<sup>56</sup> *Id.* at 797.

<sup>57</sup> *Id.* at 813.

<sup>58</sup> *Id.* at 821.

<sup>59</sup> *Id.* at 814.

<sup>60</sup> *Dalehite v. United States*, 346 U.S. 15, 43 (1953).

<sup>61</sup> *Varig*, 467 U.S. at 814 (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963)).

<sup>62</sup> For more on *Dalehite*'s distinction, see *supra* text accompanying notes 31–34.

<sup>63</sup> *Varig*, 467 U.S. at 813 (emphasis added).

directions cannot be actionable,<sup>64</sup> as the status of the government employee as a subordinate or a supervisor was no longer relevant to the discretionary function analysis. The Court in *Varig* also broke from *Indian Towing Co.*'s artificial distinction of *operational* activities. In *Indian Towing Co.*, the Court refused to apply the discretionary function exception to protect "operational" activities such as routine lighthouse maintenance.<sup>65</sup> However, in *Varig*, the Court applied the discretionary function exception to protect "efficient government operations," such as routine airplane spot checks.<sup>66</sup>

At this point, the FTCA's discretionary function exception had become a muddled and contradictory standard, with the Supreme Court openly rejecting its prior distinctions while still refusing to provide a precise definition. The Court had further confused things by adding more tests to rationalize certain outcomes, such as employing state-law-derived liability to justify loss spreading (as in *Rayonier*<sup>67</sup>) or using the discretionary function exception to protect efficient government functioning (as in *Varig*<sup>68</sup>).

### C. More Confusion

Four years after *Varig*, the Court added more layers to the discretionary function exception in an FTCA suit filed on behalf of a three-month-old boy, Kevin Berkovitz, who contracted polio after receiving a government-approved polio vaccine.<sup>69</sup> The Court added two new requirements to the nature-of-the-conduct test from *Varig*: (1) an element of choice on the part of the employee<sup>70</sup> and (2) the choice relating to a government policy decision.<sup>71</sup> The Court consequently reversed the holding of the Third Circuit Court of Appeals that the government licensing of the polio vaccine was discretionary, remanding the case to determine whether

---

<sup>64</sup> *Dalehite*, 346 U.S. at 36 (emphasis added).

<sup>65</sup> *Indian Towing Co. v. United States*, 350 U.S. 61, 61 (1955) (emphasis added); *see also id.* at 76 (Reed, J., dissenting) ("The over-all impression from the majority opinion is that it makes the Government liable under the [FTCA] for negligence in the conduct of any governmental activity on the operational level." (internal quotation marks omitted)).

<sup>66</sup> *Varig*, 467 U.S. at 814 (emphasis added) (quoting *Muniz*, 374 U.S. at 163).

<sup>67</sup> *See Rayonier, Inc. v. United States*, 352 U.S. 315, 318 (1957).

<sup>68</sup> *See Varig*, 467 U.S. at 821.

<sup>69</sup> *See Berkovitz v. United States*, 486 U.S. 531, 531 (1988).

<sup>70</sup> *Id.* at 536 ("[C]onduct cannot be discretionary unless it involves an element of judgment or choice [for the employee].").

<sup>71</sup> *Id.* at 539 ("The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.").

there was an element of choice that involved public policy considerations.<sup>72</sup> Interestingly, under the new *Berkovitz* rule, the discretionary function exception would not apply when an employee was following specific orders: “In this event, the employee ha[d] no rightful option but to adhere to the directive.”<sup>73</sup> This formulation closely mirrored the operational–planning distinction from *Dalehite* and *Indian Towing Co.* without using that terminology. Still, the scope of the discretionary function exception remained unclear.

Three years later, the Court used this mishmash of tests to immunize the government in the 1991 case of *United States v. Gaubert*,<sup>74</sup> in which a shareholder of a savings and loan association sued the government, alleging that federal financial regulators were negligent in their duties to supervise corporate officers.<sup>75</sup> The Court attempted to synthesize its precedent, finding that the discretionary function exception applied because the federal regulators exercised choice in forming public policies (satisfying the *Berkovitz* rule) and because the federal regulators were making “planning-level decisions” (satisfying a combination of *Dalehite* and *Indian Towing Co.*).<sup>76</sup> But even while relying on this “planning-level” language, the Court explicitly eliminated the formal operational–planning distinction from *Dalehite* and *Indian Towing Co.*<sup>77</sup> This presents a strange set of circumstances: The Court, in attempting to clarify the discretionary function exception by tearing down old distinctions, did so while still relying on the very language it was purporting to eliminate.<sup>78</sup> This attempt at clarification further muddled the interpretation of the already vague discretionary function exception.

