

# TORTIOUS CONSTRUCTIONS: HOLDING FEDERAL LAW ENFORCEMENT ACCOUNTABLE BY APPLYING THE FTCA'S LAW ENFORCEMENT PROVISIO OVER THE DISCRETIONARY FUNCTION EXCEPTION

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*Courts are reluctant to decide cases alleging abuses by federal law enforcement. This judicial reluctance is largely attributed to the principle of sovereign immunity, which holds that the United States—and therefore the federal government—cannot be sued. However, the sovereign can of its own accord consent to be sued: The federal government provided that consent in 1946 by enacting the Federal Tort Claims Act (FTCA), which allows tort suits against the United States. Specifically, a provision of the FTCA—the law enforcement proviso—explicitly states that law enforcement officers are amenable to suit for certain intentional torts. Nevertheless, courts have restricted the proviso's efficacy through narrow interpretations and undue deference to competing FTCA provisions such as the discretionary function exception.*

*This Note argues that the law enforcement proviso must be interpreted more broadly to properly hold government officers accountable. It takes on the project of sifting through the FTCA's complexity and history to articulate why the correct doctrinal approach is to apply the proviso exclusively, superseding any competing provision within the FTCA. It delineates the current spectrum of approaches among the circuit courts, finding that only the Eleventh Circuit has adopted the advocated approach. The Note then justifies this approach under statutory interpretation principles and tort law theory while also considering the practical consequences of a disappearing Bivens remedy. Properly understood, the complexity of the FTCA and the barrier of sovereign immunity fade away: For government activity as intrusive and forceful as law enforcement, a court of law simply must have the ability to hold officers accountable.*

INTRODUCTION .....	1944
I. THE FTCA'S MECHANISM FOR HOLDING FEDERAL LAW ENFORCEMENT ACCOUNTABLE .....	1948
A. <i>Intentional Torts Under the FTCA and Enactment of the Law Enforcement Proviso</i> .....	1949

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1.	<i>The FTCA Generally</i> .....	1949
2.	<i>The Intentional Torts Exception</i> .....	1951
3.	<i>The Law Enforcement Proviso</i> .....	1953
B.	<i>The Circuit Courts' Narrowing of the Proviso's Reach</i> .....	1955
C.	<i>Millbrook: The Court's Proviso Interpretation</i> .....	1957
D.	<i>Overdue Recognition of Statutory Intent for Broad Officer Liability</i> .....	1960
II.	THE DISCRETIONARY FUNCTION EXCEPTION AS AN OBSTACLE TO THE PROVISIO .....	1964
A.	<i>The Discretionary Function Exception and the Separation of Powers</i> .....	1965
1.	<i>Defining Discretionary Functions Within Separation of Powers</i> .....	1965
2.	<i>Applying the Discretionary Function Exception to the Tortious Acts of Federal Law Enforcement Officers</i> .....	1970
B.	<i>The Collision Between the Law Enforcement Proviso and the Discretionary Function Exception</i> .....	1972
III.	THE LAW ENFORCEMENT PROVISIO SHOULD SUPERSEDE DISCRETIONARY FUNCTIONS .....	1977
A.	<i>Statutory Construction Tenets and Immunity Jurisprudence Support Construing the Proviso Broadly</i> .....	1978
B.	<i>The Proviso's Exclusivity Provides Doctrinal Clarity and Statutory Congruence Instead of Overlap</i> .....	1983
1.	<i>The Underappreciated Import of the Proviso Being Confined to Intentional Tort</i> .....	1983
2.	<i>Exclusive Application of the Proviso Provides Clarity for Each Provision's Role</i> .....	1987
C.	<i>The Proviso's Increasing Importance in Law Enforcement Accountability</i> .....	1991
	CONCLUSION .....	1994

## INTRODUCTION

Chaidez Campos brought her one-year-old child along to her appointment with a federal probation officer.<sup>1</sup> Shortly after her arrival, a Customs and Border Protection (CBP) officer separated Ms. Campos from her child.<sup>2</sup> Ms. Campos presented proof of her accurate

<sup>1</sup> See *Campos v. United States*, 888 F.3d 724, 728 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1317 (2019).

<sup>2</sup> See *id.*

and lawful temporary resident status to the CBP officer, but the officer nevertheless took her into custody and transferred her to the border where she was detained, searched, and deported to Mexico that same day.<sup>3</sup> Ms. Campos remained in Mexico separated from her child for two months.<sup>4</sup>

Ms. Campos sued alleging the intentional torts of false arrest and false imprisonment. She argued first that the CBP officer should have known her documents established her legal presence in the United States,<sup>5</sup> and second that at a certain point, the detention was willful and done with knowledge of its impropriety.<sup>6</sup> The Fifth Circuit dismissed Ms. Campos's case for lack of jurisdiction.<sup>7</sup> Even in such a situation of apparent egregious negligence, if not abuse, the court held that Ms. Campos's plight "in no respect sinks to the necessary level" to warrant legal recourse.<sup>8</sup>

Incidents like this demand examining the supposed role of tort law in remedying these infringements on basic rights by federal law enforcement. Typically when a tort occurs, the rule of law provides that the tortfeasor must compensate the victim. However, when it comes to holding the government accountable—particularly federal law enforcement officers—that basic understanding falls apart. Courts are loath to adjudicate suits against the federal government at all, let alone impose liability. Despite legislative mechanisms that aim to overcome this reluctance, courts remain overly stingy, leaving many aggrieved citizens without a remedy.

This judicial reluctance is largely attributed to the principle of sovereign immunity, which holds that the United States as a sovereign entity—and therefore the federal government—is immune from suit. An entrenched and unassailable concept far predating the founding of this nation itself, sovereign immunity commands such reverence among judges that as a rule, interpretive ambiguities must be read in favor of immunity.<sup>9</sup>

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<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 732 ("Campos's basic point is that the [Employment Authorization Document] is *unequivocal proof* of the right to remain in the United States." (emphasis added)).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 728, 738.

<sup>9</sup> See *McMahon v. United States*, 342 U.S. 25, 27 (1951) ("[S]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign."); see also *Price v. United States*, 174 U.S. 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.").

However, the sovereign can, of its own accord, consent to be sued. The United States provided that consent in 1946 by enacting the Federal Tort Claims Act (FTCA).<sup>10</sup> The FTCA allows tort suits against the United States that track state common law torts, from negligent car accidents involving government vehicles to intentional assault and battery by federal law enforcement.<sup>11</sup> While the FTCA's coverage runs the gamut of tort law, this Note focuses on *intentional* torts: A provision of the FTCA, the law enforcement proviso, specifically states that law enforcement officers like the CBP officer that detained Ms. Campos are amenable to suit for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."<sup>12</sup>

Nevertheless, the FTCA is not a blanket waiver and preserves the government's immunity in a variety of areas. The complexity of both the FTCA itself and the doctrine it has spawned make it difficult to determine whether immunity in any given case is preserved or waived. Indeed, despite the government's consent, courts remain hesitant in applying the law enforcement proviso to entertain suits against federal law enforcement officers. Most notably, the FTCA retains immunity under the aptly named discretionary function exception for torts arising out of any governmental action involving policy discretion.<sup>13</sup> The exception is difficult to apply due to the nebulous nature of what constitutes policy discretion, and this lack of clarity generates inconsistency in the application of immunity. At times, though it may appear clear that a law enforcement officer's intentional tort falls under the law enforcement proviso, courts still see the defendant's conduct as falling within the penumbra of discretionary immunity.

This Note argues that the law enforcement proviso must be interpreted more broadly to properly hold government officers account-

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<sup>10</sup> See *Dalehite v. United States*, 346 U.S. 15, 24 (1953) ("The Federal Tort Claims Act was passed by the Seventy-ninth Congress in 1946 as Title IV of the Legislative Reorganization Act . . . . It was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."); see also Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1209–10 (2001) (arguing that sovereign immunity is found nowhere in the text of the Constitution but instead is a modern judicial doctrine created by courts to respond to "contemporary functional considerations").

<sup>11</sup> Compare *Kosak v. United States*, 465 U.S. 848, 855 (1984) ("One of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault."), with *Millbrook v. United States*, 569 U.S. 50, 57 (2013) (holding that an inmate's allegations of assault and battery resulting from sexual abuse by federal prison guards are cognizable under the FTCA).

<sup>12</sup> 28 U.S.C. § 2680(h) (2018).

<sup>13</sup> See 28 U.S.C. § 2680(a).

able. It takes on the project of sifting through the FTCA's complexity and history to articulate and justify why the correct doctrinal approach is to apply the proviso exclusively, superseding competing provisions within the FTCA such as the discretionary function exception. Properly understood, the complexity of the FTCA and the barrier of sovereign immunity fade away: For law enforcement activity as intrusive and forceful as intentional torts, a court of law must follow Congress's mandate to hold federal officers accountable. Given recent signs that situations like that faced by Chaidez Campos might become more commonplace,<sup>14</sup> along with shrinking alternative mechanisms for redress,<sup>15</sup> a proper reading of the law enforcement proviso is more urgent and necessary than ever.

Part I explains the current doctrinal state of the law enforcement proviso and situates it within the statutory framework of the FTCA. It provides an overview of the FTCA's history as well as the legislative context of the FTCA section in which the proviso is located. This is necessary for understanding the proviso's purpose, and why courts' narrow constructions of the proviso contradict that purpose. Part I then explores how the Supreme Court rejected narrow constructions of the proviso in *Millbrook v. United States*.<sup>16</sup> While the Court's simple, plain text approach produced a relatively restrained opinion, Part I concludes by arguing that the full import of *Millbrook* condones a broad interpretation of the proviso going forward.

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<sup>14</sup> See Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html> (discussing the deployment of CBP officers normally stationed at the border to various cities as part of an immigration enforcement crackdown); cf. Thomas Gibbons-Neff, Eric Schmitt & Helene Cooper, *Aggressive Tactics by National Guard, Ordered to Appease Trump, Wounded the Military, Too*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/national-guard-protests.html> (describing a post-engagement investigation for the impropriety of the National Guard being deployed to the District of Columbia as part of a crackdown on protests); Garrett M. Graff, *The Story Behind Bill Barr's Unmarked Federal Agents*, POLITICO (June 5, 2020, 8:08 AM), <https://www.politico.com/news/magazine/2020/06/05/protests-washington-dc-federal-agents-law-enforcement-302551> (detailing the post-9/11 proliferation of federal law enforcement and how the "list of crimes these agents and officers collectively enforce is endless" while "oversight reins have loosened"); Jonathan Levinson, Conrad Wilson, James Doubek & Suzanne Nuyen, *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NPR (July 17, 2020, 1:04 PM), <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland> (describing how "[f]ederal law enforcement officers have been using unmarked vehicles to drive around downtown Portland and detain protesters").

<sup>15</sup> See *infra* Section III.C (discussing the Supreme Court's recent limiting of the *Bivens* doctrine, which provides a damages remedy when federal officers commit constitutional violations).

<sup>16</sup> 569 U.S. 50.

Part II examines the FTCA's discretionary function exception as the major obstacle frustrating application of the law enforcement proviso. It first explains the purpose of the exception as a means of protecting and animating separation of powers and subsequently explores why the exception is difficult to apply. It then explains why that difficulty can lead the exception to subsume other provisions of the FTCA like the law enforcement proviso. The interaction between the exception and the proviso presents an especially thorny problem, and Part II surveys the myriad ways that circuit courts have attempted to compromise.

Part III articulates why the proviso should be applied exclusively over the discretionary function exception. It first explains as a matter of statutory construction why exclusive application of the proviso is proper. It then mitigates concerns of upending the existing statutory scheme by showing first that the mechanism of intentional tort naturally limits the proviso's reach, and second that an intentional tort analysis does not implicate the discretionary function exception. Then, Part III describes how the alternative accountability mechanism of a constitutional damages claim via *Bivens* actions is being relegated to obsolescence, which warrants giving the law enforcement proviso broader coverage to compensate.

## I

### THE FTCA'S MECHANISM FOR HOLDING FEDERAL LAW ENFORCEMENT ACCOUNTABLE

The primary mechanism to hold federal law enforcement accountable is a provision of the FTCA known as the "law enforcement proviso."<sup>17</sup> The proviso allows for damages suits against the United States for claims arising out of eight specific intentional torts committed by federal law enforcement officers. However, despite the clear directive of its plain text and legislative purpose, courts continue to read the proviso narrowly to limit the federal government's liability.

This Part first explains the basic mechanism of the FTCA, its law enforcement proviso, and the legislative history that motivated its enactment. It then examines how courts have limited the proviso's application, culminating in the 2013 Supreme Court case *Millbrook v. United States*,<sup>18</sup> which adopted a relatively expansive reading of the proviso. Finally, it situates the holding of *Millbrook* within the

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<sup>17</sup> See 28 U.S.C. § 2680(h) (listing the intentional torts for which immunity is not waived for federal employees).

<sup>18</sup> 569 U.S. 50.

broader history of sovereign immunity, arguing that the full implication of *Millbrook* is to vindicate the liability of government officers as a core principle underlying the FTCA. Understood properly, *Millbrook* implores lower courts to waive immunity by applying the proviso broadly going forward.

A. *Intentional Torts Under the FTCA and Enactment of the Law Enforcement Proviso*

This Section provides the necessary background to understand how the proviso functions within the FTCA: as an exclusive avenue to government liability, subject to a variety of specifications and limitations.

1. *The FTCA Generally*

The FTCA is a grant of jurisdiction: Because of sovereign immunity, courts simply do not have authority to hear claims against the United States without the FTCA and like statutes.<sup>19</sup> The FTCA thus allows courts to hear cases they would otherwise not be able to and exposes the government to liability.<sup>20</sup> The FTCA does not guarantee a finding of liability or ultimate compensation, but merely allows courts to adjudicate cases in the first place. Furthermore, the FTCA is not a blanket waiver of immunity; the waiver is strictly limited to its terms, and also codified are a variety of exceptions where the government nevertheless *withholds* consent.<sup>21</sup> The interpretive challenge in any FTCA case is thus determining the *extent* of the government's consent to suit within the FTCA's statutory structure. Because of the FTCA's complexity, the operative question is usually whether immunity is waived or not rather than ultimate liability on the merits.<sup>22</sup> To that end, the Supreme Court has admonished that interpretations for

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<sup>19</sup> See *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“[T]he terms of [the government’s] consent to be sued in any court define that court’s jurisdiction to entertain the suit.”). See generally 14 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 3656 (4th ed. 2020) (“In a series of federal statutes, . . . Congress successively has widened the exceptions to the doctrine of sovereign immunity and broadened the consent of the United States to be sued. Two major examples of legislative exceptions to the sovereign immunity doctrine are the Tucker Act and the [FTCA].” (footnote omitted)).

<sup>20</sup> See generally WRIGHT & MILLER, *supra* note 19, § 3654 (discussing how sovereign immunity acts as a jurisdictional bar).

<sup>21</sup> See 28 U.S.C. § 2680 (enumerating various exceptions to the government’s consent to be sued).

<sup>22</sup> Cf. WRIGHT & MILLER, *supra* note 19, § 3658 (“As generally is the case with waivers of sovereign immunity, the plaintiff bears the burden of proving that the Government has given its consent to suit.”).

waivers of immunity “cannot be implied but must be unequivocally expressed.”<sup>23</sup>

In the case of the FTCA, the United States has waived sovereign immunity to the extent of allowing individuals to pursue tort claims. The FTCA grants federal courts exclusive jurisdiction to hear certain common law tort suits seeking money damages against the federal government.<sup>24</sup> Critically, the FTCA piggybacks off of state tort law in that the federal government’s consent to suit is only for claims that would exist against a private individual in the state of the claim’s occurrence.<sup>25</sup> The FTCA does not cover constitutional violations or grant injunctive relief.<sup>26</sup> Additionally, claims must arise from an action or failure to act of an employee functioning within the scope of their government employment.<sup>27</sup> If a court deems that a tortfeasor employed by the government was acting outside of their official duties, it must dismiss the case for want of jurisdiction against the United States.<sup>28</sup>

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<sup>23</sup> *United States v. King*, 395 U.S. 1, 4 (1969).

<sup>24</sup> *See* 28 U.S.C. § 1346(a)(2)–(b)(1) (2018) (explaining the basic grant of jurisdiction to federal courts to hear negligence suits against government employees).

<sup>25</sup> *See id.* § 1346(b)(1) (“[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” (emphasis added)); *see also 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, but shall not be liable for interest prior to judgment or for punitive damages.”); *United States v. Muniz*, 374 U.S. 150, 153 (1963) (“Whether a claim could be made out would depend upon whether a private individual under like circumstances would be liable under state law . . .”).

<sup>26</sup> *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477 (1994) (“[This] constitutional tort claim is not ‘cognizable’ under § 1346(b) because . . . § 1346(b) does not provide a cause of action for such a claim.”); *Hatahley v. United States*, 351 U.S. 173, 182 (1956) (“Since the District Court did not possess the power to enjoin the United States, neither can it enjoin the individual agents of the United States over whom it never acquired personal jurisdiction.”).

<sup>27</sup> *See* 28 U.S.C. § 1346(b)(1) (prescribing the FTCA’s jurisdiction “for injury or loss of property, or personal injury or death caused by the negligent or wrongful *act or omission* of any employee of the Government *while acting within the scope of his office or employment*” (emphases added)); *see also* *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425–29 (1995) (describing the functioning of a scope-of-employment certification within the FTCA and ultimately confirming the certification’s judicial reviewability). *See generally* WRIGHT & MILLER, *supra* note 19, § 3658 (describing the various qualifications to the FTCA’s waiver of immunity).

