IMMUNITY FOR IMAGINARY POLICY IN TORT CLAIMS AGAINST THE FEDERAL GOVERNMENT

*Gregory C. Sisk**

Fictional policy justifications for official negligence are regularly accepted by the federal courts to shield the federal government from liability for ordinary tortious wrongdoing. The lower federal courts have adopted an extravagant interpretation of the discretionary function exception to the Federal Tort Claims Act that applies whenever a policy implication can be theorized. Under this "susceptible to policy analysis" approach, the United States government escapes accountability through after-the-fact speculation regarding policy factors that could have played a role (but actually did not) in the harmful government conduct.

By textual command, the exception shields only government decisions "based on," that is, causally linked to, a "discretionary function," a term of art that means an actual policy judgment. Moreover, the purpose of the exception is to prevent judicial second-guessing of public policy decisions made by the federal government. But the risk of judicial intrusion into the realm of policymaking vanishes when government officials have exercised no policy judgment.

The promise of the FTCA in waiving federal sovereign immunity for common law torts is being suffocated beneath a blanket of immunity stretched to cover not only genuine policy choices, but also the conjectures of government lawyers about a policy ensemble that could have been fashioned. New empirical evidence confirms that the government almost invariably prevails in the new regime of hypothetical policy creep. Garden-variety miscarriages of public safety are transmuted into imaginary policy reflections, leaving victims of carelessness to bear their own losses.

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* Laghi Distinguished Chair in Law, University of St. Thomas School of Law (Minnesota) (gcsisk@stthomas.edu). My thanks to generous fellow scholars who commented on an earlier draft, Will Baude, Kristin Hickman, Hal Krent, Aaron Nielson, Mike Paulsen, Jim Pfander, and Alex Reinert, and thanks as well to my research assistants, Marian Farah, Meredith LaVine, and Taryn Reichow. I also honor the late Professor Cornelius Peck whose early scholarly work on this subject deserves renewed attention, and who also happened to be my torts professor in law school.

INTRODUCTION

In the case of the angry mountain goat, National Park Service employees at Olympic National Park in Washington State were made pointedly aware of the growing danger posed by an aggressive mountain goat who menaced hikers.[1] Over the course of four years, Park Service personnel communicated among themselves about the 370-pound, belligerent animal they had named "Klahhane Billy."[2]

This goat had frequently threatened human beings, rearing up and brandishing its horns, even to the point of butting its head against a person.[3] Throwing rocks at the animal and shooting it with paintballs and bean bags failed to deter this goat, who quickly returned to terrorizing whoever was walking on the trail.[4] The park's Wildlife Branch Chief warned in writing that "it may be only a[] matter of time until someone is hurt."[5] Yet the months dragged on without further action to eliminate the threat.

Sadly, the predicted tragedy came to pass in 2010. A group of tourists, including Robert Boardman and his wife Susan Chadd, encountered the malicious goat during their hike in the park.[6] Boardman threw rocks at the approaching goat and tried to fend it off with his walking stick.[7] The goat attacked, goring him in the leg with its sharp horns and opening an artery.[8] Standing over the grievously injured man, the goat then prevented anyone from coming to Boardman's aid as he bled to death.[9]

Finally awakened from their bureaucratic slumber, park personnel pursued the goat, easily finding it with blood on its horns, and then shot it dead.[10]

Boardman's surviving wife Chadd and his estate brought suit against the United States under the Federal Tort Claims Act (FTCA), a statute that waives sovereign immunity.[11] In response, the government asserted the discretionary function exception, which excludes

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1 Chadd v. United States, 794 F.3d 1104, 1117 (9th Cir. 2015) (Kleinfeld, J., dissenting).

2 *Id.*

3 *Id.* at 1118.

4 *Id.* at 1107 (majority opinion); *id.* at 1117–18 (Kleinfeld, J., dissenting).

5 *Id.* at 1117 (Kleinfeld, J., dissenting).

6 *Id.* at 1107–08 (majority opinion).

7 *Id.* at 1117 (Kleinfeld, J., dissenting).

8 *Id.* at 1107–08 (majority opinion).

9 *Id.* at 1117 (Kleinfeld, J., dissenting).

10 *Id.*

11 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2018); *see also Chadd*, 794 F.3d at 1108; *infra* subsection I.A.1.

government liability for policy judgments.[12] Government lawyers submitted an after-the-fact declaration by park officials referring to the mountain goat in the park as "an appealing, iconic animal" that is "an attraction to park visitors."[13]

While a policy to preserve the iconic mountain goat might seem alluring, it was fictional. The rationalization that the public wanted to see these creatures was fashioned after Boardman's death to justify the government's lengthy and ultimately fatal inaction.[14] In truth, the mountain goat was an invasive pest in Olympic National Park. The goat had been classified as an "exotic" species that was not native to the park.[15] Pursuant to the park's management manual, such species were subject to intensive control "up to and including eradication," especially when the animal "create[d] a hazard to public safety."[16]

Based on a theoretical policy justification, the government secured dismissal of Chadd's lawsuit in the district court, which was affirmed on appeal.[17] The majority of the appellate panel invoked an extravagant interpretation of the discretionary function exception to the FTCA as applying whenever a policy justification can be hypothesized, regardless of whether it had played a genuine role in the government choice. As the court majority explained, for the exception to apply, "the decision giving rise to tort liability 'need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis.'"[18] The concurring judge agreed that circuit precedent demanded this deference "to a hypothetical policy analysis," although she worried that "our jurisprudence in this area has gone off the rails."[19]

The dissenting judge insisted that, properly read, the FTCA's discretionary function exception is triggered only "where a government policy decision guided the exercise of discretion," rather than wherever "a policy judgment can subsequently be imagined and articulated."[20] As the dissent observed, "There never was a park policy to leave dangerous animals alone because 'the public desired to see the goats.'"[21]

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12 United States' Reply at 10, Chadd v. United States, No. 11-cv-05894, 2012 WL 3578660 (W.D. Wash. Aug. 20, 2012); *see also* 28 U.S.C. § 2680(a) (2018); *infra* Section I.B.