To make matters worse, the Court added yet another wrinkle, stating that the “routine or frequent nature of a decision” does not foreclose discretionary function exception protection.<sup>79</sup> The routine nature of an activity had never previously been a factor in the discretionary function

---

<sup>72</sup> *Id.* at 548 (remanding because the Court of Appeals prematurely invoked the discretionary function exception). The district court originally denied the government’s motion to dismiss for lack of subject matter jurisdiction. *Id.* at 531.

<sup>73</sup> *Id.* at 536.

<sup>74</sup> 499 U.S. 315 (1991).

<sup>75</sup> *Id.* at 319–20.

<sup>76</sup> *Id.* at 322–23.

<sup>77</sup> *See id.* at 325–26 (“Discretionary conduct is not confined to the policy or planning level . . . . There [is] no suggestion that decisions made at an operational level could not also be based on policy.”).

<sup>78</sup> *Compare id.* at 323 (“[T]here is no doubt that planning-level decisions . . . are protected by the discretionary function exception.”), *and id.* at 335 (“[T]here is something to the planning vs. operational dichotomy.”), *with id.* at 325 (“Discretionary conduct is not confined to the policy or planning level.”).

<sup>79</sup> *Id.* at 334.

exception, unless it was in reference to the now-outdated operational-versus-planning distinction raised in *Dalehite* and *Indian Towing Co.*<sup>80</sup> These new factors distracted from the central point, briefly raised in *Varig*, that the discretionary function exception protects “efficient government operations.”<sup>81</sup>

The discretionary function exception had now been at least partially defined by such varied metrics as the employee’s status,<sup>82</sup> the operational–planning distinction,<sup>83</sup> and how state law would apply,<sup>84</sup> but these same metrics had been rejected as factors of a viable discretionary function test in *Varig*<sup>85</sup> and *Gaubert*.<sup>86</sup> Indeed, as the Court has admitted, judicial interpretations of the FTCA have failed to settle on a consistent standard.<sup>87</sup>

### III. ATTEMPTS TO STREAMLINE THE DISCRETIONARY FUNCTION EXCEPTION

The dynamic nature of the discretionary function exception makes it especially difficult to properly define. Throughout its history, the discretionary function exception has been analyzed in a variety of frameworks, and scholars have offered various proposals to clarify the doctrine. But these analyses and proposals have been unsuccessful in two ways: they have failed to provide more clarity than the current test and to align with the Court’s most recent precedent.

A new discretionary function test should do both things. First, there is no point in proposing a new framework that is plagued by the same ambiguities as the current discretionary function test. The doctrine will not benefit from more discretion. Second, considering the Court’s stubborn adherence to its precedent in this area, asking the Court to disregard its precedent entirely is unlikely to be successful. Moreover, as the FTCA plays an important role in controlling governmental liability, there should be some consistency in how it is interpreted. A good proposal should

---

<sup>80</sup> For more on this distinction, see *supra* text accompanying notes 31–34.

<sup>81</sup> *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (quoting *United States v. Muniz*, 374 U.S. 150, 163 (1963)).

<sup>82</sup> See *supra* text accompanying notes 31–34.

<sup>83</sup> See *supra* text accompanying notes 31–34.

<sup>84</sup> See *supra* text accompanying notes 49–51.

<sup>85</sup> See *supra* text accompanying notes 62–66 (discussing *Varig*’s rejection of a status-of-the-employee test).

<sup>86</sup> See *supra* text accompanying notes 77–78 (explaining *Gaubert*’s rejection of the operational–planning distinction).

<sup>87</sup> See, e.g., *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984) (“[I]t is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception.”).

therefore attempt to methodically synthesize the precedent. Scholarly analyses and proposals have failed to provide such practical guidance for the Court.