<sup>28</sup> *See* 28 U.S.C. § 1346(b)(1); *supra* note 27 and accompanying text; *see also* *M.D.C.G. v. United States*, 956 F.3d 762, 765 (5th Cir. 2020) (finding that CBP agent’s horrific, abusive “conduct was outside the scope of his employment, and accordingly, we AFFIRM the district court’s dismissal of [the plaintiffs’] claims based on [the CBP agent’s] conduct”).



The FTCA is the exclusive remedy for common law tort claims arising out of federal government conduct.<sup>29</sup> That is, if a court has jurisdiction over the alleged FTCA claims, individual tort liability of the employee is precluded<sup>30</sup> and the United States is the sole defendant. This also benefits plaintiffs who would prefer to litigate against a “financially reliable defendant” rather than the personal coffers of individual employees.<sup>31</sup> The FTCA therefore serves a dual function: “both to allow recovery by people injured by federal employees or by agents of the Federal Government, and, at the same time, to immunize such employees and agents from liability for negligent or wrongful acts done in the scope of their employment.”<sup>32</sup>

## 2. *The Intentional Torts Exception*

Even within the FTCA’s specific waiver for common law tort damages suits, there remain codified exceptions that nevertheless render the United States immune. The intentional torts exception is one important example.<sup>33</sup> This exception enumerates eleven intentional torts which are outside the ambit of the FTCA; that is, the government does *not* waive immunity for “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”<sup>34</sup>

The intentional torts exception has been part of the FTCA since its enactment in 1946, but much like other provisions of the FTCA, scant legislative history exists for gleaning its original purpose.<sup>35</sup> The

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<sup>29</sup> See 28 U.S.C. § 2679(b)(1) (2018) (“The remedy against the United States provided by section [ ] 1346(b) . . . is exclusive. . . . Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.”).

<sup>30</sup> The FTCA does explicitly preserve tort claims against government employees in their individual capacities in two areas: constitutional violations and violations of statutes that otherwise grant an individual cause of action. See 28 U.S.C. § 2679(b)(2)(A)–(B); see also *infra* Section III.C. See generally WRIGHT & MILLER, *supra* note 19, § 3658 (discussing the exclusivity of the FTCA and its preclusive effect). Regardless, this Note is concerned with the United States’ liability and argues that the United States should be liable irrespective of additional or concurrent liability in an individual capacity.

<sup>31</sup> See *Lamagno*, 515 U.S. at 422 (“Ordinarily, scope-of-employment certifications occasion no contest. While the certification relieves the employee of responsibility, plaintiffs will confront instead a financially reliable defendant.”).

<sup>32</sup> *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 80 (2d Cir. 2005).

<sup>33</sup> See 28 U.S.C. § 2680(h) (2018) (excepting various intentional torts from the FTCA’s common law tort liability).

<sup>34</sup> *Id.*

<sup>35</sup> *Cf.* *United States v. Wong*, 575 U.S. 402, 412 (2015) (“Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here.”); see also Jeff L. Lewin, *The Tail Wags the Dog: Judicial Misinterpretation of the*

most helpful piece of evidence is a statement by Alexander Holtzoff who was a Special Assistant to the Attorney General.<sup>36</sup> In advocating for passage of the FTCA and its provisions, he explained that the intentional torts exception concerns the “type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts . . . .”<sup>37</sup>

That intuition proved wrong. The early 1970s “witnessed a remarkable series of events urgently demonstrating the need for increased government responsibility for the tortious and unconstitutional acts of its officials.”<sup>38</sup> Instead of trepidation regarding exaggerated claims, the Supreme Court decided the landmark case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which involved Federal Bureau of Narcotics agents committing a warrantless search without probable cause and using excessive force, all in contravention of the Fourth Amendment.<sup>39</sup> The Court held for the first time that a plaintiff is entitled to money damages when a federal agent violates the plaintiff’s rights under the Federal Constitution.<sup>40</sup> Part of the Court’s decision to create a constitutional damages remedy in *Bivens* reflected the prevailing sentiment that such claims of government abuse were not being sufficiently redressed.<sup>41</sup> However, unlike FTCA

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*Punitive Damages Ban in the Federal Tort Claims Act*, 27 WM. & MARY L. REV. 245, 250 (1986) (“The legislative history of the FTCA includes . . . materials relating to various bills concerning tort claims against the government that had been introduced during the twenty years preceding the FTCA’s enactment. As a general rule, the thoughts expressed by members of earlier Congresses are not probative . . . .”); Dianne Rosky, *Respondent Inferior: Determining the United States’ Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. DAVIS L. REV. 895, 935–36, 936 n.139 (2003) (describing how “[t]he legislative history of the original FTCA is likewise ambiguous as to what law Congress intended to govern the scope of government employment under Section 1346(b)” and more generally that previous attempts at legislation further obfuscate the appropriate history (citing Irvin M. Gottlieb, *The Federal Tort Claims Act – A Statutory Interpretation*, 35 GEO. L.J. 1, 19 (1947))); 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, 690 (“There is little pertinent legislative history of title IV of the Legislative Reorganization Act of 1946, the provisions that finally enacted the FTCA.”).

<sup>36</sup> *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Comm. on the Judiciary*, 76th Cong. 33 (1940).

<sup>37</sup> *Id.* at 39.

<sup>38</sup> Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 498 (1976).

<sup>39</sup> See 403 U.S. 388, 389–90 (1971).

<sup>40</sup> *Id.* at 397 (“[W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the [Fourth] Amendment.”).

<sup>41</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (explaining the “different approach” that was “the prevailing law when [*Bivens* was] decided” as “the Court assumed it to be a proper judicial function to ‘provide such remedies as are necessary to make

liability, *Bivens* claims do not directly implicate the government itself as under *Bivens*, the federal agents are the defendants and liable only in their individual capacities.<sup>42</sup>

This new constitutional remedy against individual officers was nevertheless insufficient. Just two years after *Bivens*, the Senate report supporting amendment of the FTCA described *Bivens* as “a rather hollow remedy” given that “[t]he injustice of [the intentional torts] provision should be manifest” in continuing to block common torts that may not rise to a violation at the constitutional level.<sup>43</sup> Additionally, even though *Bivens* was available as a potential accountability mechanism, federal officers too readily established defenses to escape liability, frustrating the ultimate vindication of *Bivens* claims on the merits.<sup>44</sup> Furthermore, *individual* officer liability was seen as insufficient, because even if found liable, federal officers were unlikely to provide reasonable money damages in their individual capacities.<sup>45</sup>

### 3. *The Law Enforcement Proviso*

As a result of that prevailing sentiment, in 1974 an amendment to the intentional torts exception was enacted: the law enforcement proviso.<sup>46</sup> The proviso added to the end of the intentional torts exception that the FTCA’s consent to suit “shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of pro-

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effective’ a statute’s purpose” by “imply[ing] causes of action not explicit in the statutory text itself” (citation omitted)); *Carlson v. Green*, 446 U.S. 14, 21 (1980) (“[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose.” (emphasis added)); see also Boger, Gitenstein & Verkuil, *supra* note 38, at 498–99 (elaborating on various public scandals resulting from constitutional violations by federal agents in the years preceding *Bivens*); Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1138–40 (2014) (detailing the early expansion of *Bivens* doctrine); cf. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (concurring in a judgment declining to recognize a *Bivens* action and writing separately to assert that “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action”).

<sup>42</sup> See James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 572 (2020) (“Congress did not, however, accept governmental liability for *Bivens* claims, leaving the individual liability model in place for constitutional torts.”).

<sup>43</sup> S. REP. NO. 93-588, at 3 (1973).

<sup>44</sup> See, e.g., Rosky, *supra* note 35, at 940–41 (“This concern was based on the recognition that the Supreme Court’s decision in *Bivens* . . . provided ‘a rather hollow remedy’ given that individual officers can readily establish good faith defenses, and are in any event often unable to pay even reasonable money damages.”).

<sup>45</sup> See *id.*; *supra* notes 31–32 and accompanying text. See generally Kent, *supra* note 41, at 1171–73 (discussing specifically the history of how “robust immunity rules tightly limited money damages suits” including within the context of *Bivens* actions).

<sup>46</sup> See Act to Amend Reorganization Plan Numbered 2 of 1973, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974) (codified as amended at 28 U.S.C. § 2680(h) (2018)).

cess, or malicious prosecution” for “acts or omissions of investigative or law enforcement officers.”<sup>47</sup> The law enforcement proviso therefore opened the government to suit for most—six of the eleven—torts originally excepted under the FTCA’s intentional torts exception when committed by federal law enforcement. In this way, it functions as an exception to the exception for intentional torts and “should be viewed as a counterpart to the *Bivens* case and its progeny [sic]” rather than a replacement.<sup>48</sup>

The impetus for the proviso was two mistaken drug enforcement raids on the wrong homes the night of April 23, 1973, in Collinsville, Illinois.<sup>49</sup> Both tell a similar story: in one of the raids, the Giglotta household was held at gunpoint in their bedroom while agents ransacked their house.<sup>50</sup> The Giglotts were thrown facedown onto their bed and had their hands tied behind their backs as agents screamed obscenities at them.<sup>51</sup> After about fifteen minutes of Mr. Giglotta trying to understand the situation with a pistol to his head, one of the agents walked into the bedroom and declared: “Well, we have the wrong people.”<sup>52</sup> The Giglotts were unceremoniously untied and the federal agents left without explanation, leaving smashed furniture and strewn personal effects in their wake.<sup>53</sup> The second raid took place nearby at the Askew household while the Askews were eating dinner around the kitchen table.<sup>54</sup> Mrs. Askew fainted after being threatened by a shabbily dressed agent who appeared in the living room window while Mr. Askew desperately tried to hold the kitchen door closed in panicked confusion.<sup>55</sup> After rummaging through the house, the agents confessed to acting upon a “bad tip” and left the Askews with a number to call.<sup>56</sup> In the fallout of the raid, Mrs. Askew required hospitalization and Mr. Askew could not keep up with his business.<sup>57</sup> The FTCA at the time left the victims of the Collinsville raids without recourse due to the intentional torts exception; Congress acted swiftly

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<sup>47</sup> See 28 U.S.C. § 2680(h) (maintaining the same language since the 1974 amendment).

<sup>48</sup> S. REP. NO. 93-588, at 3 (1973).

<sup>49</sup> Boger, Gitenstein & Verkuil, *supra* note 38, at 499–500; see also 2 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 13.06 (2019) (attributing the proviso’s enactment to the widespread publicity of the Collinsville raids).

<sup>50</sup> See Rosky, *supra* note 35, at 940.

<sup>51</sup> See *id.*

<sup>52</sup> See Boger, Gitenstein & Verkuil, *supra* note 38, at 500–01.

<sup>53</sup> See *id.* at 501.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.* at 504.

in response.<sup>58</sup> Enactment of the law enforcement proviso was meant to provide an “effective legal remedy against the Federal Government for the actual physical damage, much less the pain, suffering and humiliation to which the Collinsville families ha[d] been subjected.”<sup>59</sup> By adding the proviso *within* the intentional torts exception, Congress abrogated the exception’s reasoning as it relates to federal law enforcement: law enforcement abuses are *not* too easily exaggerated and should be squarely within the ambit of the FTCA.<sup>60</sup>

### B. *The Circuit Courts’ Narrowing of the Proviso’s Reach*

Despite legislative intention to hold federal law enforcement accountable, courts have hesitated to do so by reading the proviso narrowly. The severity of the Collinsville raids that inspired congressional action has ironically been the proviso’s greatest obstacle: courts justify a narrow application of the proviso by emphasizing its founding context of extreme abuse.<sup>61</sup> By interpreting the clause as remedying only abuses during certain *actions* such as the execution of a raid, the circuit courts have limited the fact patterns in which the proviso has been implicated.

The Fifth Circuit, for example, has stated that the “law enforcement proviso waives sovereign immunity . . . *in situations like* the Collinsville raids when relief was otherwise unavailable.”<sup>62</sup> Both the Third and Fifth Circuits also read the law enforcement proviso “as addressing the problem of intentionally tortious conduct occurring *in the course of* the specified government activities.”<sup>63</sup> Thus, in order for the proviso to apply, the federal officer must have “committed an intentional tort *while* executing a search, seizing evidence, or making an arrest.”<sup>64</sup> The specified actions are drawn from the proviso’s defini-

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<sup>58</sup> See *id.* at 508–09 (describing how the FTCA at the time “permitted recovery against the government for the *negligent* acts of its employees” which meant that “the federal treasury could not be tapped for an illegal invasion of a citizen’s privacy”).

<sup>59</sup> S. REP. NO. 93-588, at 2 (1973).

<sup>60</sup> See *supra* notes 35–37 and accompanying text (explaining that the intentional torts exception’s purpose was to exclude the kind of tort that could be easily exaggerated and would be difficult to defend against).

<sup>61</sup> See S. REP. NO. 93-588, at 3 (“[I]nnocent individuals *who are subjected to raids of the type* conducted in Collinsville, Illinois, will have a cause of action against the individual Federal agents and the Federal Government.” (emphasis added)).

<sup>62</sup> *Sutton v. United States*, 819 F.2d 1289, 1298 (5th Cir. 1987) (emphasis added).

<sup>63</sup> *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986) (emphasis added); see *Cross v. United States*, 159 F. App’x 572, 576 (5th Cir. 2005) (“[The proviso] must at minimum charge the government with wrongdoing based on ‘acts or omissions of investigative or law enforcement officers’ *while they are engaged in investigative or law enforcement activities.*” (quoting *Emp’rs Ins. v. United States*, 815 F. Supp. 255, 259 (N.D. Ill. 1993))).

<sup>64</sup> *Pooler*, 787 F.2d at 872 (emphasis added).

tion of law enforcement officer which includes “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests.”<sup>65</sup> Similarly, the Ninth Circuit opines that the proviso “was intended to provide remedies for victims of law enforcement *abuses*, not for the routine and lawful exercise of law enforcement privileges.”<sup>66</sup> That distinction is reminiscent of the intentional torts exception’s fear of opening the door to frivolous claims.<sup>67</sup> The Ninth Circuit’s slightly broader approach holds that the proviso “limits the government’s waiver of its immunity to intentional torts committed *in the course of* investigative or law enforcement activities,” without further enumeration.<sup>68</sup> The court also considered the possibility that legislative history *could* support an interpretation not tied specifically to the course of law enforcement activity, but rather that federal law enforcement should be held liable for intentional torts that arise in *any* context within the scope of employment.<sup>69</sup> The Ninth Circuit nevertheless adopted the former, narrower interpretation which it justified by citing the general principle that ambiguities should be construed “in favor of immunity.”<sup>70</sup>

The Fourth Circuit on the other hand has broken from the consensus and declined to restrict the proviso to torts occurring in the course of specific actions.<sup>71</sup> A concurring opinion pointed out that doing so shifts the focus of the analysis to whether the federal law

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<sup>65</sup> 28 U.S.C. § 2680(h) (2018).

<sup>66</sup> *Tekle v. United States*, 511 F.3d 839, 852 (9th Cir. 2007) (citation omitted).

<sup>67</sup> The distinction is questionable because it implies either that law enforcement agents may illegally infringe on individual rights without recourse, or that a fact pattern must be severe enough to demonstrate likelihood of success on the merits in order for a court to merely have jurisdiction. Neither is tenable. *See Boger, Gitenstein & Verkuil, supra* note 38, at 530–32 (discussing interpretations and how “[a] better reading would make the government responsible whenever overzealous officers act tortiously against a citizen”).

<sup>68</sup> *Orsay v. U.S. Dep’t of Justice*, 289 F.3d 1125, 1135 (9th Cir. 2002) (emphasis added).

<sup>69</sup> *Id.* at 1135 n.4 (stating that the legislative history “indicates that the federal government’s waiver of its sovereign immunity might reach more than federal law enforcement abuses, and might apply whenever investigative or law enforcement officers commit an enumerated tort while acting within the scope of their employment”).

<sup>70</sup> *Id.* at 1133 (“[A]ny ambiguities in the scope of the government’s waiver must be construed in favor of immunity.” (citing *United States v. Williams*, 514 U.S. 527, 531 (1995))). As mentioned earlier, this pro-sovereign presumption is part of the entrenchment of the doctrine of sovereign immunity. *See supra* note 9 and accompanying text. As discussed later, however, the presumption has questionable status within the FTCA context, with the Supreme Court itself admonishing against its application lest it frustrate the FTCA’s functioning. *See infra* notes 82–85 and accompanying text. Nevertheless, courts continue to construe ambiguities in favor of immunity to justify a narrow approach to the FTCA. *See Tekle*, 511 F.3d at 852 (citing *United States v. Olson*, 546 U.S. 43, 44 (2005)).

<sup>71</sup> *See Ignacio v. United States*, 674 F.3d 252, 255 (4th Cir. 2012) (“Accordingly, we decline to import a requirement that an officer commit the tort in the course of an investigative or law enforcement activity . . .”).

enforcement officer in any given case is the *type* of officer covered by the proviso, as opposed to whether the officer's *actions* are covered.<sup>72</sup> The majority opinion recognized the Ninth Circuit's concerns about the ambiguity of the proviso's legislative history, but found the proviso unambiguous on its face and therefore did not need to consider legislative history;<sup>73</sup> finding the statute unambiguous allowed it to skirt the Ninth Circuit's application of the principle of construing ambiguities in favor of immunity.<sup>74</sup>

### C. Millbrook: *The Court's Proviso Interpretation*

In 2013, a year after the Fourth Circuit's consensus-breaking opinion, the Supreme Court in *Millbrook v. United States* unanimously agreed with the Fourth Circuit's broader interpretation.<sup>75</sup> The Court held that analysis under the proviso "focuses on the *status* of persons whose conduct may be actionable, not the types of activities that may give rise to a tort claim against the United States."<sup>76</sup> That is, the operative question for the proviso is simply whether the federal officer in question is covered under the proviso's definition of "law enforcement officer," and not whether the action complained of arose in the proper context.<sup>77</sup>

The Court rendered its decision based on a purely textual interpretation and did not reference legislative history or congressional intent; the Court concluded that the plain text was unambiguous, and like the Fourth Circuit, did not need to reach the presumption in favor of immunity.<sup>78</sup> According to the Court, the proviso's reference to other operative parts of the FTCA—namely that an officer's challenged action must be "within the scope of his office or employment" under § 1346(b)—is dispositive of its unambiguity.<sup>79</sup> Because the proviso is already subject to specifications on what kinds of actions are covered under the FTCA (those within the scope of employment), applying *additional* narrowing interpretations to the proviso is pre-

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<sup>72</sup> See *id.* at 256–59 (Diaz, J., concurring).