*A. Inability to Keep Up with the Doctrine*

Throughout the ad hoc judicial interpretation of the discretionary function exception described above, scholarly literature has lagged in efforts at analysis.<sup>88</sup> At various points, academics have tentatively described the discretionary function exception, but the Court's ever-shifting tests quickly mooted their analyses.<sup>89</sup>

Eventually, many scholars eschewed trying to explain the discretionary function exception and instead began offering proposals to cure the exception's vagueness and ambiguity.<sup>90</sup> The proposals offered, however, have failed to provide greater clarity in their attempts to incorporate and reason through the convoluted line of judicial precedents.<sup>91</sup>

---

<sup>88</sup> See, e.g., Fleming James Jr., *The Federal Torts Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957) (describing immunity for planning-level decisions before this distinction was erased in *Varig*); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968) (similarly describing operational and planning activities before the distinction was erased in *Varig*).

<sup>89</sup> See, e.g., *United States v. Gaubert*, 499 U.S. 315, 325–26 (1991) (formally eliminating the operational–planning distinction, outdated decades of prior academic analysis on that distinction).

<sup>90</sup> See, e.g., Barry R. Goldman, Note, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837 (1991) (proposing a distinction in FTCA claims based on economic versus physical harm); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 882 (1991) (calling for a process-based test to protect independent actions taken by agency officials when the agency's policies provided discretion for that official).

<sup>91</sup> For example, Barry Goldman's proposal for a distinction in FTCA claims based on economic versus physical harm, see *supra* note 90, runs contrary to at least four cases. First is *Dalehite*, in which the Court found the government's safety procedures for storing fertilizer were discretionary, even though there were many deaths in the accident. *Dalehite v. United States*, 346 U.S. 15, 41 (1953). Next, he runs into issues with *Indian Towing Co.*, as there the Court found maintenance of a lighthouse was not discretionary, even though there were only economic harms. *Indian Towing Co. v. United States*, 350 U.S. 61, 61 (1955). Third, he faces difficulty with *Rayonier*, where although there were only economic harms, the Court left open the possibility for liability. *Rayonier, Inc. v. United States*, 352 U.S. 315, 318 (1957). Lastly, his proposal overlooks how the Court in *Varig* found spot-checking an airplane was discretionary, even though many deaths resulted from the occurrence. *Varig*, 467 U.S. at 814.

Professor Krent's proposal, see *supra* note 90, fares little better against the dynamic case law: A circuit split has formed over whether the discretionary function exception protects agency action that is the subject matter of policy discretion or only agency action that involves policy discretion. For example, after an accident occurred during the EPA's cleanup of an abandoned chemical facility, the Third Circuit found the cleanup efforts were protected by the discretionary function exception because the entire cleanup effort was the subject matter of policy discretion. *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988) (“[I]t is irrelevant whether the government employee actually

These failures demonstrate that even academic proposals intended to clarify the discretionary function exception fail to keep up with the courts' dynamic interpretations of the discretionary function exception.<sup>92</sup> The discretionary function exception knot has been so twisted over the years that it cannot be easily untangled.

### 1. Plain Text State Law Standard

The plain text of the FTCA holds the United States liable in circumstances where a private person “would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*”<sup>93</sup> One description of the discretionary function exception would simply follow this language: if the government would be liable for its actions under state law, then it is liable under the FTCA. It is unclear, however, how this standard would interact with the numerous other considerations the Court has explored. For example, the Court potentially endorsed this state law standard in *Rayonier*, when the Court held the government could be liable if state law would impose liability “on private persons or corporations under similar circumstances.”<sup>94</sup> However, *Rayonier* did not involve other factors, such as an employee’s discretionary choice informed by policy considerations.<sup>95</sup> If these other factors had been included, the Court could have discussed whether the state law standard is always controlling for application of the discretionary function exception or

---

balanced economic, social, and political concerns in reaching his or her decision.”). By contrast, after a man was hit by a boat and killed while snorkeling in a lake in a state park, the Tenth Circuit found the Army Corps of Engineers’ decision not to warn swimmers of danger from boats was not protected by the discretionary function exception because there was no evidence of any policy consideration. *Boyd v. United States*, 881 F.2d 895, 898 (10th Cir. 1989) (“An alleged failure to warn swimmers of dangerous conditions in a popular swimming area does not implicate any social, economic, or political policy judgments with which the discretionary function exception properly is concerned.”).

<sup>92</sup> Notably, both Goldman’s and Professor Krent’s proposals are more aligned with the recent case law. Goldman’s distinction between economic and physical harm followed the two most recent FTCA cases: in *Gaubert*, the Court applied the discretionary function exception to federal financial regulators and barred liability for purely economic harms, *Gaubert*, 499 U.S. at 322–23, and in *Berkovitz*, the Court did not apply the discretionary function exception for the physical harm suffered by a three-month-old boy who contracted polio from a vaccine, *Berkovitz v. United States*, 486 U.S. 531, 548 (1988). Still, Goldman’s economic-versus-physical distinction did not hold up to the older case law from *Dalehite* through *Varig*. See *supra* note 91 and accompanying text.

Krent’s process-based proposal also followed *Berkovitz*: the *Berkovitz* Court had stated that if agency policies “allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion.” 486 U.S. at 546. However, a succeeding circuit split in the aftermath of *Berkovitz* foiled Krent’s proposal. See *supra* note 91.

<sup>93</sup> 28 U.S.C. § 1346(b)(1) (2012) (emphasis added).

<sup>94</sup> 352 U.S. at 318.

<sup>95</sup> *Id.* at 316 (only alleging “improper firefighting” as a cause of the damages, not an employee’s discretionary choice).

if it can be overshadowed by other factors (such as an employee's discretionary choice). Thus, although the state law standard is clear on its face, it has not been robustly tested against other factors, and the remaining ambiguity surrounding this potential interplay with other factors of the discretionary function exception clouds any potential application.

## 2. *Three-Part Threshold Test*

A more complex description of the discretionary function exception sets forth three requirements before the exception can be applied.<sup>96</sup> First, the Court must determine whether a uniquely governmental function was involved.<sup>97</sup> If so, then the Court must determine whether the employee had a choice in the matter, instead of being instructed to act in a specified manner.<sup>98</sup> Finally, the Court must determine whether the choice involved policy considerations, taking into account the employee's status and the subject matter of the decision.<sup>99</sup> If all of these elements are satisfied, a court can apply the discretionary function exception.

This three-part threshold test seemingly complies with judicial precedent because it incorporates the latest discretionary function language from *Berkovitz* with its requirement that an employee makes a voluntary judgment call based on considerations relating to public policy.<sup>100</sup> However, this test also includes elements that have been expressly rejected by the Supreme Court, such as the uniquely governmental function test<sup>101</sup> and the employee's status.<sup>102</sup> The proposal assumes that the discretionary function exception has largely swallowed the liability rule, and it thus boldly calls for the Court to reconsider its prior rejection of these factors to redefine the discretionary function exception more strictly.<sup>103</sup> But, as discussed above, the Court is unlikely to completely overturn its own precedent. This proposal is thus less than ideal, as it is impractical and would further undermine any consistency in how the FTCA is applied.

---

<sup>96</sup> See Amy M. Hackman, Note, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411, 445–46 (1997).

<sup>97</sup> *Id.* at 445–46.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See *Berkovitz v. United States*, 486 U.S. 531, 539 (1988) (“The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.”).

<sup>101</sup> This consideration was rejected in *Indian Towing Co.* See *supra* text accompanying notes 43–47 (discussing the Court's rejection of this proposed test).

<sup>102</sup> And this consideration was rejected in *Varig. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984); see also *supra* text accompanying notes 62–66 (discussing the Court's break with precedent to reject this potential test).

<sup>103</sup> Hackman, *supra* note 96, at 446.

### 3. *Common Law Negligence Test*

Third, another proposal finds that the text of the discretionary function exception contributes little beyond common law negligence principles and should simply be replaced by the same, even if the text remains unchanged.<sup>104</sup> This view, incidentally, aligns with the FTCA's legislative history, as expressed by Assistant Attorney General Shea in 1942: the discretionary function exception should not provide any additional protection beyond what the courts already provided through common law negligence principles.<sup>105</sup>

This innovative proposal's engineer, Professor William Kratzke, argues that the gradual ad hoc development of the discretionary function exception parallels the development of common law negligence and that, in practice, courts do not apply the discretionary function exception when they feel capable of evaluating the case on grounds similar to negligence.<sup>106</sup> Professor Kratzke further argues that, because of its similarity to common law negligence, any "inconsistency" in the application of the discretionary function exception "should simply be accepted," and that "[n]o more than that can be expected."<sup>107</sup>