<sup>73</sup> *Id.* at 255 (citing *Orsay*, 289 F.3d at 1333–35).

<sup>74</sup> See *supra* note 70 and accompanying text.

<sup>75</sup> 569 U.S. 50, 56 (2013) ("The plain text confirms that Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority.").

<sup>76</sup> *Id.*

<sup>77</sup> See *supra* notes 69–72 and accompanying text.

<sup>78</sup> See *Millbrook*, 569 U.S. at 55 ("The plain language of the law enforcement proviso answers when a law enforcement officer's 'acts or omissions' may give rise to an actionable tort claim under the FTCA.").

<sup>79</sup> See *id.*

cluded.<sup>80</sup> Likewise, because other provisions that target specified actions are explicit in that regard, the Court found the *lack* of specificity in the law enforcement proviso telling.<sup>81</sup> One could say the Court deftly framed the proviso's language in a goldilocks fashion, rendering what may appear to be ambiguities as clear compromises. In other words, the Court read the text of the proviso itself as unambiguously broader than most courts have allowed, essentially precluding reading the proviso narrowly.

While this purely textual approach is relatively restrained as opposed to an explicit endorsement of broad application of the proviso, its real import is its *rejection* of limited readings of the proviso. Regarding the presumption of construing ambiguities in favor of immunity, the Supreme Court has explicitly cautioned against applying it in the FTCA context, admonishing that "unduly generous interpretations of the exceptions [to waiver] run the risk of defeating the central purpose of the statute."<sup>82</sup> Nevertheless, "unduly generous" is not a clear standard, and the Court has been hesitant to provide further guidance for when the presumption should apply.<sup>83</sup> Instead, it has avoided the presumption altogether by prescribing a plain text approach under the FTCA as reflected in *Millbrook*.<sup>84</sup> Indeed, "what the Court did in each of these cases is nearly as important as what it said. Rather than being diverted by the canon of strict construction, . . . what the Court did say tended to contradict the pro-government

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<sup>80</sup> See *id.* at 56–57 ("[T]here is no basis for so limiting the term when Congress has spoken directly to the circumstances in which a law enforcement officer's conduct may expose the United States to tort liability.").

<sup>81</sup> See *id.* at 57 (citing the language of the discretionary function exception which covers employees "in the execution of a statute or regulation").

<sup>82</sup> *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984).

<sup>83</sup> See *United States v. Williams*, 514 U.S. 527, 531 (1995) ("Our task is to discern the 'unequivocally expressed' *intent* of Congress, construing ambiguities in favor of immunity." (emphasis added)). But see *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed *in statutory text* . . ." (emphasis added)). The key point here is that unequivocal expression is the operative inquiry, and it is unclear if the clarity of congressional expression is limited strictly to a matter of textual analysis or can include the legislative history behind the statutory text's enactment. The Court has said, however, that legislative history should not be used *in favor* of waivers of immunity when the expression is *not* unequivocal, which implies that legislative history is not part of the preliminary inquiry of whether the expression is unequivocal to begin with. See *id.* ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text . . .").

<sup>84</sup> See *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) ("[T]he proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception'—*no less and no more.*" (emphasis added) (quoting *Kosak*, 465 U.S. at 853 n.9)).



presumption of strict construction.”<sup>85</sup> By refusing to find *any* ambiguity in the proviso’s language in *Millbrook*, the Court eviscerates any justification for narrow interpretations and signals that the proviso’s application is unambiguously straightforward. The Court vindicates the proviso’s original legislative purpose by finding it in the text, simultaneously avoiding the interpretive pitfalls which frustrate the proviso’s ability to hold law enforcement accountable.

Sure enough, courts have read *Millbrook* as condoning more expansive applications of the proviso, reaching officers that have not previously been subject to FTCA liability. The Seventh Circuit recently applied this broader interpretation to subject a forensic chemist, employed by the Federal Bureau of Alcohol, Tobacco, and Firearms, to suit.<sup>86</sup> The Third Circuit in an en banc opinion similarly extended coverage to airport Transportation Security Administration (TSA) officers,<sup>87</sup> and the Eighth Circuit has followed suit.<sup>88</sup> All three circuits found that the proviso applied as long as the officer in question “is empowered by law to execute searches, to seize evidence, or to make arrests,” which is how the proviso defines law enforcement officers.<sup>89</sup> Notably, all three circuit courts explicitly endorse a broad reading of the proviso as encouraged by *Millbrook*.<sup>90</sup>

However, the Third Circuit opinion was not without a vigorous dissent which found the term “law enforcement officer” within the context of TSA officers ambiguous and therefore sought to apply the presumption in favor of immunity.<sup>91</sup> The dissent’s approach was recently endorsed in an opinion by the Second Circuit where the court held that there is nevertheless a distinction between TSA screeners and TSA law enforcement officers, with the former potentially outside the coverage of the proviso.<sup>92</sup> While there is not enough caselaw to

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<sup>85</sup> Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. REV. 1245, 1316 (2014).

<sup>86</sup> See *Bunch v. United States*, 880 F.3d 938, 945 (7th Cir. 2018) (“We are also influenced by the broad reading of the law-enforcement proviso that the Court adopted in *Millbrook*.”).

<sup>87</sup> See *Pellegrino v. U.S. Transp. Sec. Admin.*, 937 F.3d 164, 172 (3d Cir. 2019) (en banc) (“Furthermore, as recently as 2013 the Supreme Court clamped down on a cramped reading of the proviso.”).

<sup>88</sup> See *Iverson v. United States*, 973 F.3d 843, 853–54 (8th Cir. 2020) (“[T]wo of our sister circuits have adopted similarly broad interpretations of the law enforcement proviso. . . . Our analysis here is consistent with the Supreme Court’s instructions and our sister circuits’ interpretations.” (citing *Pellegrino*, 937 F.3d at 172; *Bunch*, 880 F.3d at 944–45)).

<sup>89</sup> 28 U.S.C. § 2680(h) (2018); see *supra* notes 71–73 and accompanying text.

<sup>90</sup> See *supra* notes 86–88.

<sup>91</sup> See *Pellegrino*, 937 F.3d at 199–200 (Krause, J., dissenting).

<sup>92</sup> See *Leytman v. U.S. Dep’t of Homeland Sec. Transp. Sec. Admin.*, 804 F. App’x 78, 80–81 (2d Cir. 2020).

draw any conclusions yet, it appears that *Millbrook*'s elimination of ambiguity for *actions* under the proviso may merely displace that ambiguity to *status* of law enforcement officers. Questions such as those posed by the Second Circuit looking for nuance in what roles may constitute law enforcement officers under the proviso are yet another opportunity for courts to make narrowing distinctions.<sup>93</sup> The next Section argues that this would be a mistake.

#### D. *Overdue Recognition of Statutory Intent for Broad Officer Liability*

On its face, *Millbrook* is a restrained opinion that declares the proper reading of the law enforcement proviso's statutory text alone. But the real thrust of *Millbrook* and its plain meaning interpretation is not so much to broaden federal liability, but rather to reject a narrowing judicial approach. Conceivably, one can *always* find ambiguity in some part of the law enforcement proviso to justify applying the presumption for a limited interpretation.<sup>94</sup> By declaring that courts

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<sup>93</sup> See Robert C. Longstreth, *Millbrook v. United States: The Supreme Court Expands the Government's Liability for Intentional Torts of Law Enforcement Officers*, LEXISNEXIS TORTS EMERGING ISSUES (2013) ("[A] distinction between those officers empowered to make arrests, seize evidence or execute searches who conduct 'traditional law enforcement functions' and those . . . who do not . . . does not appear to be well-taken.").

<sup>94</sup> See, e.g., Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 744 (2019) ("Judges, wary of appearing overly 'results-oriented' by liberally applying the absurdity doctrine, have seized upon an interpretive rule with broader acceptance that ultimately permits them to achieve the same result: ambiguity."); Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 273, 291 (2010) (discussing how there "are no rules or clear agreements among judges about just how to decide whether a text is ambiguous" and ultimately suggesting that the results of empirical surveys show the perspective of ordinary, non-legal readers would mitigate "the serious risks of bias that attend the more usual task of simply asking whether a statute seems clear to oneself"); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1370 (2018) (interviewing a federal appellate judge about statutory interpretation who asserts "I would work really hard to find enough ambiguity to avoid an absurd result"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) ("[B]ecause it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity."); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1, 4 (1998) ("Nonetheless, [Chevron] doctrine is considered inherently unstable because individual judges will defer more or less often *depending upon how readily they perceive ambiguity* in statutory text." (emphasis added)); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 791-92, 799-802 (2010) ("The judiciary's selectivity regarding ambiguity is driven by its conflation of ambiguity identification with

have no need to look beyond the plain text, however, *Millbrook* brings the proviso in line with the longstanding practice of entirely avoiding any favoring of immunity. After all, that is the central purpose of the statute—to hold law enforcement accountable by specifically carving them out of immunity.<sup>95</sup>

This directive from the Supreme Court is premised on the historical understanding that injuries caused by government employees warrant redress, the same understanding that gave rise to the FTCA in the first place.<sup>96</sup> The FTCA's very existence is to balance providing such redress against the background rule of sovereign immunity. This balancing act far predates the FTCA, however; sovereigns throughout history have used various mechanisms to expose themselves to liability in spite of their immunity. In light of this history, what *Millbrook* means is that like the FTCA itself, the proviso is simply a calibration of that balance by Congress—a calibration in the direction of liability.

Sovereign immunity is widely and historically accepted as an obvious maxim, yet its origins are notoriously opaque.<sup>97</sup> Its conceptual genesis is often attributed to the ancient aphorism “the King can do no wrong,” rooted in a simple, medieval quandary: How can the king issue a writ—a command in the name of a court or other legal authority<sup>98</sup>—against himself, the highest authority in the land?<sup>99</sup> The fact that the apex of the hierarchical pyramid was inevitably left without a more authoritative layer was simply seen as “an accident” of a procedural nature rather than a substantive right.<sup>100</sup> In light of this

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ambiguity resolution, which allows courts to determine arbitrarily the context for resolving statutory meaning through the discretionary selection of judicially created, but untested, interpretive tools.”); see also *Yates v. United States*, 574 U.S. 528, 552–53 (2015) (Kagan, J., dissenting) (“This case raises the question whether the term ‘tangible object’ means the same thing in § 1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes.”).

<sup>95</sup> See *supra* Section I.A.3.

<sup>96</sup> See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–9 (1963) (taking a historical approach to sovereign immunity and “conclud[ing] on the basis of this history that the King, or the Government, or the State, as you will, has been suable throughout the whole range of the law”).

<sup>97</sup> See, e.g., *United States v. Lee*, 106 U.S. 196, 207 (1882) (“[T]he exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has . . . been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”); see also George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 481 (1953) (“Even during the Revolution itself, a Pennsylvania admiralty court denied jurisdiction in a libel action against a ship of war.”).

<sup>98</sup> *Writ*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>99</sup> See Jaffe, *supra* note 96, at 3 (noting this “logical anomaly”).

<sup>100</sup> David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 2–3, 3 n.6 (1972) (describing the feudal pyramid structure and

quirk, workaround mechanisms for redress against the king were created.<sup>101</sup> In other words, to create a functional system, immunity had to be balanced against liability.

The main mechanism for redress against the King was to sue his officers that carried out royal decrees rather than the Crown itself.<sup>102</sup> Unfortunately for the officers, sovereign immunity meant that officers dutifully executing orders could not claim those orders as a defense to individual liability.<sup>103</sup> How the concept of sovereign immunity survived the founding of the United States is “a magnificent historical irony . . . [considering] a republic whose independence was declared in a document indicting the sovereign for treasonous acts.”<sup>104</sup> Most importantly, however, sovereign immunity likewise did not preclude the individual liability of federal government officers in the new nation.<sup>105</sup>

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noting “that there happens to be in this world no court above his court is, we may say, an accident”) (quoting FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 518 (2d ed. 1898)); see also Pugh, *supra* note 97, at 478 (“[T]he king’s immunity . . . arose from the practical needs and peculiarities of the feudal system, rather than from any conception that the king is superior to the law.”).

<sup>101</sup> See Engdahl, *supra* note 100, at 3 (“Because the medieval Englishmen recognized that the king was capable of and did commit wrongs . . . they developed an effective machinery outside the regular court process to redress such wrongs and vindicate the rule of law.”); Jaffe, *supra* note 96, at 4 (describing how “the King . . . nevertheless endorsed on petitions ‘let justice be done,’ thus empowering his courts to proceed” in providing redress for the King’s own transgressions).

<sup>102</sup> See Jaffe, *supra* note 96, at 15 (noting the scarcity of actions against high officers of the state in contrast with the many cases against inferior officers).

<sup>103</sup> See Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 356 (1925). However, government officers’ exposure to personal liability in medieval times likely had an understated effect relative to modern expectations in the administrative state. See Harold J. Laski, *Responsibility of the State in England*, 32 HARV. L. REV. 447, 451 (1919) (“[I]n the days when the functions of government were negative rather than positive in character, the consequences of its irresponsibility should hardly have pressed themselves upon the minds of men.”).

<sup>104</sup> Jeremy Travis, Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 607 (1982); see also Edwin M. Borchard, *Governmental Responsibility in Tort*, 34 YALE L.J. 1, 4 (1926) (“How it came to be applied in the United States of America, where the prerogative [of the Crown] is unknown, is one of the mysteries of legal evolution.”); Chemerinsky, *supra* note 10, at 1201–03 (arguing that the “entire body of law is simply wrong and that the doctrine of sovereign immunity should be banished from American law”).

<sup>105</sup> 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, 1871–76 (2010) (“The founding generation inherited a system of administrative law that ensured government accountability . . . . Thus, the common law developed an array of writs that allowed individuals to test the legality of government conduct by filing suit against government officials.”).

Many began to see this as an unjust situation. By the dawn of the nineteenth century, the federal government had established an indemnification process through which the *government* assumed financial responsibility for tortfeasors who were government officials even though it could not be sued directly.<sup>106</sup> Congress assumed responsibility through the enactment of private bills “that protected the officer from ruinous liability, assured the victim of compensation, and overcame the doctrine of sovereign immunity by ensuring that, at the end of the day, the government paid for the losses its officials inflicted in the line of duty.”<sup>107</sup> Functionally, the government assumed liability while maintaining technical immunity.

In the wake of the Civil War, the private bill mechanism of indemnification was overwhelmed. Congress began to waive sovereign immunity outright so courts could help process claims.<sup>108</sup> Because “the private bill device was notoriously clumsy,”<sup>109</sup> increasing pressure was put on the relative functionality of waiver, culminating in passage of the FTCA in 1946.<sup>110</sup> As discussed, Congress decided that only *some* government activities and actors would have immunity waived under the FTCA and thus be subject to the jurisdiction of federal courts. Congress then decided in 1974 to also have courts adjudicate the intentional torts of federal law enforcement.<sup>111</sup> But until *Millbrook* in 2013, most courts applied limiting interpretations such that they reached only a sliver of claims alleged under the proviso. *Millbrook* thus restored the proviso’s rightful force by imploring federal courts to process claims against law enforcement officers.

This history illuminates two insights. First, immunity has never precluded redress for plaintiffs harmed by government activity—sovereign immunity and compensation have coexisted, and what changes is the *mechanism* for redress. Since this nation’s founding, the mechanism for federal law enforcement has shifted from individual liability to indemnification before arriving at its modern form of direct suit

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<sup>106</sup> See *id.* at 1888–911 (“Although the nation’s first private indemnity bills operated for the benefit of Danish claimants and arose from naval actions on the high seas, everyone appears to have understood that the system of litigation and indemnity applied to losses inflicted by government officers acting within the United States as well.”).

<sup>107</sup> *Id.* at 1876.

<sup>108</sup> See Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders’ Intent*, 47 U. RICH. L. REV. 555, 575–77 (2013) (describing how as claims against the United States increased, “Congress . . . struggled to provide avenues for prompt and adequate compensation. . . . At the urging of President Lincoln, who noted it was the duty of the government to render ‘prompt justice,’ Congress began to waive sovereign immunity” (citation omitted)).

<sup>109</sup> *Dalehite v. United States*, 346 U.S. 15, 24–25 (1953).

<sup>110</sup> See Skinner, *supra* note 108, at 577.

<sup>111</sup> See *supra* Section I.A.3.

against the United States. Second, *Congress* has always been the one to balance immunity with the mechanism of redress by calibrating the scope of government liability. By applying a judicial presumption in favor of immunity, the judiciary treads on that calibration made by Congress and shuns its delegated role in adjudicating claims for redress.<sup>112</sup> Therefore, properly understood, the plain text of the law enforcement proviso—let alone the entire FTCA itself—is an affirmative and unambiguously broad waiver of immunity which at the very least should not be subject to narrowing presumptions by the judiciary.<sup>113</sup> *Millbrook* recognized as much in giving the law enforcement proviso its proper power, animating Congress's intent to hold federal law enforcement accountable.