This argument is less a proposal than an antiproposal: it is an argument for the status quo. While it may be tempting to "simply accept" a vague standard such as the discretionary function exception, such judicial complacency passes the responsibility of applying the discretionary function exception to the next judge on the bench. As previously discussed, this fails to address the potential for misuse of the exception. In other words, it supplies judges with too much discretion. Under this proposal, nothing would prevent a judge from expanding the exception such that it swallows the rule and eliminates the core purpose of the FTCA, thus restoring blanket sovereign immunity and rendering the hard-won FTCA moot.<sup>108</sup> Or, veering in the opposite direction, a judge could virtually eliminate the discretionary function exception by refusing to apply it at all, leaving the government vulnerable to endless lawsuits from private citizens

---

<sup>104</sup> See William P. Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law Negligence*, 60 ST. JOHN'S L. REV. 221, 222 (1986).

<sup>105</sup> See *supra* text accompanying note 21.

<sup>106</sup> See Kratzke, *supra* note 104, at 286 ("Quite simply, discretion disappears when a court feels capable of assessing the relative values of B, P, and L.").

<sup>107</sup> *Id.* at 287.

<sup>108</sup> The FTCA is a fragile legislative creation: it gestated in Congress for decades before it was finally passed, and it has never been successfully amended in its seventy-one-year existence. See Zillman, *supra* note 11.

and threatening essential government functions. When the stakes are this high, the law requires clearer guidance.

Finally, even if Professor Kratzke is correct that courts apply the discretionary function exception whenever they feel capable of applying common law negligence principles, then the Court should at least articulate a factor-based standard to provide guidance for judges, such as proposed in this Note.<sup>109</sup> A factor-based standard provides a broader and more comprehensive picture of how the discretionary function exception is applied. Yet, it is not overly broad: enumerated factors reign in judicial discretion by requiring judges to consider only those factors.

#### 4. *Eliminating the Discretionary Function Exception*

Lastly, a more recent proposal calls for Congress to simply eliminate the discretionary function exception entirely, arguing that common law negligence principles would do a better job of defining meritorious cases and advocating a bar on recovery for purely economic loss as an alternative means to limit potential government liability.<sup>110</sup> This argument, proposed by Jonathan Bruno, is based partially on empirical grounds: the government has enjoyed a 76.3% success rate in asserting the discretionary function exception post-*Gaubert*, even as it has invoked the exception nearly twice as often in the twenty-five years since *Gaubert* than in the forty-four years prior to *Gaubert*.<sup>111</sup> Bruno's concern is that the discretionary function exception is too broad a bar on potentially meritorious claims and that courts should at least evaluate a case on the merits before dismissing it via the discretionary function exception.<sup>112</sup>

This proposal simply substitutes one amorphous test for another. Common law negligence principles are themselves vaguely defined yet do not include several important considerations that courts have used in applying the discretionary function exception to FTCA claims. For example, the role of agencies and mandatory regulations in many FTCA claims will necessarily implicate an analysis of whether the governmental official had a choice under the *Berkovitz* test.<sup>113</sup> Further, the role of

---

<sup>109</sup> Such a standard may resemble Judge Learned Hand's formula for common law negligence. *See, e.g.,* Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand That Hides?*, 32 ARIZ. L. REV. 77 (1990) (describing how the Learned Hand formula involves a factor-based test of estimated cost of risks weighed against the cost to avoid the risks).

<sup>110</sup> Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 414–15 (2012).

<sup>111</sup> *See id.* at 430.

<sup>112</sup> *See id.* at 414 ("The discretionary function exception is largely redundant because most of the claims it now bars would ultimately fail on the merits, even absent immunity.").

<sup>113</sup> *See* *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (introducing choice-of-employee language).

government as a party to FTCA suits implicates concerns over separation of powers and protecting government's core functions; indeed, these concerns can be traced back to the legislative history of the original statute.<sup>114</sup> The concepts of common law negligence are simply not equipped to resolve these thorny issues.

Moreover, for reasons previously discussed, a bar on purely economic loss will not comport with existing precedent.<sup>115</sup> This murky legal concept has so far not featured in the Court's interpretation of the discretionary function exception—nor should it, as the exception is best clarified by streamlining prior precedent into factors.