## II

### THE DISCRETIONARY FUNCTION EXCEPTION AS AN OBSTACLE TO THE PROVISIO

Apart from narrow interpretations of the proviso's text, the major obstacle to the law enforcement proviso's efficacy is a separate exception to the FTCA's waiver of immunity: the "discretionary function exception." This Part first explains the discretionary function exception and its underlying rationale rooted in the separation of powers. It then explains the tension between the exception and the law enforcement proviso and surveys the spectrum of approaches circuit courts have taken to reconcile the two. It concludes that proper reconciliation of this tension is for the law enforcement proviso to apply exclusively over the discretionary function exception.

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<sup>112</sup> See *United States v. Yellow Cab Co.*, 340 U.S. 543, 548-49 (1951) ("This Act does not subject the Government to a previously unrecognized type of obligation. . . . [E]ach Congress . . . recognized the Government's obligation to pay claims . . . This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims.").

<sup>113</sup> Cf. *Feres v. United States*, 340 U.S. 135, 139 (1950) ("The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."); Cornelius J. Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433, 449 (1957) (explaining that the word "wrongful" in the FTCA's jurisdictional provision for "negligent or wrongful act[s]" of the government leaves "little doubt that the word was added to expand the Government's liability beyond liability for negligence").

### A. *The Discretionary Function Exception and the Separation of Powers*

The most controversial and often-litigated segment of the FTCA is the discretionary function exception.<sup>114</sup> The exception was designed to shield federal employees from liability when acting or failing to act upon a “discretionary function or duty . . . whether or not the discretion involved be abused.”<sup>115</sup> What constitutes discretion, however, is not defined by the FTCA, and thus courts have consistently struggled to answer that question.<sup>116</sup> Courts tend to withhold jurisdiction by applying the exception broadly, immunizing many government actions as discretionary.<sup>117</sup> They justify this approach by citing a need to protect and not impinge executive functions and decisionmaking.

#### 1. *Defining Discretionary Functions Within Separation of Powers*

Unlike the law enforcement proviso, the plain text of the discretionary function exception leaves much for interpretation. Even at its most general level, the exception’s statutory text functions as little more than a platitude. As Judge Edwards writes in *Gray v. Bell*, “virtually all decisions in the realm of human experience involve some element of discretion” and so the literal text tells us “virtually nothing about the scope of [the discretionary function exception’s] protection.”<sup>118</sup> The Supreme Court therefore has looked to the statute’s legislative history to flesh out the meaning of “discretion” under the FTCA.<sup>119</sup> The Court cites heavily to the explanation of an Assistant Attorney General at the time of the FTCA’s enactment, Francis M. Shea.<sup>120</sup> In advocating for the bill’s passage, Shea posited it would be “neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary

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<sup>114</sup> WRIGHT & MILLER, *supra* note 19, § 3658. (“Undoubtedly one of the FTCA’s most important and frequently litigated exceptions is found in Section 2680(a) of Title 28, which provides that claims based upon discretionary acts or omissions by governmental employees are excluded from the reach of the Government’s waiver of immunity.”).

<sup>115</sup> 28 U.S.C. § 2680(a) (2018).

<sup>116</sup> WRIGHT & MILLER, *supra* note 19, § 3658.1 (“The FTCA does not define the term discretionary, and the exact boundaries of the exception remain unclear, despite an immense amount of precedent that has developed on the subject.”).

<sup>117</sup> See *infra* notes 144–50 and accompanying text.

<sup>118</sup> 712 F.2d 490, 508 (D.C. Cir. 1983).

<sup>119</sup> See *Dalehite v. United States*, 346 U.S. 15, 26–30, 27 n.16 (1953) (quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 29 (1942) [hereinafter *Tort Claims: Hearings*] (statement of Francis M. Shea, Assistant Att’y Gen. of the United States)).

<sup>120</sup> *Id.*

administrative act should be tested through the medium of a damage suit for tort."<sup>121</sup>

Shea's statement and the Court's interpretation of it make clear that the primary reason behind the discretionary function exception is the separation of powers: FTCA suits must not be a channel to challenge legislative and regulatory decisions through the judiciary.<sup>122</sup> Although the Supreme Court has never explicitly used the phrase "separation of powers" to describe the discretionary function exception, "the Court's explanation of the purpose behind the exception makes it clear that the exception is a statutory embodiment of separation-of-powers concerns."<sup>123</sup> The fear is that by having courts adjudicate challenges to certain types of government functions, courts would effectively be engaging in legislative and regulatory activity, overstepping their constitutionally delegated function. The conundrum is ascertaining when an FTCA claim amounts to such an overstep.

To make that determination, the Court has developed two frameworks for identifying whether a discretionary function is implicated in an FTCA claim. In *Dalehite v. United States*, the Supreme Court attempted to provide an answer by making a distinction between government decisions made at the planning versus operational level, with the former being discretionary and therefore immune from suit.<sup>124</sup> *Dalehite* involved a deadly explosion of government fertilizer resulting from negligent storage. The question was whether the negligent storage method was devised and approved by high-level agency officials—the planning level—or merely the sole decision of a worker depositing the fertilizer at the operational level.<sup>125</sup> The idea was that adjudicating torts which occur when government employees are merely executing decisions made by superiors

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<sup>121</sup> *Tort Claims: Hearings*, 77th Cong. 28 (1942) (statement of Francis M. Shea, Assistant Att'y Gen. of the United States).

<sup>122</sup> See, e.g., *McMellon v. United States*, 387 F.3d 329, 341–42 (4th Cir. 2004) ("The wellspring of the discretionary function exception is the doctrine of separation of powers." (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989))); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 872 (1991) ("Most agree that separation of powers concerns furnish part of the justification for the government's retained immunity."); Peck, *supra* note 113, at 452 ("[T]he discretionary function exception . . . was adopted primarily to preserve a proper relationship between the judiciary and other branches of Government.").

<sup>123</sup> *McMellon*, 387 F.3d at 341.

<sup>124</sup> 346 U.S. at 42 ("In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level . . .").

<sup>125</sup> See *id.* at 39–40.



does not implicate the decisionmaking of the executive or legislative branches.<sup>126</sup>

The *Dalehite* test was eventually criticized for having an overly formalist focus, giving too much weight to the status of officials making the judgment and making it difficult to apply.<sup>127</sup> Instead, the Court began to offer an alternative gloss on separation of powers not based on the planning versus operational inquiry, writing 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>128</sup> This reasoning was developed into a two-part test in *Berkovitz v. United States*: “[A] court must first consider whether the action is a matter of choice for the acting employee.”<sup>129</sup> If so, the court must then “determine whether that judgment is of the kind that the discretionary function exception was designed to shield.”<sup>130</sup>

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<sup>126</sup> See *id.* at 28 (“[I]t was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function. Section 2680(a) draws this distinction.” (emphasis added)).

<sup>127</sup> See Laird v. Nelms, 406 U.S. 797, 811 (1972) (Stewart, J., dissenting) (“Decisions in the courts of appeals following *Dalehite* have interpreted this language as drawing a distinction between ‘policy’ and ‘operational’ decisions . . . . That distinction has bedeviled the courts that have attempted to apply it to torts outside routine categories such as automobile accidents . . . .”); *Caban v. United States*, 671 F.2d 1230, 1232–33 (2d Cir. 1982) (acknowledging three types of tests for the discretionary function exception including the planning-operational distinction, and “agree[ing] with the current thinking that the policy balancing test best fulfills the purpose for which the discretionary function exception was designed”); *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975) (“This distinction is based on the status of the official making a judgment. While offering some general guidance, it is not a sufficient test . . . . [T]he basic question . . . is whether the judgments of a Government employee are of ‘the nature and quality’ which Congress intended to put beyond judicial review.” (citation omitted)); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 104–05 (1968) (“[T]he leading cases . . . suppl[y] no clear test. Application of the planning-operational interpretation usually . . . requires still further tests. The result is not a rule but rather a large number of examples—judicial applications of key phrases of the Federal Tort Claims Act. Furthermore, the examples are not even in agreement.”); see also *Dalehite*, 346 U.S. at 49, 57 (Jackson, J., dissenting) (criticizing the distinction because “Congress has defined the tort liability of the Government as analogous to that of a private person” which “do[es] not predicate liability on any decision taken at ‘Cabinet level’ or on any other high-altitude thinking”); cf. David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 296 (1989) (“*Dalehite* caused a certain amount of trauma. Its language was broad and potentially encompassed just about everything . . . . [I]n the years that followed, many courts sought to interpret *Dalehite* as narrowly as possible.”).

<sup>128</sup> *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984).

<sup>129</sup> 486 U.S. 531, 536 (1988).

<sup>130</sup> *Id.*

Because “choice”—like “discretion”—is nebulously imprecise,<sup>131</sup> the first prong of the *Berkovitz* test is very much a limited inquiry: It asks in a literal sense whether the officer in question is permitted any choice at all in taking the alleged action.<sup>132</sup> As long as there is a discernible “element of judgment,” the first prong is satisfied;<sup>133</sup> going any further in trying to qualify “choice” would collapse the test into the very question it attempts to answer. As such, the salience of the first prong largely comes down to whether a statutory mandate was violated<sup>134</sup>: If a plaintiff can show that the challenged government action is in violation of its statutory directive, then by definition the action must be outside the possible scope of prescribed actions or choices an officer can take.<sup>135</sup> Because this would mean the alleged action is not within the officer’s discretion, the discretionary function exception would not apply in such a case and a court could properly exercise jurisdiction.<sup>136</sup>

If no violation is found—meaning the action was a matter of choice for the employee—the second prong of the test evaluates

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<sup>131</sup> See *supra* note 118 and accompanying text.

<sup>132</sup> See *Berkovitz*, 486 U.S. at 536 (“[T]he discretionary function exception will not apply when a federal statute, regulation, or policy *specifically prescribes a course of action* for an employee to follow.” (emphasis added)).

<sup>133</sup> *Id.*; see, e.g., *Holbrook v. United States*, 673 F.3d 341, 350 (4th Cir. 2012) (“The inquiry is thus whether the discretion exists . . . .”); *Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392, 396 (6th Cir. 2004) (holding that the statute in question “creates no mandatory, nondiscretionary duty” because it “does not prescribe a specific course of action that . . . officials must follow” (citing *Calderon v. United States*, 123 F.3d 947, 949 (7th Cir. 1997))).

<sup>134</sup> See, e.g., *Campos v. United States*, 888 F.3d 724, 731 (5th Cir. 2018) (asserting that the plaintiff “must direct us to authority that the officer was required to allow Campos to remain” in the United States to demonstrate a violation); *Evans v. United States*, 876 F.3d 375, 381 (1st Cir. 2017) (evaluating plaintiff’s argument that the agency “had no discretion . . . to violate this mandatory state policy”).

<sup>135</sup> See, e.g., *Pieper v. United States*, 713 F. App’x 137, 140 (4th Cir. 2017) (holding that guidelines for the Army’s waste and remediation decisions were “neither mandatory nor specific enough” to demonstrate a lack of discretion and satisfy the first prong); *Spotts v. United States*, 613 F.3d 559, 567 (5th Cir. 2010) (“[T]he discretionary function exception does not apply if the challenged actions in fact violated a federal statute, regulation, or policy.”).

<sup>136</sup> See, e.g., *McKinney v. United States*, 950 F. Supp. 2d 923, 927–28 (N.D. Tex. 2013) (holding that because prison officials disregarded their “mandatory obligation” under a statute, “[i]t follows that if one or both parts of the test are not met, the exception does not apply, and the court maintains jurisdiction over the action”); *Irvin v. Owens*, No. 9:10-01336, 2012 WL 1534787, at \*6 (D.S.C. Apr. 30, 2012) (“The Court finds that the Code of Conduct is a mandatory policy . . . . [T]herefore [the court] finds that the discretionary function exception does not apply to this aspect of the Plaintiff’s FTCA claim.”); *Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d 85, 92 (S.D.N.Y. 2005) (holding that an executive order declaring “the Federal Emergency Management Agency (FEMA) may reimburse 100 percent of total eligible costs” meant FEMA “lacked discretion as to whether it was obligated to pay for the clean-up and recovery efforts”).

whether the exercised discretion is nevertheless of the type meant to be immunized. The Court clarifies that the exception is designed to shield decisions that implicate “considerations of public policy” in order “to prevent ‘[j]udicial intervention in . . . the political, social, and economic judgments’ of governmental—including regulatory—agencies.”<sup>137</sup> This includes “judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer,”<sup>138</sup> for example, or “the initial decision to undertake and maintain light-house service.”<sup>139</sup> The point is that the discretionary function exception “insulates the Government from liability” for “policy judgment[s]” by removing them from the ambit of the judiciary altogether.<sup>140</sup> The Court’s reasoning in *Berkovitz* thus invokes both the language and the principles underlying the separation of powers.<sup>141</sup>

Between the *Dalehite* and *Berkovitz* tests, the Court has indicated a strong preference for the latter. While never explicitly abrogated, *Dalehite*’s planning-operational distinction was deemphasized, if not disavowed, by the Court’s most recent discussion of the FTCA’s discretionary function exception in *United States v. Gaubert*.<sup>142</sup> The

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<sup>137</sup> *Berkovitz*, 486 U.S. at 537, 539 (quoting *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984)).

<sup>138</sup> *Id.* at 538 (quoting *Varig Airlines*, 467 U.S. at 820).

<sup>139</sup> *Id.* at 538 n.3 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955)).

<sup>140</sup> *Id.* at 537.

<sup>141</sup> See *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1411–12 (2018) (Alito, J., concurring) (“[C]onsistent with the separation of powers, we have neither the luxury nor the right to make such policy decisions ourselves.”); *Dennis v. United States*, 341 U.S. 494, 539 (1951) (Frankfurter, J., concurring) (“[W]e are not legislators . . . direct policy-making is not our province.”); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 575 (1994) (“Courts are supposed to use moderation in reviewing decisions of the lawmaking body in order to avoid engaging in policymaking, because determining policy . . . is not a function allocated to the judicial branch.”); *supra* notes 122–23 and accompanying text. *But see* *Gregory v. Ashcroft*, 501 U.S. 452, 482 (1991) (White, J., dissenting in relevant part) (referring to “the policymaking nature of the judicial function” (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113–15 (1921))); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” could “be subjected to more exacting judicial scrutiny”); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches . . . .”); *THE FEDERALIST* NO. 48 (James Madison), <https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493415> (last visited Aug. 10, 2020) (“[T]he political apothegm . . . does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. . . . [T]he degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”).

<sup>142</sup> 499 U.S. 315 (1991). The Court rejected the Fourth Circuit’s dichotomous reasoning which hinged entirely on the planning-operational distinction. *Id.* at 326. But it did not say the level of government at which discretion is exercised is *not* relevant to the inquiry;

Court explicitly stated that “[d]iscretionary conduct is not confined to the policy or planning level,” reframing past cases as not dependent on the planning-operational distinction from *Dalehite*.<sup>143</sup> Moreover, the Court reaffirmed that the core of the inquiry is whether or not the discretionary decisions in question are “susceptible to policy analysis”; the exception functions by immunizing government actions that are “based on the purposes that the regulatory regime seeks to accomplish.”<sup>144</sup> In this way, the Court again animates the separation of powers concern that courts should not be involved in policymaking.

## 2. *Applying the Discretionary Function Exception to the Tortious Acts of Federal Law Enforcement Officers*

The kinds of decisions found susceptible to policy analysis by courts—and thus outside the ambit of the judicial power according to the discretionary function exception—run the gamut. Policy can be implicated in matters of relatively low stakes, such as the government cutting down trees on private property,<sup>145</sup> all the way to tactical deforestation during the Vietnam War.<sup>146</sup> It can be implicated by broad actions like the design of national monuments,<sup>147</sup> as well as granular ones like how to load and unload mail at a specific post office.<sup>148</sup> Perhaps unsurprisingly, it is not difficult for the government to argue that any decision is susceptible to policy analysis. For example, almost any government decision can be framed as a balancing of safety against cost, an example the Supreme Court has explicitly endorsed.<sup>149</sup> Natu-

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Justice Scalia penned a concurrence arguing that such a distinction, while not dispositive, still provides valuable insight. *Id.* at 335–36 (Scalia, J., concurring in relevant part).

<sup>143</sup> *Id.* at 325.

<sup>144</sup> *Id.* at 325 & n.7.

<sup>145</sup> See *Evans v. United States*, 876 F.3d 375, 383–84 (1st Cir. 2017) (removing trees on private property to combat Asian Longhorned Beetle infestation without permission was an excepted policy decision).

<sup>146</sup> See *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 210, 215 (2d Cir. 1987) (testing and using Agent Orange which poisoned U.S. soldiers and doctors is protected by the discretionary function exception).

<sup>147</sup> See *Chantal v. United States*, 104 F.3d 207, 212–13 (8th Cir. 1997) (balancing aesthetic interests of maintaining design against the safety benefits of modification is a decision susceptible to policy analysis).

<sup>148</sup> See *Burrows v. United States*, 120 F. App’x 448, 450 (4th Cir. 2005) (finding the Postal Service’s statutory mandate to provide prompt, reliable, and efficient services to the nation involves decisions grounded in economic and social policies and are therefore protected by the exception).

<sup>149</sup> See Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 707–08 (1997) (“The Court has made clear that protected policymaking includes the balancing of safety concerns against budgetary or other feasibility concerns. . . . The parties to FTCA actions often make similar arguments, thus framing the issue in a way that supports the conclusion that the challenged government conduct involved protected discretion.”).

rally, the near-universal applicability of such an argument has been roundly criticized.<sup>150</sup> After all, how does holding the government liable for the faulty design of a national monument implicate separation of powers?<sup>151</sup>

Yet courts have applied the discretionary function exception under the *Berkovitz* test to federal law enforcement in a relatively straightforward manner. The first prong of the *Berkovitz* test—that the challenged action be a matter of choice—is easily satisfied given the limited nature of the inquiry.<sup>152</sup> But this is unremarkable: As discussed,<sup>153</sup> the indefiniteness of the term “discretion” means the first prong is only failed under actual statutory violations.<sup>154</sup> Furthermore, law enforcement actions almost by definition “involve considerable judgment that a court is ill-equipped to second-guess.”<sup>155</sup>

The second prong of the test meanwhile has been relatively difficult for the government to satisfy—to show that FTCA immunity is *not* waived because officer misconduct is susceptible to policy analysis. The Ninth Circuit declared “[w]hile law enforcement involves exercise

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<sup>150</sup> See, e.g., *Duke v. Dep’t of Agric.*, 131 F.3d 1407, 1410 (10th Cir. 1997) (“One of the problems . . . is that nearly every governmental action is, to some extent, subject to policy analysis—to some argument that it was influenced by economics or the like. An added difficulty is that a failure to act can be a policy decision . . .”); *Cope v. Scott*, 45 F.3d 445, 448–49 (D.C. Cir. 1995) (“Determining whether a decision is ‘essentially political, social, or economic,’ . . . is admittedly difficult, since nearly every government action is, at least to some extent, subject to ‘policy analysis.’ . . . ‘Budgetary constraints,’ for example, ‘underlie virtually all government activity.’” (citations omitted)); *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) (“[T]he fact that Park Service maintenance personnel were required to work within a budget does not make their failure to maintain Thoroughfare Pass a discretionary function . . .”); John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223, 252 n.125 (1992) (“Courts . . . are criticized for protecting government decisions on the mere showing that cost was a considered factor, given that most government decisions have an economic consequence.” (citations omitted)); see also Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to “Jurisdictionality” and the Federal Tort Claims Act*, 88 TEMP. L. REV. 91, 112–17 (2015) (arguing that the discretionary function exception should be an affirmative defense that the United States must prove as opposed to a jurisdictional provision, and questioning whether sovereign immunity generally is really jurisdictional at all).

<sup>151</sup> See *supra* note 147 and accompanying text.

<sup>152</sup> See *supra* notes 131–36 and accompanying text. That is, to satisfy both steps of the *Berkovitz* test is to demonstrate that the discretionary function applies, and thus insulate the alleged action from federal courts’ jurisdiction.

<sup>153</sup> See *supra* notes 134–35 and accompanying text.

<sup>154</sup> See, e.g., *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (“[V]iolation of agency regulations represents conduct outside the discretionary function exception, and thus, outside sovereign immunity.”).

<sup>155</sup> See William P. Kratzke, *The Supreme Court’s Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 49–52 & nn.203–24 (1993) (collecting cases as examples).

of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability.”<sup>156</sup> Similarly, the Second Circuit ruled that a border patrol agent’s “decision to detain someone at the border is not fraught with the need to balance competing policy considerations . . . .”<sup>157</sup> The court did so explicitly on the basis of recognizing border patrol as law enforcement officers.<sup>158</sup> The District of Columbia Circuit has said that the exception rarely applies to law enforcement made up of “primarily persons (such as police officers) whose jobs do not typically include discretionary functions.”<sup>159</sup> Quite explicitly, courts have held that adjudicating claims of tortious conduct to hold federal law enforcement accountable does not indict the judiciary for policymaking.<sup>160</sup>

The discretionary function exception to the FTCA’s waiver of immunity counsels courts to extend jurisdiction carefully because of separation of powers concerns. When a court dismisses a claim for implicating discretion susceptible to policy analysis, it is not because the alleged injury is somehow not deserving of redress. Rather, the court is concerned that it is overstepping the bounds of the FTCA.<sup>161</sup>

### *B. The Collision Between the Law Enforcement Proviso and the Discretionary Function Exception*

The Court’s recent interpretation of the law enforcement proviso exacerbates the tension between the proviso and the discretionary function exception. Because *Millbrook* instructs that the proviso applies to all officers with law enforcement status, more federal officers—many of whom may have excepted discretionary functions—are now susceptible to suit.<sup>162</sup> This quandary is not new, however, as concerns about this overlap were raised upon passage of the proviso in

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<sup>156</sup> *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987) (citing *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982)).

<sup>157</sup> See *Caban*, 671 F.2d at 1232–33 (applying a policy analysis that was still “in the ascendency” at the time but is identical to what was eventually adopted by *Berkovitz*).

<sup>158</sup> See *id.* at 1234.

<sup>159</sup> *Gray v. Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983).

<sup>160</sup> *But see* Krent, *supra* note 122, at 889–92 (“[D]iscretion may still underlie an official’s decision to deviate from pre-existing rules and regulations.”).

<sup>161</sup> Cf. Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1304 (2002) (“[T]his traditional jurisprudence of official liability—which was based on calculations of the impact of liability in these instances on the effective functioning of government—provides the guide to identifying the proper scope of the discretionary function exception.”).

<sup>162</sup> See Nicholas Henes, *Liability and Consent of the United States to Be Sued—Torts in General: The United States Supreme Court Interprets the Federal Tort Claim Act’s Enforcement Proviso*, 89 N.D. L. REV. 341, 356–57 (2013).

1974, when contemporary scholars admonished that “[a] broad reading of the exception so as to exclude recovery by those wronged by the Collinsville raids would deny the impetus for the amendment itself.”<sup>163</sup> Even at an abstract level, the clash is clear: Lawsuits under the proviso must be based on an underlying intentional tort, and intentionality runs headlong into the very idea of discretion.<sup>164</sup> Though almost fifty years later, this tension remains unresolved.<sup>165</sup>

The textual hook for this conflict is in the word “any”: the discretionary function exception “covers [a]ny claim involving a discretionary function,” and the proviso “covers any claim arising from” the enumerated intentional torts committed by a law enforcement officer.<sup>166</sup> The circuit courts are currently split on this “war between the ‘anys’” in determining which one should apply over the other.<sup>167</sup>

To illustrate, say a plaintiff files a false arrest claim—an intentional tort under the FTCA. His complaint alleges that while the arresting officer knew plaintiff was not a suspect and thus the wrong person to arrest, the officer arrested him anyway. The law enforcement proviso permits a federal court jurisdiction over this suit. But what if the officer was unsure of the plaintiff’s identity, yet nevertheless made the decision to follow agency policy to err on the side of arrest? In this situation, a court might hesitate to extend jurisdiction, as the claim now seems susceptible to policy analysis; indeed, a court

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<sup>163</sup> Boger, Gitenstein & Verkuil, *supra* note 38, at 530–31; *see also id.* at 527–32 (discussing the contemporary doctrine of the discretionary function exception and its relevance to the law enforcement proviso).

<sup>164</sup> *See id.* at 530 (“If determination of the proper scope of the discretionary function exception is difficult in the context of good faith plans and their negligent execution, the question obviously becomes much cloudier when one considers treatment of intentional torts.”).

<sup>165</sup> *See Medina v. United States*, 259 F.3d 220, 224 (4th Cir. 2001) (noting that while the Supreme Court has provided guidance in “unraveling the former mystery” of what the discretionary function exception protects, the latter question of “whether and how to apply the exception in cases brought under the intentional tort proviso . . . remains unsettled”).

<sup>166</sup> *Nguyen v. United States*, 556 F.3d 1244, 1252 (11th Cir. 2009) (alteration in original); *see also* 28 U.S.C. § 2680(a) (2018) (“*Any claim* based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . .” (emphasis added)); *id.* § 2680(h) (“That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter . . . shall apply to *any claim* arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.” (emphasis added)).

<sup>167</sup> *Nguyen*, 556 F.3d at 1257; *see also Garling v. U.S. Evtl. Prot. Agency*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017) (noting, but not reaching, the issue).

could determine that it would be adjudicating the merits of an agency policy, and such claims are excepted as discretionary functions.<sup>168</sup>

Courts struggle in this analysis because, as the Fifth Circuit put it, “it is both impossible and certainly inappropriate for us to declare categorically—or try to state in a principled way—the circumstances in which either the discretionary function exception or the law enforcement proviso governs to the exclusion of the other.”<sup>169</sup> A spectrum of approaches has therefore developed. The Eleventh Circuit in *Nguyen* applies the proviso exclusively, determining that “sovereign immunity does not bar a claim that falls within the proviso . . . regardless of whether the acts giving rise to it involve a discretionary function.”<sup>170</sup> The court found that a compromise was impossible, holding that the proviso’s “plain meaning and clear purpose of the statutory language” warranted its application over the exception entirely.<sup>171</sup>

The Fifth Circuit has used the Collinsville raids<sup>172</sup> as an example of clear discretion being *invalidated* by the proviso, implying a proviso-exclusive approach similar to the Eleventh Circuit’s approach in *Nguyen*.<sup>173</sup> However, it has since walked back that approach in a confusing opinion which recognized that while the proviso should be read expansively, the actions alleged must somehow “sink[] to the necessary level” to supersede the discretionary function exception.<sup>174</sup> Because the Fifth Circuit still makes an attempt “to blend the ‘on the one hand,’ with the ‘on the other’ nature of these dueling provisions,” it does not quite reach the Eleventh’s level of proviso-exclusivity.<sup>175</sup> Presumably, exclusivity kicks in when an action reaches the “necessary level,” so the Fifth Circuit’s approach can be described as conditional proviso-exclusive.

Conversely, the Ninth and Seventh circuits evince a discretionary function exception-exclusive approach. The Ninth Circuit has declared

<sup>168</sup> These facts are drawn from *Awad v. United States*, No. 15-373 MV/CG, 2018 U.S. Dist. LEXIS 147169, at \*7–8 (D.N.M. Aug. 29, 2018) (recognizing that claims may fall under either provision).

<sup>169</sup> *Sutton v. United States*, 819 F.2d 1289, 1298 (5th Cir. 1987).

<sup>170</sup> *Nguyen*, 556 F.3d at 1256–57 (emphasis added).

<sup>171</sup> *Id.* at 1256.

<sup>172</sup> See *supra* notes 49–61 and accompanying text.

<sup>173</sup> See *Sutton*, 819 F.2d at 1297 (“[I]f the law enforcement proviso is to be more than an illusory—now you see it, now you don’t—remedy, the discretionary function exception cannot be an absolute bar which one must clear to proceed under § 2680(h).”).

<sup>174</sup> See *Campos v. United States*, 888 F.3d 724, 738 (5th Cir. 2018) (declining to extend jurisdiction to recognize claims of false arrest and false imprisonment).

<sup>175</sup> *Id.* at 737; see also *Joiner v. United States*, 955 F.3d 399, 406 (5th Cir. 2020) (“So even if [Plaintiff] invoked the law enforcement proviso here, that does not automatically trump the discretionary function exception—and he has not demonstrated why it should trump the discretionary function exception here.”).



that “[i]f a defendant can show that the tortious conduct involves a ‘discretionary function,’ a plaintiff cannot maintain an FTCA claim, *even if* the discretionary act constitutes an intentional tort under [the proviso].”<sup>176</sup> The Seventh Circuit recently agreed, holding explicitly “that *discretionary* acts by law-enforcement personnel remain outside the FTCA by virtue of [the discretionary function exception], *even though* the proviso allows other malicious-prosecution suits.”<sup>177</sup>

The remaining circuits have not taken an exclusive interpretive approach. The District of Columbia Circuit preferences the discretionary function exception by making it the initial “hurdle” a claimant must clear before proving the proviso applies.<sup>178</sup> This is softer than the Seventh and Ninth Circuits’ exception-exclusive approach, as the discretionary function exception here is a hurdle that *can* be cleared. The implication is that if a challenged discretionary act is not squarely excepted, then it is possible for the proviso to grant jurisdiction.<sup>179</sup> The court leaves no indication, however, of how to clear this hurdle,

<sup>176</sup> *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994) (emphasis added).

<sup>177</sup> *Linder v. United States*, 937 F.3d 1087, 1089 (7th Cir. 2019) (emphasis added).

<sup>178</sup> *See Gray v. Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983) (“[W]e believe that Gray must clear the ‘discretionary function’ hurdle *and* satisfy the ‘investigative or law enforcement officer’ limitation to sustain the malicious prosecution component of his FTCA claim.”).

<sup>179</sup> *See id.* at 515–16 (“In the present case, the improper and tortious actions allegedly undertaken by the defendants are *too intertwined* with *purely discretionary* decisions of the prosecutors to be sufficiently separated from the initial decision to prosecute.” (emphases added)). The “hurdle” could also fairly be read to mean that a plaintiff has to show the discretionary function exception *entirely* does not apply before separately demonstrating that the proviso should apply. *See, e.g., Paret-Ruiz v. United States*, 943 F. Supp. 2d 285, 289 (D.P.R. 2013) (explaining how to treat the hurdle and how “[o]ne line of logic . . . necessitates that the discretionary function exception applies to the intentional torts enumerated in Section 2680(h)” (emphasis added) (citing *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Gray*, 712 F.2d at 508)); *see also Huntress v. United States*, No. 18-CV-2974 (JPO), 2019 U.S. Dist. LEXIS 55156, at \*16 n.7 (S.D.N.Y. Mar. 29, 2019) (describing the concept of the “hurdle” and concluding that “[b]ecause the Court has already concluded that Plaintiffs’ claims must be dismissed under the discretionary function exception, the Court *need not discuss* whether the law-enforcement-officer proviso would apply here” (emphasis added)). But this makes little sense in context of the case’s discussion regarding the collision of the two provisions: If the exception must be inapplicable outright, then there is simply no overlap and thus nothing to reconcile in the first place. The effect would be indistinguishable from the dichotomous exception-exclusive approach where either the exception applies or it doesn’t, rendering *Gray*’s elaborations on reconciliation completely irrelevant. The “hurdle” analogy, as well as the case’s discussion of the opacity of discretionary function exception doctrine, make more sense when read as allowing for the possibility of *potentially* excepted actions that nevertheless fall under the proviso. *Cf. Peck, supra* note 113, at 452 (“[L]iability cannot be imposed when to do so . . . necessarily brings into question the propriety of governmental objectives or programs . . . . Nor can liability be imposed when it *necessarily* brings into question the decision of one who, with the authority to do so, determined that the acts or omission involved should occur . . .”).

let alone where the balance falls once that hurdle is cleared.<sup>180</sup> The Fourth Circuit indicates a stronger deference to the discretionary function exception, declaring “that the actions underlying intentional tort allegations described in § 2680(h) . . . may be considered discretionary functions under § 2680(a), even if they would otherwise constitute actionable torts under state law.”<sup>181</sup> Nevertheless, the Fourth Circuit still suggests that there is space for coexistence.<sup>182</sup> Similar to the D.C. Circuit, the Fourth Circuit has yet to produce subsequent cases directly addressing a situation in which a law enforcement action is only tenuously discretionary but is firmly covered as an intentional tort under the proviso, which would require a more explicit stance on the issue. The D.C. and Fourth Circuits’ approaches are therefore best described as exception-preferred. Meanwhile, the Second Circuit has stated only that the two must coexist but has not revisited the issue in decades.<sup>183</sup> Finally, the Tenth Circuit in two recent cases has noted the circuit split on this issue, but did not need to reach it in either.<sup>184</sup>

For the discretionary function exception-exclusive and -preferred circuits, it is important to point out that the law enforcement proviso is not completely snuffed out. For example, the Ninth Circuit’s explicitly broad exception-exclusive rule in effect makes the discretionary function exception the primary inquiry. But the court is able to mitigate the rule’s broadness by removing law enforcement from the world of discretionary functions as much as possible; this is exactly what motivates characterizing law enforcement actions as straightfor-

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<sup>180</sup> See *id.* at 508 (“Nevertheless, since we hold that all of the activities alleged in the complaint are protected under the discretionary function clause, we need not address whether the individual defendants were ‘investigative or law enforcement officer[s].’” (alteration in original)).

<sup>181</sup> *Medina*, 259 F.3d at 226.

<sup>182</sup> See *id.* (describing the discretionary function exception as a “hurdle” to clear, and holding that the case at bar failed to do so since “this case presents *exactly the sort of situation* that the discretionary function exception seeks to address,” thus mirroring the rationale of the D.C. Circuit in *Gray* that the hurdle may be cleared if the exception does not *clearly* apply (emphasis added)).

<sup>183</sup> See *Caban v. United States*, 671 F.2d 1230, 1234 (2d Cir. 1982) (“We believe that the government is correct in asserting that this subsection must be read in conjunction with the discretionary function exception. We do not think, however, that either section should be read to eviscerate the other.”).

<sup>184</sup> See *Awad v. United States*, No. 18-2159, 2020 U.S. App. LEXIS 11331, at \*13 n.5 (10th Cir. Apr. 10, 2020) (“[Plaintiff’s] failure to allege intentionally tortious conduct obviates any need to consider the interaction between § 2680(a) and § 2680(h).”); *Garling v. U.S. Evtl. Prot. Agency*, 849 F.3d 1289, 1298 n.5 (10th Cir. 2017) (“We recognize the disagreement among the circuits regarding the interaction between § 2680(a) and § 2680(h). . . . Because [plaintiffs] fail to allege facts showing they were falsely arrested . . . they cannot use § 2680(h) to avoid sovereign immunity, and we need not reach this issue.”).

wardly non-discretionary.<sup>185</sup> The goal of this approach is to reduce as much as possible the universe of fact patterns that could implicate both provisions. However, such an approach may be a tortured compromise at best since the “conclusion that police work is ministerial and not discretionary is arguable as a matter of common understanding and semantics.”<sup>186</sup>

Indeed, not having to make that sort of compromise is part of what motivated the Eleventh Circuit in *Nguyen* to take the opposite approach.<sup>187</sup> By giving precedence to the law enforcement proviso, the Eleventh Circuit’s proviso-exclusive approach arrives at the same conclusion: The discretion law enforcement exercises is never the type of policymaking discretion with which the exception is concerned. This conception is a more natural fit with longstanding doctrine wrestling with the scope of discretion under the exception. Scholars suggest that the scope has actually been shrinking over the years, which is congruous with the Eleventh Circuit’s approach.<sup>188</sup> Importantly, this approach also resonates with the Supreme Court’s directive to interpret the proviso broadly.<sup>189</sup>

### III

#### THE LAW ENFORCEMENT PROVISIO SHOULD SUPERSEDE DISCRETIONARY FUNCTIONS

The Eleventh Circuit’s exclusive application of the law enforcement proviso—that the proviso’s coverage simply supersedes the discretionary function exception—is not only tenable, but is the *proper* interpretation under the FTCA. When a claim against law enforcement abuse is excepted as discretionary, it is not that the officer is immune from accountability, but rather that the court hesitates to be

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<sup>185</sup> See *supra* Section II.A.