#### IV. A FACTOR-BASED STANDARD FOR THE DISCRETIONARY FUNCTION EXCEPTION

The above analyses highlight the dilemma with the discretionary function exception: it is too multifaceted to be resolved by a simple proposal but too restricted by its own precedent to allow much room for creativity in more complex proposals. Therefore, the best way to clarify the discretionary function exception is not to add additional factors or to resurrect eliminated distinctions; rather, the courts should simply and clearly articulate the core guiding principles that the Court has been implicitly relying on. These guiding principles date back to the FTCA's legislative history<sup>116</sup> and have surfaced in the precedent as well.<sup>117</sup> Articulating these principles in the form of a factor-based standard is the superior approach, as it would eliminate confusion by cleanly breaking with contradictory precedent and elucidating the practical and policy concerns underlying the FTCA's application.

##### A. *Why Factors Are Necessary*

A factor-based standard allows courts to simultaneously cabin and preserve the discretionary function exception, fulfilling two primary purposes of the FTCA: allowing citizens to sue the government and protecting the government's vital operations from endless private litigation. Such a factor-based standard provides much-needed judicial guidance.

---

<sup>114</sup> See *supra* Part I.

<sup>115</sup> See *supra* note 91.

<sup>116</sup> See *supra* Part I.

<sup>117</sup> For example, the Court in *Varig* balanced the concern with judicial second-guessing of legislative policy-related decisions, the desire to protect efficient government operations, and the legislative intent to hold the government accountable for negligence. See *supra* text accompanying notes 61–66.

Without a factor-based standard, mixed judicial language creates uncertainty in how the discretionary function exception should be applied.

For instance, language from past holdings has resurfaced in later cases. In *Gaubert*, to take one example, the Court found that federal regulators were making “planning-level decisions” in justifying the application of the discretionary function exception,<sup>118</sup> resuscitating the operational–planning distinction from *Dalehite*.<sup>119</sup> However, later in the same opinion, the Court appeared to end the operational–planning distinction, finding that “[d]iscretionary conduct is not confined to the policy or planning level . . . . There [is] no suggestion that decisions made at an operational level could not also be based on policy.”<sup>120</sup> A factor-based standard clears up this confusion by providing relevant considerations while deliberately omitting irrelevant factors. In turn, this will allay concerns about the amount of discretion involved in applying the discretionary function exception.

The need for a factor-based test is especially relevant and pressing today because there have been recent developments hinting at the possibility of applying the FTCA to private litigation of foreign governments, in addition to the federal government. For example, Congress in 2016 voted to override President Barack Obama’s veto in passing a 9/11 Victims Bill, which allowed private citizens to directly sue the Saudi Arabian government, or any other foreign government, in federal court for any role played in deadly terrorist attacks on American soil.<sup>121</sup> As the FTCA increases in importance and scope, the need for clearer doctrine grows.

### B. *The Excluded Factors*

In creating a factor-based test, some factors should be excluded, including at least three factors that have been explicitly ruled out by prior FTCA precedent. First, the “uniquely governmental function” test was rejected in *Indian Towing Co.* and *Rayonier*,<sup>122</sup> so no matter what kind of conduct the government is performing, it can be the basis of an FTCA claim if the other requirements are met. Second, the “status of the

---

<sup>118</sup> *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

<sup>119</sup> See *supra* text accompanying notes 31–34 (discussing this distinction).

<sup>120</sup> *Gaubert*, 499 U.S. at 325–26.

<sup>121</sup> See Jennifer Steinhauer et al., *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016), [www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html](http://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html) [<https://perma.cc/WV4N-B2VH>].

<sup>122</sup> See *supra* text accompanying notes 43–47, 51 (discussing the Court’s rejection of this test).

employee” consideration was eliminated in *Varig*,<sup>123</sup> so the rank of the relevant government employee responsible for the alleged negligence is immaterial, unless it relates to another factor.<sup>124</sup> Finally, the operational–planning distinction was eliminated in *Gaubert*,<sup>125</sup> so the level of decisionmaking is also immaterial, unless it is relevant for another factor.<sup>126</sup> These factors: the uniquely governmental function test, the status-of-the-employee test, and the operational–planning test, have been left behind in the ever-changing judicial interpretation of the FTCA and should be retired for good. Omitting these outdated factors will clear up any confusion as to their relevance.