<sup>186</sup> *Beran v. United States*, 759 F. Supp. 886, 892 (D.D.C. 1991).

<sup>187</sup> See *Nguyen v. United States*, 556 F.3d 1244, 1257 (11th Cir. 2009) (listing reasons for taking the opposite approach).

<sup>188</sup> See Bagby & Gittings, *supra* note 150, at 223 (“The DFE is one of the last surviving remnants of sovereign immunity, which has steadily been eroded since the 1940s.”); Gregory C. Sisk, *Foreword: Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. ST. THOMAS L.J. 295, 297 (2011) (“The stream of legal history is flowing ever more forcefully in the direction of affording recovery in court against the United States government for tort and tort-like injuries.”); Sienho Yee, Note, *The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?*, 93 COLUM. L. REV. 744, 774–75 (1993) (“The discretionary function exceptions under both the FTCA and the FSIA are anachronistic in their preservation of sovereign immunity from tort actions: the immunity of domestic and foreign sovereigns has long been shrinking.”).

<sup>189</sup> For a discussion of the Supreme Court’s landmark *Millbrook* decision, see *supra* Section I.C.

the one to hold the officer accountable.<sup>190</sup> However, the FTCA's law enforcement proviso is a clear directive from Congress that courts *are* the ones to hold law enforcement officers accountable, and the Court's recent expansive reading of the proviso in *Millbrook* signals the judiciary's assent to that responsibility. Accordingly, the proviso's waiver of immunity must trump the discretionary function exception's preservation of immunity.

This Part justifies the proviso-exclusive approach as a matter of statutory interpretation and in context of the historical norms that the FTCA embodies. Furthermore, this Part argues that concerns about separation of powers relevant to the discretionary function inquiry are properly incorporated into the proviso's mechanism of redress through claims for intentional torts. Finally, the continued disavowal of law enforcement redress under *Bivens* bolsters an approach that applies the proviso broadly.

#### A. *Statutory Construction Tenets and Immunity Jurisprudence Support Construing the Proviso Broadly*

Leaving aside any normative justification, basic concepts of statutory interpretation demonstrate why the law enforcement proviso should take precedence. Additionally, the Supreme Court's own jurisprudence within the context of sovereign immunity supports broad applicability of waivers of immunity.

As an initial matter, when the language of a statute is clear and unambiguous on its face, there is little else to discuss.<sup>191</sup> Despite the complicated doctrinal history of the proviso, the Court's "plain meaning rule" stipulates that not only is unambiguous text sufficient for interpretation, but also that reaching beyond such text is inappropriate.<sup>192</sup> In *Millbrook*, the Supreme Court unanimously endorsed the plainness of the proviso's language by applying the plain meaning

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<sup>190</sup> See *supra* Section II.A.

<sup>191</sup> See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("[T]he starting point in every case involving construction of a statute is the language itself." (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring))); cf. *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018) ("There is thus no reason to depart from the plain meaning of § 1226(c) in order to avoid making the provision superfluous.").

<sup>192</sup> See *Ass'n of Westinghouse Salaried Emps. v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444 (1955) (defining "the so-called 'plain meaning rule'" as "mak[ing] further inquiry needless and indeed improper"). *But see* *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928))).

rule.<sup>193</sup> A straightforward interpretive rule creates straightforward results, benefitting both the judiciary and the public.<sup>194</sup> Such a rule is particularly suitable given the proviso's emotionally charged genesis indicating the dire need to hold federal law enforcement accountable.

Beyond the proviso's plain text, other canons of construction preclude alternate interpretive results. The Eleventh Circuit in *Nguyen* identifies two that apply with particular force.<sup>195</sup> The first is that "[o]rordinarily, where a specific provision conflicts with a general one, the specific governs."<sup>196</sup> While both the proviso and the exception contain the word "any," the proviso "applies only to six specified claims arising from acts of two specified types of government officers."<sup>197</sup> The proviso also refers to law enforcement *officers*, while the exception applies to an *employee* of the government.<sup>198</sup> To the extent that those two terms are different, an officer is a type of employee, and thus more specific.<sup>199</sup> And because the proviso is more specific, it should supersede the more general discretionary function exception.

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<sup>193</sup> See *Millbrook v. United States*, 569 U.S. 50, 55–56 (2013) (relying on the "plain language" and "plain text" to support its interpretations without reference to legislative history or context); *supra* notes 78–81 and accompanying text.

<sup>194</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) ("If the statutory language is plain, the Court must enforce it according to its terms."). See generally William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 549–57 (2017) (summarizing purported benefits of a plain meaning rule, albeit with the purpose of undermining them).

<sup>195</sup> See *Nguyen v. United States*, 556 F.3d 1244, 1252–53 (11th Cir. 2009).

<sup>196</sup> *Edmond v. United States*, 520 U.S. 651, 657 (1997).

<sup>197</sup> *Nguyen*, 556 F.3d at 1253.

<sup>198</sup> Judges in both the Eleventh Circuit and the Third Circuit, in dissent, have highlighted this difference to *restrict* application of the proviso, ultimately taking issue with how the word "officer" may be construed. See *Pellegrino v. U.S. Transp. Sec. Admin.*, 937 F.3d 164, 190 (3d Cir. 2019) (en banc) (Krause, J., dissenting); *Corbett v. U.S. Transp. Sec. Admin.*, 568 F. App'x 690, 701–02 (11th Cir. 2014) (finding that TSA security agents do not constitute "officers" and are thus not subject to the proviso). The Third Circuit dissent accused the majority of reading "officer" as coterminous with "employee," despite the fact that "officer" is subject to far narrower definitions. See *Pellegrino*, 937 F.3d at 190 (Krause, J., dissenting) ("If Congress wanted the proviso to sweep broadly, it could have . . . defined 'investigative or law enforcement officer' as any 'employee' empowered to execute searches. It did not."). But see *Iverson v. United States*, 973 F.3d 843, 848–50 (8th Cir. 2020) ("[T]he use of the term *any* before *officers* does not favor a narrow definition to those who are classified as appointed."). Nevertheless, for purposes of this argument (which depends only on "officer" being more specific), if a difference exists, it cuts in the direction of the proviso's applicability.

<sup>199</sup> Compare *Officer*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining with relation to a specified office), with *Employee*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining as servicing any work authority).

The second and related canon is that "if two statutes conflict, the more recent . . . statute controls."<sup>200</sup> The discretionary function exception was part of the FTCA as originally enacted along with the rest of the patchwork exceptions in Section 2680.<sup>201</sup> When Congress amended the FTCA in 1974, it did so fully aware of the existence of the discretionary function exception which had already created considerable controversy.<sup>202</sup> The law enforcement proviso is therefore a statutory carveout, a fix to the framework originally envisioned. This is what gives the law enforcement proviso its exceptional import, and as such it should apply *over* any coverage under the preexisting framework.

Despite these textual underpinnings, some courts still hesitate to construe the proviso broadly because of prevailing sentiment that it is "an exception to an exception" and thus should be read narrowly.<sup>203</sup> However, the Supreme Court has qualified its conventions of statutory construction specific to the sovereign immunity context such that they also support a broad reading of the law enforcement proviso. As discussed, the Court's current textual approach can be seen as a way of dodging the traditional principle that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign."<sup>204</sup> Indeed scholars have noted the Court's retreat from that principle in the twenty-first century, perhaps as an erosion of sovereign immunity itself.<sup>205</sup>

But leaving aside scholars and commentators, the Supreme Court *itself* has recognized that strict construction simply should not apply in the FTCA context. Strict construction leads to broad application of

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<sup>200</sup> *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 948 (11th Cir. 2001); *see also* *United States v. Lara*, 181 F.3d 183, 198 (1st Cir. 1999) ("[S]tatutes relating to the same subject matter should be construed harmoniously if possible, and if not, that *more recent* or specific statutes should prevail *over older* or more general ones." (emphasis added)).

<sup>201</sup> *See supra* Section II.B.

<sup>202</sup> *See* Boger, Gitenstein & Verkuil, *supra* note 38, at 527–28 (writing in 1973 that "the 'discretionary function' clause has been extensively litigated, and has probably spawned more literature than any other single provision in the FTCA"); *see also* *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives . . . know the law . . .").

<sup>203</sup> *Pellegrino*, 937 F.3d at 199–200 (Krause, J., dissenting) ("While *Dolan* held that the general rule [of construing waivers of immunity strictly] does not adhere when interpreting an exception to the FTCA, i.e., when the United States *reclaims* its sovereign immunity, . . . we consider here an exception to an exception." (citation omitted)).

<sup>204</sup> *McMahon v. United States*, 342 U.S. 25, 27 (1951); *see also* *United States v. Nordic Vill, Inc.*, 503 U.S. 30, 34 (1992) (describing the canon as a "traditional principle"); *supra* note 84 and accompanying text.

<sup>205</sup> *See* Sisk, *supra* note 85, at 1254 ("While purporting to sidestep the strict construction issue, the Court's pattern of action reflects a quiet disapproval of a pro-government interpretive slant.").

the FTCA's exceptions, since preserving immunity is in favor of the sovereign. But the Court specifically admonishes that "[w]e have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act."<sup>206</sup> That is, whether or not something is characterized as an "exception" is not dispositive; rather, the overwhelming congressional intent to waive immunity should be given its full import throughout the FTCA, regardless of where it appears.<sup>207</sup> In fact, the Court has even abrogated an FTCA exception pursuant to a superseding provision in certain contexts, which is exactly the approach advocated for here.<sup>208</sup>

Despite the Supreme Court's declarations to the contrary, lower courts continue to construe immunity strictly in favor of the government in FTCA cases.<sup>209</sup> Exclusive application of the proviso can thus help preclude such erroneous constructions. And *Millbrook* says that even applying the prescribed *neutral* interpretive methodology of plain meaning, the proviso's language is broad; the proviso taking precedence is supported by the Court's own interpretive jurisprudence.<sup>210</sup>

Additionally, courts hesitate with an exclusive interpretation of the proviso because of their desire to give effect to all parts of the FTCA such that neither "section should be read to eviscerate the other."<sup>211</sup> After all, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."<sup>212</sup> To this end, courts have cautioned that aggressive application of the discretionary function exception would swallow not only the proviso but also the rest of waived sover-

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<sup>206</sup> *Nordic Vill., Inc.*, 503 U.S. at 34 (citation omitted).

<sup>207</sup> See *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951) ("The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person." (citation omitted)).

<sup>208</sup> See *Levin v. United States*, 568 U.S. 503, 518 (2013) ("[W]e hold that the Gonzalez Act direction in 10 U.S.C. §1089(e) abrogates the FTCA's intentional tort exception and therefore permits Levin's suit against the United States alleging medical battery by a Navy doctor acting within the scope of his employment.").

<sup>209</sup> E.g., *Zelaya v. United States*, 781 F.3d 1315, 1326 (11th Cir. 2015) (noting that the FTCA's exceptions "must be strictly construed in favor of the United States" (citation omitted)).

<sup>210</sup> See *Sebelius v. Cloer*, 569 U.S. 369, 372 (2013) ("[S]trict construction of waivers of sovereign immunity . . . must . . . give way when, as here, the statute's words 'are unambiguous.'" (citation omitted)).

<sup>211</sup> *Caban v. United States*, 671 F.2d 1230, 1234 (2d Cir. 1982).

<sup>212</sup> *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

eign immunity under the FTCA.<sup>213</sup> But the reverse is not true: Aggressive application of the proviso would not swallow the discretionary function exception because the proviso is limited on its face. The proviso's textual bounds are far easier to apply relative to the discretionary function exception's convoluted doctrinal limitations.<sup>214</sup> Sure enough, opinions that purport to give credence to both tend to rise or fall based on the applicability of the discretionary function exception alone, rendering the proviso irrelevant.<sup>215</sup> Such an approach has proven untenable.<sup>216</sup>

If the proviso precludes the exception, on the other hand, the exception still applies to all government employees who are not law enforcement officers. *Millbrook* conspicuously does not mention the discretionary function exception except to point out that it contains more limiting language than the proviso, suggesting that the Court saw no conflict in direct application of the proviso.<sup>217</sup> A rule that *avoids* statutory conflicts rather than creates them is surely the more sensible construction,<sup>218</sup> particularly when the proviso's purview of federal law enforcement officers is exactly the group Congress wished to expose to intentional tort liability. Having the proviso supersede the exception therefore harmonizes these two FTCA provisions, rather than one eviscerating the other.

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<sup>213</sup> Gray v. Bell, 712 F.2d 490, 508 (D.C. Cir. 1983) (“[A]ny interpretation focusing on the plain import of the [discretionary function exception’s] statutory language would swallow the general waiver of sovereign immunity in the FTCA.”).

<sup>214</sup> See *supra* Section II.A.

<sup>215</sup> See, e.g., Valour LLC v. United States, No. 6:17-CV-01538, 2019 U.S. Dist. LEXIS 64632, at \*22–25 (W.D. La. Mar. 29, 2019) (giving credence to both by merely “assum[ing] that the law enforcement proviso applies” and then ultimately finding that the discretionary function exception precludes liability); Jackson v. United States, 77 F. Supp. 2d 709, 714 (D. Md. 1999) (ending the inquiry after considering the discretionary function “hurdle” which precluded consideration of the intentional tort proviso at all); see also Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987) (holding that a discretionary function hurdle would “render [the proviso’s] authorization of suits for malicious prosecution, which frequently arise out of, or in connection with discretionary acts, superfluous”).

<sup>216</sup> Cf. Morton v. Mancari, 417 U.S. 535, 551 (1974) (“When there are two acts upon the same subject, the rule is to give effect to both *if possible* . . . .” (emphasis added) (citation omitted)).

<sup>217</sup> See *Millbrook v. United States*, 569 U.S. 50, 57 (2013) (“Congress adopted similar limitations in neighboring provisions, see § 2680(a) (referring to ‘[a]ny claim based upon an act or omission of an employee of the Government . . . in the execution of a statute or regulation’ (emphasis added)), but did not do so here.”).

<sup>218</sup> Lau Ow Bew v. United States, 144 U.S. 47, 59 (1892) (“Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention . . . .”).



B. *The Proviso's Exclusivity Provides Doctrinal Clarity and Statutory Congruence Instead of Overlap*

By applying the proviso broadly, one might think the potential for conflict between the two FTCA sections increases significantly. It does not; such fears fail to consider the proviso's coverage of *intentional* torts as a natural limiting principle, as well as the clarity derived from a straightforward framework to be applied.

1. *The Underappreciated Import of the Proviso Being Confined to Intentional Tort*

As an initial matter, fears that aggressive application of the proviso would open the floodgates to liability are unfounded. It is easy to forget that the FTCA is concerned with *jurisdiction*. In virtually all relevant law enforcement FTCA cases, courts are solely determining whether or not they have jurisdiction to entertain the alleged claims.<sup>219</sup> As a result, the government has been criticized for using jurisdictional technicalities to obfuscate government accountability.<sup>220</sup> Expanding jurisdiction under the law enforcement proviso to reach the merits would assuage such criticism while shedding light on how intentional tort claims against a federal officer would be both proven and defended under state law. One explanation for the dearth of FTCA cases on the merits is that meritorious claims which would otherwise survive a jurisdictional challenge settle, and thus expanding

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<sup>219</sup> See, e.g., *Caban v. United States*, 671 F.2d 1230, 1235 (2d Cir. 1982) (“It may very well be that . . . on these facts it will be very difficult for appellant to prove that a tort was committed. We are concerned here only with whether the district court erred by, in effect, finding that it lacked subject matter jurisdiction . . .”).

<sup>220</sup> See George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L. REV. 509, 661 (1985) (“A different but related problem is the Justice Department’s apparent practice of routinely raising technical defects in a claim as a jurisdictional defense in FTCA litigation . . . even though the agency processed and denied the claim on its merits during the administrative phase.”); Helen Hershkoff, *Early Warnings, Thirteenth Chimes: Dismissed Federal-Tort Suits, Public Accountability, and Congressional Oversight*, 2015 MICH. ST. L. REV. 183, 194 (2015) (“Court decisions dismissing FTCA claims on procedural or jurisdictional grounds likewise require a second look—at the agency conduct that precipitated the filing of the lawsuit. Yet every branch of government lacks incentives . . . . [T]he agency whose employees are implicated . . . likely would prefer to keep performance problems under the radar.”); Adin Pearl, Note, *Assigning the Burden of Proof for the Discretionary Function Exception to the Federal Tort Claims Act: An Optimal Approach*, 73 N.Y.U. ANN. SURV. AM. L. 275, 276–77 (2018) (“In particular, federal courts have treated the exceptions for torts caused through the government’s discretionary functions as a condition of judicial jurisdiction and not as a merits provision as it clearly is.”). *But see* Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L. REV. 2859, 2873 (1999) (arguing that “a judge deciding an FTCA jurisdictional issue that implicates merits questions would not be overstepping any historically-drawn lines for judicial decision-making”).

jurisdiction will only lead to more settlements.<sup>221</sup> Nevertheless, the function of intentional torts within the law enforcement proviso is still an important and effective limiting principle on the United States' ultimate liability on the merits. Fears of the proviso intruding on discretionary functions through intentional torts or chilling government decisionmaking due to the threat of liability are therefore largely overstated.