### C. The Proposed Factors

This Note proposes a test with three primary factors: (1) whether the government employee exercised a choice, (2) whether the choice related to policy considerations, and (3) whether the government employee’s conduct, if performed by a private person, would violate state law. In addition to these primary factors, courts must consider two other important concerns under this proposed test: (1) practical concerns over inhibiting essential government functioning<sup>127</sup> and (2) a desire to minimize sovereign immunity and allow private citizens to sue the government for wrongful or negligent acts by its agents, officers, or employees.<sup>128</sup>

#### 1. Whether the Government Employee Exercised a Choice

The first factor is whether the government employee exercised a choice, which stems from the similar *Berkovitz* requirement that the relevant government employee had a choice in the allegedly negligent act or omission.<sup>129</sup> While this requirement is broad, it interprets the word “discretionary” by focusing on whether the employee had any discretion. For example, an employee who was simply following orders would not be

<sup>123</sup> See *supra* text accompanying notes 62–66 (discussing *Varig*’s rejection of such a test).

<sup>124</sup> For example, it could relate to whether there was a choice relating to a policy consideration, or if the employee was simply following orders without a choice. See *infra* Section IV.C.1 for additional information on that proposed factor.

<sup>125</sup> See *supra* text accompanying notes 76–78 (discussing *Gaubert*’s rejection of this distinction).

<sup>126</sup> Like the status of the employee, see *supra* note 124, it may be relevant for whether there was a choice relating to a policy consideration, which this Note proposes as a factor in Section IV.C.1, *infra*.

<sup>127</sup> This has its roots in the FTCA’s legislative history. See *supra* Part I.

<sup>128</sup> This was the desire that led to the FTCA’s passage in the first place. See *supra* Part I.

<sup>129</sup> See *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (“[C]onduct cannot be discretionary unless it involves an element of judgment or choice [for the employee].”).

protected under the discretionary function exception because the employee lacked any discretion.<sup>130</sup>

One concern with adopting this factor is that if the courts strictly apply the choice requirement, it will incentivize government bureaucracies to provide less guidance, and potentially regulations, for their employees because fewer directives will mean less potential liability. For example, if enforcement was left to the discretion of individual employees due to lack of any concrete guidelines in enforcing statutes and regulations, then the government would never be liable because there would always be a discretionary act. However, this fear is unfounded for three reasons.

First, the government does not decide on policy as a means of avoiding liability—government functions to help resolve collective action problems.<sup>131</sup> So the government will not shirk enforcement of regulations merely to avoid liability if the regulations help play a role in government functioning. Second, while annual statistics of FTCA claims are not published, FTCA payouts are constrained by a prohibition on punitive damages and a reluctance to certify class actions.<sup>132</sup> Thus, the potential liability from the FTCA will not prevent government from functioning. Third, even if the government were to provide employees with less guidance in response to the choice requirement, the costs and benefits of regulation are far from clear; it would be misleading to characterize all deregulation as having a negative outcome.<sup>133</sup>

Thus, incorporating the *Berkovitz* choice requirement will do nothing more than align the discretionary function exception with existing precedent; fear of unintended consequences should not outweigh the judiciary's duty to clarify the scope of the law.

## 2. *Whether the Choice Is Related to Policy Considerations*

The second proposed factor is the nature of the choice; the employee's choice must be related to policy considerations.<sup>134</sup> These policy

---

<sup>130</sup> This also clarifies that the status of the employee is not independently relevant, especially in light of *Varig*'s rejection of that consideration. See *supra* text accompanying notes 62–66.

<sup>131</sup> See, e.g., Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 115 (2010).

<sup>132</sup> See Donald N. Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 LA. L. REV. 961, 980 & n.124 (1983).

<sup>133</sup> See Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. REG. 233, 233 (1991) (finding there are large efficiency costs from economic regulation).

<sup>134</sup> This is based on the Court's analysis in *Berkovitz*. See 486 U.S. at 539; see also *supra* text accompanying note 72.

considerations could be social, economic, or political in nature, as described in *Varig*.<sup>135</sup>

While this is another broad requirement, it tethers the employee's choice to a broader system, which functionally excludes individual employee decisions not reflective of the larger organization. For example, an employee who chooses not to do his job would not be protected under the discretionary function exception, because refusing to do one's job is not a policy-related decision. On the other hand, an employee deciding how to allocate sparse resources in performance of his job-related duties could be protected by the discretionary function exception because the resource-allocation decision would necessarily pertain to social, economic, or political considerations. Thus, the government is protected when its employees make decisions while completing their job-related duties, which preserves government functioning.