The elements of intentional torts tend not to implicate the discretionary function exception's protection of decisions susceptible to policy analysis. Take the intentional tort of false arrest in Texas, for example. The elements are: "(1) willful detention, (2) without consent, and (3) without authority of law."<sup>222</sup> The first two elements are straightforward as the plaintiff is suing precisely because she was detained without consent. Here, the operative inquiry is the third prong: Under Texas law, whether an arrest was made under authority of law hinges on whether there was probable cause.<sup>223</sup> Texas has "long defined probable cause as 'the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor . . . that the person charged was guilty of the crime for which he was prosecuted.'"<sup>224</sup> Therefore, to make such a determination, a court must pore over the facts to determine if the officer met the objective standard of reasonable belief that there was probable cause to effectuate an arrest.<sup>225</sup>

It is difficult to see how this individualized, factual determination of probable cause might be susceptible to policy analysis as applied to a federal officer. Certainly, whether there was probable cause for arrest is a discretionary call; that is, under the first prong of *Berkovitz*, the decision to arrest someone based on an officer's interpretation of

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<sup>221</sup> See KEVIN M. LEWIS, CONG. RESEARCH SERV., *THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW* 33 (2019) (describing how opportunity for settlement exists throughout the FTCA's procedural process and may be encouraged when claims are meritorious).

<sup>222</sup> See, e.g., *Lewis v. Cont'l Airlines, Inc.*, 80 F. Supp. 2d 686, 701 (S.D. Tex. 1999).

<sup>223</sup> See *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 754 (Tex. App. 1998) (assessing the facts for a false arrest claim to determine if officers "reasonably believed a crime had been committed").

<sup>224</sup> *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997) (quoting *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983), *cert. denied*, 466 U.S. 938 (1984)).

<sup>225</sup> See *Villegas*, 975 S.W.2d at 754; see also *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009) ("The constitutional claim of false arrest requires a showing of no probable cause. . . . We apply an objective standard, which means that we will find that probable cause existed if the officer was aware of facts justifying a reasonable belief that an offense was being committed . . .").

factual circumstances is clearly “a matter of choice.”<sup>226</sup> But being held to an objective standard of reasonable belief under state law precludes the second prong of *Berkovitz* from being satisfied<sup>227</sup>: The *only* relevant judgment in the case of false arrest is that of the reasonable person, and not of any federal actor or agency policy.<sup>228</sup> Put another way, the inquiry is limited to the judgment of the immediate tortfeasor, in this case the individual arresting officer.<sup>229</sup> In terms of the *Dalehite* planning-operational distinction, the intentional tort inquiry is entirely limited to the “operational” stage, and thus outside the ambit of the discretionary function exception.<sup>230</sup> Ultimately, the discretionary function exception is concerned only with judgments susceptible to policy analysis; holding the judgment of individual federal officers to objective standards of societal conduct does not implicate executive policymaking.<sup>231</sup>

No doubt, these objective limits may differ from state to state, and courts uncomfortable with this lack of uniformity have employed the discretionary function exception as a federal resolution.<sup>232</sup> But this is both improper and unwarranted, for the FTCA itself is premised on federal employees navigating and respecting different state laws.<sup>233</sup>

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<sup>226</sup> See Krent, *supra* note 122, at 891 (“A tort suit may still be appropriate, but not because of any absence of discretion.”); *supra* notes 129–36 and accompanying text (explaining the first prong of the *Berkovitz* test and the ease with which it is satisfied).

<sup>227</sup> See *supra* notes 137–41 and accompanying text (explaining the second prong of the *Berkovitz* test and how it is concerned with the separation of powers).

<sup>228</sup> See *Richey*, 952 S.W.2d at 517 (“The probable-cause determination asks whether a reasonable person would believe that a crime had been committed *given the facts* as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted.” (emphases added)).

<sup>229</sup> See *Akin*, 661 S.W.2d at 921 (defining probable cause as “the existence of such facts and circumstances as would excite belief in a reasonable mind, *acting on the facts within the knowledge of the prosecutor*, that the person charged was guilty of the crime for which he was prosecuted” (emphasis added) (citation omitted)).

<sup>230</sup> See *supra* notes 124–26 and accompanying text (explaining the *Dalehite* test and how the exception only immunizes decisions at the higher level “planning” stage).

<sup>231</sup> See *Richards v. United States*, 369 U.S. 1, 6–7 (1962) (“It is evident that the Act was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather . . . the statutory scheme is exemplary of the generally interstitial character of federal law.”); *Bagby & Gittings*, *supra* note 150, at 253 (“The key to the judicial inquiry is to determine whether the challenged decision is driven or dominated by a conscious balancing of competing policy objectives or alternatives. *FTCA exposure arises where objective standards should guide the choice.*” (emphasis added)).

<sup>232</sup> See *Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001) (“This result obtains from the necessity that federal officials be permitted without impediment to conduct the Nation’s business in fifty independent, yet constitutionally inferior, legal jurisdictions. Hence, this case presents exactly the sort of situation that the discretionary function exception seeks to address.”).

<sup>233</sup> See *supra* note 25 and accompanying text (describing the FTCA’s coverage of torts based on state common law). It is true that the discretionary function exception *does*

This can be seen through Congress's constant reference to the need for the postal service truck driver to be subject to suit as justification for expanding liability by enacting the FTCA,<sup>234</sup> and traffic laws are famously different in states as close as New Jersey and New York. The decisions involved in driving a mail truck—which are implicated when

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address uniformity concerns under the FTCA, doing so where “state law would trump federal *policies*” which “might impede agency *policymaking*.” Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1546 (1992) (emphases added). In other words, satisfying the *Berkovitz* test by finding that federal policymaking is implicated *then* means that a potential lack of uniform laws would be untenable. However, the lack of uniformity is not *itself* a justification, but rather a conclusion of the discretionary function exception analysis. Lack of uniformity is not a problem per se because “[t]ort law is state law. It has been clear since *Erie Railroad Co. v. Tompkins* that there is no general federal common law and that Congress does not have the power to declare ‘substantive rules of common law applicable in a state.’ Congress may not rewrite a state’s tort law.” Barbara Kritchevsky, *Tort Law Is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 AM. U. L. REV. 71, 75 (2010) (citations omitted). Cf. Rosky, *supra* note 35, at 901 n.16 (“The existence of a well-developed body of state law has been recognized as supporting application of state rather than federal law as the better source for a particular rule.”). For an argument of why the costs of applying the discretionary function exception nevertheless outweigh any potential uniformity benefits and why that justifies eliminating the exception entirely, see Jonathan R. Bruno, Note, *Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 441 (2012) (“Is this particular form of security against doctrinal innovation in state law governing torts—the discretionary function exception—worth its costs? This Note argues that it is not.”).

<sup>234</sup> See *Richards*, 369 U.S. at 8–9 (“The concern of Congress, as illustrated by the [FTCA’s] legislative history, was the problem of a person injured by an employee operating a government vehicle or otherwise acting within the scope of his employment, situations rarely involving a conflict-of-laws question.” (footnotes omitted)); *Tort Claims: Hearings*, 77th Cong. 9 (1942) (statement of Francis M. Shea, Assistant Att’y Gen. of the United States) (“It has been found that the Government . . . is constantly being called on . . . to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damages or injuries caused while he was operating the truck . . .”); *id.* at 50 (report of Rep. Celler) (“If an innocent child is run down by a mail truck and is crippled for life with an amputated leg, as a result of the negligence of the driver, then surely the sovereignty, the Government, through its truck driver has really done a grievous wrong.”); *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Comm. on the Judiciary*, 76th Cong. 15 (1940) (letter from Henry W. Beer, President, Federal Bar Association); *id.* at 27–28 (statement of Sen. John A. Danaher) (asking about the extent of joint and several liability with respect to “a mail truck and an automobile privately owned and operated, in a traffic case at an intersection, which happens every day over and over again” and where the “driver or passenger of a private car is badly injured”); S. REP. NO. 93-588, at 3 (1973) (supporting the passage of the law enforcement proviso by asserting how the “injustice . . . should be manifest—for under the Federal Torts Claims Act a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen”); see also Krent, *supra* note 233, at 1544 (“[T]he law of the forum in which the tortious conduct occurred governs . . . . [I]f a private driver would be negligent under state law so would the operator of a postal truck, and if a private physician would be liable for malpractice . . . so would a physician at a veterans hospital.”).

a court determines tort liability for a car accident—are not federal policy decisions, and the inquiry is likewise highly factual and individualized in focusing on those driving decisions alone.<sup>235</sup> Breaking local laws of individual conduct, even if they vary from state to state, cannot be shielded under the guise of federal policy.<sup>236</sup> In this way, the relevant judicial inquiry when it comes to intentional torts simply does not implicate discretionary functions that warrant exception, and so there is limited overlap between the proviso and the exception.

## 2. *Exclusive Application of the Proviso Provides Clarity for Each Provision's Role*

Even when a properly pleaded intentional tort could implicate discretionary functions, the nature of the intentional tort inquiry avoids the need to apply the discretionary function exception. Again, the potential overlap between the two provisions is illusory. Enforcement actions are inherently intentional: An officer does not accidentally arrest or detain someone. When police raid a house, they do not accidentally search each room. Nevertheless, an officer might have taken those actions under a direct order by a high-level agency executive, and furthermore the officer may have suspected that the arrest was without authority of law. This would appear to be an example of a situation squarely within the purview of both the proviso and the exception: The intentional tort was the direct result of high-level executive decisionmaking.

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<sup>235</sup> See, e.g., *United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991) (“If [an official] . . . drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion . . . that discretion can hardly be said to be grounded in regulatory policy.”); *Furry v. United States*, 712 F.3d 988, 992 (7th Cir. 2013) (explaining that the postal truck driver “had ‘a duty to exercise reasonable care in the operation of his vehicle and to have his vehicle under such control as [would] enable him to avoid collision with other vehicles or pedestrians’” (alteration in original) (citation omitted); *Cantu v. United States*, No. CV 14-00219 MMM (JCGx), 2015 U.S. Dist. LEXIS 104056, at \*79 (C.D. Cal. Aug. 7, 2015) (analyzing the factual circumstances of a federal CBP officer’s driving and concluding that the officer “was negligent in operating his vehicle” because he “breached his duty to operate his vehicle with due care when he traveled in excess of the posted speed limit and that he acted unreasonably by not looking at the road ahead and checking for cross-traffic while driving”).

<sup>236</sup> Cf. *Jackson v. United States*, 77 F. Supp. 2d 709, 715 (D. Md. 1999) (“Although Jackson is correct in stating that the Customs Service does not make a policy of ‘recklessly disregarding’ exculpatory evidence, it does not follow that the occasional mistaken search and detention is somehow contrary to the regulatory regime as a whole.”). *But see* Stanton R. Gallegos, *Are Police People Too? An Examination of the Federal Tort Claims Act’s “Private Person” Standard as It Applies to Federal Law Enforcement Activities*, 76 BROOKLYN L. REV. 775, 782–84 (2010) (arguing that the FTCA model of piggybacking off of private state tort rights maps poorly onto law enforcement).

Not so: The proviso's focus on intentionality prevents courts from reaching the proximate policy decisions. Proper analysis of FTCA claims takes on what some scholars term a "disaggregative" approach, where separate claims must be disaggregated into the discrete instances of conduct that led to the ultimate action challenged.<sup>237</sup> This means that when an officer commits an alleged false arrest pursuant to a direct order, embedded in that claim are two separate components that give rise to overall liability of the United States: the arrest itself which depends purely on the arresting officer's knowledge and intent, and then the *ordering* of the arrest which sounds in negligence. By disaggregating the claims, a court can consider each component separately under the FTCA, meaning the proviso's scope is limited to the former and never reaches the latter.

This is not just a matter of how to interpret pleadings—disaggregation distinguishes qualitatively different claims. For example, if the order to raid a house is in error, at a certain point in the execution of that order the error might become evident. The agents might realize the name on the front porch does not match their suspect, for example. At *that* point, any subsequent arrest and detainment may be intentionally tortious. In other words, the probable cause inquiry for

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<sup>237</sup> See Peter H. Schuck & James J. Park, *The Discretionary Function Exception in the Second Circuit*, 20 QUINNIPIAC L. REV. 55, 62 (2000) ("[D]istrict courts in the Second Circuit have followed the circuit court's lead and made a point of disaggregating the government's course of conduct into the discrete decisions, acts, and omissions that comprise it—some of which qualify for the DFE, others not."); Seamon, *supra* note 149, at 712 (describing the Supreme Court's application of the *Berkovitz* test "for identifying whether conduct is protected, not to the course of conduct as a whole, but to the specific components of the course of conduct"); see also *Sheridan v. United States*, 487 U.S. 392, 401–03 (1988) (distinguishing between the injuring tort itself and "the negligence of other Government employees who allowed a foreseeable assault and battery to occur" which "may furnish a basis for Government liability that is entirely independent of" the individual employee's actions, and basing liability solely on the former); *Indian Towing Co. v. United States*, 350 U.S. 61, 62, 66 (1955) (rejecting the government's argument that "there can be no recovery based on the negligent performance of the activity itself" and that even if the discretionary function exception immunizes the decision of the Coast Guard to provide lighthouse service, it does not reach "[t]he specific acts of negligence relied on"); cf. Ronald A. Cass, *The Discretionary Function Exception to the Federal Tort Claims Act*, in 2 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS 1503, 1543 (1987) (asserting that "[v]irtually any bureaucratic exercise of regulatory authority can be disaggregated into component parts such that one part arguably falls outside the ambit of a narrow regulatory conduct exception, no matter how that more limited exception is defined" and noting that disaggregation alone "will not assure that the 'suable' behavior either exceeded the bounds of authority (violated some binding constraint) or had enough causal connection to the asserted harm to provide a basis for liability. It will, however, provide a set of triable issues"); Krent, *supra* note 122, at 890 n.87, 891 (criticizing the Supreme Court's application of the discretionary function exception in *Berkovitz* for failing to take into account "the difficulty of disaggregating the officials' tasks for purposes of the Court's inquiry").

determining liability on a claim for false arrest would *end* there, never reaching the order to raid in the first place.<sup>238</sup> A determination on the merits for false arrest in that example would mean finding that the agents realized they had the wrong people but arrested them anyway, and *not* that the entire decision to commence a raid was erroneous.

Whatever agency decisionmaking that ultimately led to the order to raid is therefore irrelevant to the factual inquiry of whether an intentional tort was committed by the arresting officer, but it could constitute an entirely separate claim. The plaintiff could for example allege that the United States was negligent in its training and supervision of the officer which resulted in the false arrest.<sup>239</sup> This is where the discretionary function exception comes in to prevent courts from weighing in on federal policies like how to train law enforcement officers.<sup>240</sup> Disaggregation thus does not obviate the discretionary function exception, but rather disentangles components implicating the exception from those that implicate the law enforcement proviso. A proper understanding of intentional tort liability—and thus proper suit under the proviso—shows that liability lies only in the agent’s execution of an agency decision and not in the agency decision itself.<sup>241</sup>

Nevertheless, it is possible that an expanded reading of the proviso could lead to litigation stemming from the proviso’s language allowing suit “arising out of” intentional torts.<sup>242</sup> Disaggregation in such case remains crucial, and the discretionary function exception is a vitally important tool to strip away those parts of claims without reaching the merits.<sup>243</sup> When a filed FTCA claim implicates both the

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<sup>238</sup> See *supra* notes 223–25 and accompanying text (explaining the inquiry for false arrest in Texas as an example).

<sup>239</sup> See, e.g., *Zhao v. United States*, 2013 U.S. Dist. LEXIS 83888, \*1–5 (W.D.N.Y. May 30, 2013) (alleging intentional torts as well as “negligence in the hiring, retaining, supervising, and training” of the tortfeasor officer).

<sup>240</sup> See *id.* at \*9–11 (“[C]ourts in this Circuit and throughout the country have routinely held that training, hiring, and supervision decisions are discretionary, and thus, federal courts lack jurisdiction over claims asserting that such acts were performed negligently, or not at all.”).

<sup>241</sup> See *Schuck & Park, supra* note 237, at 73 (“For purposes of applying the [discretionary function exception], a government action is not grounded in policy merely by virtue of the fact that it was undertaken under the general authority of a policy decision.”).

<sup>242</sup> Cf. *Georgacarakos v. United States*, 420 F.3d 1185, 1186–87 (10th Cir. 2005) (explaining the broad definition of “arising out of” under the FTCA generally); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987) (“[T]he law enforcement proviso[s] . . . authorization of suits for malicious prosecution . . . frequently arise out of, or in connection with discretionary acts . . .”).