But the government can still be vicariously liable for the actions of rogue employees who act beyond the parameters of their job description—those choices are not policy related and thus are not protected by the discretionary function exception. This mirrors existing negligence law,<sup>136</sup> which is in the spirit of the FTCA, as it allows citizens to hold the government liable as citizens could do with a private party.<sup>137</sup> The policy-related choice requirement would therefore balance the competing concerns behind the FTCA: it would ensure that the government is liable for stepping beyond the line of its official duties while protecting essential government operations.

### 3. *Whether the Government's Conduct Violated Any State Law*

As reflected in the FTCA,<sup>138</sup> and as discussed in *Rayonier*,<sup>139</sup> the third proposed factor considers the existence of any state law violations resulting from the conduct of the federal government. If the employee's conduct violates state law in a manner such that a "private person" would be liable

---

<sup>135</sup> See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.").

<sup>136</sup> See, e.g., *Butler v. District of Columbia*, 417 F.2d 1150, 1151 (D.C. Cir. 1969) (affirming that a school's allocation of teachers in supervising rowdy students could not be considered negligent).

<sup>137</sup> As previously noted, the FTCA aims to hold government liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (2012).

<sup>138</sup> See *id.* § 1346(b)(1) (holding the government liable where its actions, if taken by "a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

<sup>139</sup> See *supra* text accompanying notes 49–50 (discussing the *Rayonier* Court's consideration of this factor).

for that conduct, that alone would be sufficient for an FTCA claim. This factor is fairly straightforward and consistent with precedent, such as *Rayonier*.<sup>140</sup>

4. *Protecting Government Functioning vs. Minimizing Sovereign Immunity*

The factor-based standard must also consider the policy guidelines underlying the FTCA. Two guidelines can be discerned from the FTCA's legislative history: (1) practical concerns over inhibiting essential government functioning, as balanced against (2) the desire to minimize sovereign immunity and allow private citizens to sue the government for wrongful or negligent acts by its agents, officers, or employees.<sup>141</sup>

On top of the delineated factors, these concerns should play a role in any application of the FTCA: to what extent will government liability impair essential government functioning? If liability will not cripple the government's essential functioning and the other FTCA elements are met, then the discretionary function exception should not protect the government because the entire purpose of the FTCA was to pull back the curtain of sovereign immunity as long as it did not impair essential government functioning.

\* \* \*

Thus, this proposed standard for the discretionary function exception has three factors: (1) whether the government employee exercised a choice, (2) whether that choice related to policy considerations, and (3) whether the government's conduct violated any state law. Concerns such as the status of the actor, whether the conduct was operational or planning in nature, and whether the conduct was governmental conduct are all irrelevant unless they speak to any of the three relevant factors. Additionally, this test balances potential deleterious effects on proper governmental functioning with the goal of deterring governmental negligence and restoring private parties who were injured by such negligence. Most importantly, the closed-ended, factor-based standard proposed here will prevent future judicial interpretation from adding unworkable and contradictory factors to the discretionary function exception. In this way, it will simultaneously cabin and preserve both the exception and the FTCA at large.

---

<sup>140</sup> See *supra* text accompanying notes 49–50.

<sup>141</sup> See *supra* Part I (discussing these concerns as related to the passage of the FTCA).

## CONCLUSION

The Court may be understandably reluctant to employ a factor-based standard for the discretionary function exception, hoping that Congress will instead clarify the scope of the exception through an amendment to the statutory text. But this wait-and-see approach is misguided. First, Congress has neglected to update the language of the discretionary function exception for the past seventy years, and there is no sign Congress plans to revisit the statute. Second, this congressional silence could potentially be interpreted as legislative approval of the judicial interpretation of the discretionary function exception. A factor-based standard aligned with existing case law would solidify this implicitly approved judicial interpretation without adding anything new. Third, a factor-based test would place limits on future judicial interpretation of the discretionary function exception; such limits are needed to prevent the government from being over- or underexposed to liability under the FTCA. Fourth, the FTCA will only grow in importance with an expanding government bureaucracy and an increasingly complex society, so this problem must be dealt with sooner rather than later. Finally, the potential for the FTCA to be applied to foreign governments, in addition to the United States government, only raises the stakes for the discretionary function exception: a clearer rule will increase predictability in foreign affairs by setting firmer limits on potential liability. Without this predictability, the United States risks alienating important allies and undermining the broader concept of diplomatic immunity. For these reasons, the Court should adopt the factor-based standard proposed in this Note.