<sup>243</sup> See, e.g., *Bridges v. United States*, No. 1:18-cv-01869-RBJ-SKC, 2019 U.S. Dist. LEXIS 196778, at \*3 (D. Colo. Aug. 5, 2019) (“[T]he FTCA’s intentional tort exception

actions of an individual officer as well as that officer's agency mandate, the proviso appropriately focuses solely on the former. The exception meanwhile makes quick work of the latter. To the extent that a plaintiff would plead that an erroneous agency decision to execute a raid was itself intentional assault or false arrest, intentional torts like assault and battery are not imputed to parties beyond the actor, which is why actual commission of the action is an element that must be proved.<sup>244</sup>

The proviso's confinement to intentional torts also simplifies the necessary factual inquiry; if one concern is abusing the proviso to plead claims that may otherwise be insulated by immunity, disaggregation coupled with the intentionality element quickly exposes that pretext. Again, using false arrest in Texas as an example, a false arrest claim hinges on whether the officer effectuated the arrest without probable cause. An FTCA claim making vague allegations that an arrest was defective in any other way would be obviated for failing to show a *lack* of probable cause. That is, the proviso only allows claims about the *falsity* of an arrest itself, and not a claim concerning negligent treatment during or after an arrest.<sup>245</sup> The directness of the inquiry facilitates courts' ability to "look to the substance of the claim" regardless of how it is pleaded.<sup>246</sup> And because analysis for

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included not only the intentional tort itself but also any claim arising out of assault, battery, or false imprisonment. . . . Because the negligence claim arose out of the assault and battery charge, Judge Babcock found that it was barred by the FTCA."); David M. Zolensky, Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803, 813 n.53 (1981) (explaining the possibility that "federal negligence is actionable when it leads to a government employee's intentional tort" and noting that the Court has mentioned that situations where negligence is actionable "would not lead to numerous suits and excessive federal liability because the government has defenses such as the exceptions for intentional torts and discretionary functions").

<sup>244</sup> That is, going back to the example of false arrest in Texas, "willful detention" is an explicit element to be proved; in order to be liable for an intentional tort, the purported tortfeasor must be the actual actor that committed the detention. *See supra* notes 222–23 and accompanying text. Thus, a suit against an agency official that merely ordered that action necessarily fails this element and the official cannot be charged with the intentional tort of false arrest. In other words, the intentional tort never reaches the more proximate policy decisions.

<sup>245</sup> *Cf. Zhao*, 2013 U.S. Dist. LEXIS 83888, at \*11–12 (holding plaintiff's argument that the proviso "renders the discretionary-function exception inapplicable to her negligent-training claim" to be unavailing because when entertaining a proviso claim "the court considered only claims for false arrest, false imprisonment, and malicious prosecution").

<sup>246</sup> *See Milligan v. United States*, 670 F.3d 686, 695 (6th Cir. 2012) ("A plaintiff may not use semantics to recast the substance of the claim so as to avoid a statutory exception."); *Tookes v. United States*, 811 F. Supp. 2d 322, 333 (D.D.C. 2011) ("[T]he plaintiff's contention that the deputy marshals falsely imprisoned her after removing her from the Superior Court is a reiteration, rather than a recharacterization, of the allegations in the plaintiff's SF-95 and Amended Complaint, and as such, provides no basis for summary



intentional torts pierces more readily to that underlying substance, the intentionality of the proviso mitigates confusion in any universe of fact patterns and simplifies the FTCA analysis for courts.<sup>247</sup>

The proviso-exclusive rule means that as long as an enumerated intentional tort is properly pleaded, a court will take jurisdiction over that claim against the United States. This framework avoids the doctrinal quagmire of having courts engage in an abstract analysis of whether jurisdiction is warranted, and instead engages with the facts as alleged. Analysis of intentional torts on the merits is straightforward and provides natural constraints that limit the sovereign's ultimate exposure, both of which significantly streamline the FTCA inquiry.<sup>248</sup> The analysis avoids overlap with an already-confusing discretionary function exception, as proper disaggregation sharpens the role that the exception and the proviso each play under the FTCA.

### C. *The Proviso's Increasing Importance in Law Enforcement Accountability*

By the FTCA's own terms, the other two avenues for a damages remedy against tortious federal officers are for constitutional violations or statutory violations that explicitly grant a cause of action.<sup>249</sup> The latter is self-explanatory; the former is a reference to the controversial so-called *Bivens* action. Given the recent, continued narrowing of *Bivens* jurisprudence, courts should more broadly utilize the FTCA's law enforcement proviso as the preferred avenue for redressing similar claims.

In 1971, the Supreme Court decided the landmark case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* which held that a plaintiff is entitled to money damages when a federal agent violates the plaintiff's rights under the Federal Constitution.<sup>250</sup> *Bivens* provides a federal damages remedy for Fourth Amendment violations

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judgment being granted to the defendant."); see also *Sheridan v. United States*, 487 U.S. 392, 403 (1988) ("In a case of this kind, the fact that [defendant's] behavior is characterized as an intentional assault rather than a negligent act is also quite irrelevant.").

<sup>247</sup> See Longstreth, *supra* note 93 ("Although the Court in *Millbrook* adopted a broad construction of the immunity waiver set forth in the law enforcement proviso, the view that the decision will now lead to a flood of claims for which Congress never intended to waive immunity appears overstated.").

<sup>248</sup> See, e.g., *Hajdusek v. United States*, 895 F.3d 146, 150 (1st Cir. 2018) ("We must decide whether the discretion . . . exercised was susceptible to policy analysis. As we have previously recognized, answering this question requires a case-by-case approach, which has, admittedly, 'led to some disarray.'" (citation omitted)).

<sup>249</sup> See 28 U.S.C. § 2679(b)(2) (2018).

<sup>250</sup> 403 U.S. 388, 397 (1971) ("[W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment.").

against officers in their individual capacities. Its groundbreaking nature was not its recognition of federal officer liability, but that violation of the Constitution itself provided an independent cause of action.<sup>251</sup> In the decade after *Bivens*, a federal damages cause of action was recognized under the Fifth Amendment for Due Process Clause violations from sex discrimination as well as under the Eighth Amendment against federal prison officials.<sup>252</sup>

*Bivens* was never without its detractors. The dissenters in *Bivens* itself accused the Court of violating separation of powers principles in creating a constitutional damages action, a task that should be left to Congress.<sup>253</sup> In recognition of these concerns, the majority recognized two exceptions which countenance that a court should not recognize a remedy under *Bivens*.<sup>254</sup> The first is whether there are “special factors counselling hesitation in the absence of affirmative action by Congress,” and the second is if there is a “congressional declaration that persons injured . . . must instead be remitted to another remedy, equally effective in the view of Congress.”<sup>255</sup> In the years since recognizing a *Bivens* action under the Eighth Amendment, the Court has declined to recognize further *Bivens* claims.<sup>256</sup>

<sup>251</sup> See Pfander et al., *supra* note 42, at 570.

<sup>252</sup> See *id.* at 570–71 (“For the next decade, the Supreme Court and lower courts read *Bivens* broadly as creating a general claim for damages caused by constitutional violations . . . .”); see also *Carlson v. Green*, 446 U.S. 14, 17–18 (1980) (allowing a *Bivens* claim to proceed for alleged violation of the Eighth Amendment’s “proscription against infliction of cruel and unusual punishment”); *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (holding that “petitioner has a cause of action under the Fifth Amendment, and . . . her injury may be redressed by a damages remedy”).

<sup>253</sup> See *Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting) (“We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress . . . .”); *id.* at 430 (Blackmun, J., dissenting) (warning that the case “opens the door for another avalanche of new federal cases” and that “in all the intervening years neither the Congress nor the Court has seen fit to take this step” to provide a damages remedy since the Fourth Amendment’s enactment); Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. 1473, 1482 (2013) (“The dissenters concluded that separation-of-powers concerns were the central issue, arguing that the creation of federal remedies was essentially a legislative act that fell within the exclusive power of Congress.”).

<sup>254</sup> See George D. Brown, “Counter-Terrorism Via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 849–50 (2009) (noting the majority “posited two exceptions that might suffice to take away the judicially created remedy” despite “brush[ing] aside the dissenters’ suggestion that congressional authorization of such a remedy was necessary”); see also Reinert & Mulligan, *supra* note 253, at 1481–82 (describing how the *Bivens* majority opinion’s conditions and therefore justifications for recognizing a claim are rooted in separation of powers concerns).

<sup>255</sup> *Bivens*, 403 U.S. at 396–97.

<sup>256</sup> See Pfander et al., *supra* note 42, at 574–77 (“Since *Carlson*, the Court has turned away *Bivens* claims for a variety of reasons, more and less openly articulated. Many factors

The pushback on *Bivens* over the years has implicated the FTCA. In particular, “[i]n a series of decisions spanning the early 1980s to the early 1990s, the Court sometimes emphasized the availability of congressionally approved alternatives that could provide remedies similar to those contemplated by *Bivens*.”<sup>257</sup> The coverage of the FTCA and *Bivens* actions, particularly with regard to law enforcement, has always been coterminous with no clear fault line.<sup>258</sup>

Recent developments in the Supreme Court’s handling of *Bivens* actions sound the death knell for the doctrine.<sup>259</sup> Because the law enforcement proviso and *Bivens* are counterparts in history, purpose, and effect, the shrinking of one puts pressure on the other to fill the redressability gap.<sup>260</sup> This is not a new dynamic: the Court in its most recent *Bivens* cases has been increasingly stingy in expanding and allowing remedies.<sup>261</sup> Moreover, the Court’s 2020 decision in *Hernandez v. Mesa* appears to be the high water mark for judicial intolerance of the doctrine.<sup>262</sup> As the majority in *Hernandez* articulated, “an implied claim for damages . . . risks arrogating legislative power.”<sup>263</sup> As a legislative enactment, the FTCA’s law enforcement proviso emerges as the obvious response to such concerns. If “a fed-

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seem central to this trend . . .”); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 357–61 (1989) (describing how the exceptions are “another tool which courts may use in other factual settings to further restrict the viability of a *Bivens* action”).

<sup>257</sup> See Pfander et al., *supra* note 42, at 575; see also Reinert & Mulligan, *supra* note 253, at 1484 (“[T]he Court has consistently looked to the existence of federally approved or created remedies as a reason to prohibit a *Bivens* action on alternative-remedies grounds.”).

<sup>258</sup> See Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 677–78 (2019) (“The parallel relationship between FTCA and *Bivens* claims is a byproduct of the coterminous symmetry between constitutional and common-law tort jurisprudence . . . . Within the Fourth Amendment context, however, there exists a more symbiotic relationship between officer misconduct and traditional common-law jurisprudence.”).

<sup>259</sup> See Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167 (2018).

<sup>260</sup> Cf. *Carlson v. Green*, 446 U.S. 14, 20 (1980) (stating that the law enforcement proviso at “§ 2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in the complaint still have an action under [the] FTCA against the United States as well as a *Bivens* action . . .”); see also *supra* notes 38–48 and accompanying text (outlining the parallel development of *Bivens* and the law enforcement proviso).

<sup>261</sup> But see Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 817 (2010) (arguing that “*Bivens* claims are more successful than has been reported”). See generally Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 548–56 (2013) (tracing the development of the *Bivens* doctrine).

<sup>262</sup> See 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring) (“[I]n my view, the time has come to consider discarding the *Bivens* doctrine altogether.”).

<sup>263</sup> *Id.* at 741 (majority opinion).

eral court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress," the Court appears to be signaling that the FTCA is the proper channel for these claims.<sup>264</sup>

Nowhere in *Hernandez* does the Court imply that its discomfort with *Bivens* has anything to do with immunity or the propriety of redress. Rather, the absence of a codified statutory remedy has been the consistent underlying concern in *Bivens* cases.<sup>265</sup> That is, aversion to a *Bivens* remedy is *not* based on a disbelief in the remedy's desired effect of compensation or deterrence.<sup>266</sup> The symbiotic relationship between the FTCA and *Bivens* remains unaffected.<sup>267</sup> Therefore, as *Bivens* shrinks to the vanishing point, the implication is that the underlying purpose of a *Bivens* remedy must merely be displaced to the FTCA.<sup>268</sup> Coupled with the Court's apparent endorsement of an expanded, unambiguous reading of the proviso in *Milbrook*,<sup>269</sup> FTCA waivers of immunity should be given their due weight as explicit Congressional avenues for redress.

#### CONCLUSION

As the nation wrestles with demands for social justice in the wake of the killing of George Floyd, law enforcement accountability has

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<sup>264</sup> *Id.* at 742. *But see Carlson*, 446 U.S. at 23 ("Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.").

<sup>265</sup> See James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 117 n.3 (2009) (providing examples of scholars raising this concern). "While the criticism ranges broadly, a consistent theme has been to question the democratic and institutional legitimacy of the judicial role in fashioning remedies for constitutional violations." *Id.* at 117–18.

<sup>266</sup> *Carlson*, 446 U.S. at 21 ("[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose.").

<sup>267</sup> See Pfander & Baltmanis, *supra* note 265, at 134 ("By foreclosing suit against federal officers on state law theories of liability and shifting to remedies against the government under the FTCA, the Westfall Act assumes the routine availability of a *Bivens* remedy."); *cf. Vazquez & Vladeck, supra* note 261, at 543 ("It was common ground in *Bivens* that, in the absence of a federal cause of action, damages would be available on the basis of the common law.").

<sup>268</sup> See Kent, *supra* note 41, at 1167 (describing how "an individual damages remedy under *Bivens* is not constitutionally required so long as other remedies, very broadly understood, provide sufficient assurance of the rule of law within the executive," although ultimately arguing that "the common law tort suit for damages has gone from a primary way that federal officers were held accountable to a nullity" in favor of injunctive relief instead); *cf. Vazquez & Vladeck, supra* note 261, at 566–77, 515 (arguing that the Westfall Act—which amended the FTCA to mandate substitution of the United States for individual government officers—"preserves state law remedies for injuries caused by federal officials' violations of the Constitution" given that the other conceivable option, that it "legislatively authorize[d] a robust *Bivens* action encompassing at least the sorts of remedies previously available under the common law," now appears foreclosed).

<sup>269</sup> See *supra* Section I.C.

come under heightened scrutiny.<sup>270</sup> Sweeping reforms are underway, with the doctrine of qualified immunity being singled out for abolishment.<sup>271</sup> While qualified immunity is concerned with individual officers, the FTCA's analog may be understood to be denying jurisdiction against the United States, particularly through the discretionary function exception.<sup>272</sup> Indeed, the calls for greater liability and thus accountability for law enforcement have come from within the judiciary itself.<sup>273</sup>

The FTCA was designed to do just that. It explicitly authorized the judiciary to hold federal government officers liable for their torts

<sup>270</sup> See generally Leila Miller, *George Floyd Protests Have Created a Multicultural Movement That's Making History*, L.A. TIMES (June 7, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-06-07/george-floyd-protests-unite-black-activists-new-allies> ("Floyd's killing has created a wide, multicultural activist movement unprecedented in scope when compared with other notorious cases of police abuse.").

<sup>271</sup> See, e.g., Daniella Cheslow, *Virginia House Passes Bill to Strip Police of Qualified Immunity*, DCIST (Sept. 9, 2020, 9:47AM), <https://dcist.com/story/20/09/09/virginia-house-democrats-vote-bill-strip-police-qualified-immunity> ("The new legislation would eliminate [qualified immunity for] . . . law enforcement officers accused of wrongdoing."); Sarah Ferris, Heather Cayle & John Bresnahan, *House Passes Sweeping Police Reform Bill*, POLITICO (June 25, 2020, 12:05 PM), <https://www.politico.com/news/2020/06/25/police-reform-plan-house-339691> ("Democrats have refused to scale back the central components of their bill, such as banning chokeholds or abolishing the 'qualified immunity' doctrine that protects police officers from lawsuits."); *Lamont Signs Sweeping Police Accountability Bill into Law*, WCBS NEWSRADIO 880 (July 31, 2020, 6:39 PM), <https://www.radio.com/wcbs880/articles/news/lamont-signs-sweeping-police-accountability-bill-into-law> (Connecticut has already enacted a law that "removes qualified immunity, which protected officers from having to pay damages").

<sup>272</sup> Cf. *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1138 n.18 (10th Cir. 1999) ("As illustrated by the opinion establishing that municipalities do not share their employees' qualified immunity from § 1983 liability, the analogy between discretionary-function immunity, which limits governmental liability, and qualified immunity, which limits officials' personal liability, is imperfect."); *Horta v. Sullivan*, 4 F.3d 2, 11 (1st Cir. 1993) ("[E]stablishing [the] qualified immunity doctrine, the Supreme Court indeed stated that 'government officials performing *discretionary functions*, generally are shielded from liability for civil damages . . . . But . . . it has never since been clear exactly what role, if any, this concept is supposed to play in applying qualified immunity." (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 621 n.147 (2007) ("See Initial ICCPR Report, *supra* note 42, ¶ 98 (recognizing qualified immunity limitations on suits for damages under Section 1983 and the discretionary function and intentional tort exceptions to the government's waiver of immunity under the FTCA)"); Stern, *supra* note 258, at 707 n.279 ("Indeed, for courts that have found that the discretionary function exception may apply even in instances where the plaintiff alleged constitutional violations, the reasoning stems from the need to mirror qualified immunity afforded to the tortfeasor.").

<sup>273</sup> *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at \*2 (S.D. Miss. Aug. 4, 2020) ("The Constitution says everyone is entitled to equal protection of the law—even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing.").

by waiving the sovereign immunity of the United States. Congress further enacted the law enforcement proviso to specifically target federal law enforcement. Instead of carrying out that mandate, courts have unduly favored immunity by overapplying the FTCA's exceptions to waiver—the discretionary function exception in particular. Fortunately, the FTCA's underutilized law enforcement proviso is not only easier to apply than courts realize, but also presents no actual tension with the discretionary function exception. The law is in a position to help fill the need for greater accountability.

The proviso's importance has been suppressed for too long. Interpretation of the proviso itself is finally being broadened in the wake of *Millbrook*, and lower courts must properly heed the full import of the Supreme Court's decision going forward. Nevertheless, the proviso's conflict with the discretionary function exception remains unduly limiting. The necessary solution is to apply the law enforcement proviso exclusive of the discretionary function exception; the need to hold federal law enforcement accountable which undergirds the proviso will not be vindicated until this happens. The first step to government accountability is a government that is *able* to be held accountable. In America, there is no King; only wrongs. The law should reflect as much.