13 *Chadd*, 794 F.3d at 1113; *see id.* at 1124 (Kleinfeld, J., dissenting).

14 *See id.* at 1116, 1124 (Kleinfeld, J., dissenting).

15 *Id.* at 1110 (majority opinion).

16 *Id.*

17 *Id.* at 1108, 1114.

18 *Id.* at 1109 (quoting Miller v. United States, 163 F.3d 591, 593 (9th Cir. 1998)).

19 *Id.* at 1114 (Berzon, J., concurring).

20 *Id.* at 1116 (Kleinfeld, J., dissenting).

21 *Id.*

Regrettably, the court of appeals in this case is hardly alone in being willing to indulge government fabrication of post hoc policy imaginings to excuse the United States from its obligations under the FTCA to remedy its own tortious wrongdoing. When government litigators adduce minimally plausible but belated policy rationalizations, then the courts are asked to pronounce the matter as "susceptible to policy analysis."[22] These courts then apply the exception to the FTCA to bar liability, regardless of whether the alleged tortious "conduct was 'the end product of a policy-driven analysis.'"[23] Indeed, courts have declared that it is "largely irrelevant" whether "government agents . . . did or did not engage in a deliberative process before exercising their judgment."[24]

Through the discretionary function exception, Congress wisely withdrew government policy judgments from the misplaced venue of the courts. Unfortunately, as shown in the trends in the lower federal courts, judicial interpretation of this exemption has become unmoored from its anchor in the text and purpose of the statute.[25]

In the arena of intense federal regulation of financial institutions, the Supreme Court recognized that, even in a policy-permeated field, not every decision is "susceptible to policy analysis," noting for example that negligent driving of an automobile would lack a tight connection to federal regulatory policy.[26] Taking this phrase out of context, the lower federal courts have taken flights into fancy to find policy justifications for careless behavior that exist only in the speculation of government litigators.[27]

But the very text of the exception shields only government decisions "based upon" a "discretionary function."[28] Under the "most natural reading" of the phrase "based upon" and the historical understanding of "discretionary function" as a term of art, the exception applies only when a policy judgment was a "necessary condition" to the government's decision that is alleged to have harmed the tort plaintiff.[29]

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22 *See infra* Section I.C.

23 Sánchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86, 93 (1st Cir. 2012) (quoting Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999)).

24 Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993); *see also Sánchez*, 671 F.3d at 93 (saying "it is not relevant whether" any actual policy analysis occurred).

25 *See infra* subsections I.C.1–2.

26 United States v. Gaubert, 499 U.S. 315, 325 & n.7 (1991); *see also infra* subsection I.C.1.

27 *See infra* subsections I.C.2–3.

28 *See* 28 U.S.C. § 2680(a) (2018); *infra* subsection II.A.1.

29 *Cf.* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63 (2007) (interpreting the phrase "based on" in a federal statute as requiring but-for causation).

The discretionary function exception to the FTCA rightly carves out the political arena of federal government policymaking and places it beyond court review under ill-suited legal standards of tort liability.[30] As the Supreme Court explained, through this exception, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[31]

The risk of judicial intrusion into the realm of political considerations vanishes when government officials have exercised no policy judgment. The courts should not be asked to defer to the clever imaginings of government lawyers who postulate a hypothetical policy choice that was never made.[32] And such a suggestion contravenes the "simple but fundamental rule of administrative law" that reviewing courts "must judge the propriety of such action solely by the grounds invoked by the agency."[33] Indeed, by giving its imprimatur to a hypothetical policy rationale, the court effectively offers an unconstitutional advisory opinion on the legal implications of a policy not yet adopted.[34]

The FTCA is the most important and most widely invoked statutory waiver of federal sovereign immunity for compensatory damages enacted by Congress.[35] Providing compensation for those injured by government negligence, the FTCA has considerable merit in holding the federal government accountable for official wrongdoing and carelessness.[36] Indeed, the vitality of the FTCA is even greater today than when first enacted seventy-five years ago, as federal officers have since been granted immunity from individual liability for tortious conduct in the scope of employment.[37] Moreover, in the past several years, the Supreme Court has greatly restricted the *Bivens* constitutional tort remedy against individual federal officers.[38]

With this backdrop of current federal government and federal officer litigation, it is all the more concerning that the promise of the FTCA is being suffocated beneath a blanket of fictional policy immunity that transforms ordinary carelessness into policy-based, political choices.[39] And new empirical evidence confirms that is precisely what

30 *See infra* Section I.B.

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

32 *See infra* Sections II.B–C.

33 SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); *see also infra* Section II.B.

34 *See infra* subsection II.B.4.

35 On the FTCA, see generally GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT §§ 3.2–3.8, at 115–224 (2d ed. 2023).

36 *See infra* Section I.A.

37 *See* 28 U.S.C. § 2679(b)(1) (2018); *see also infra* subsection I.A.2.

38 *See infra* subsection I.A.2.

39 *See infra* Section II.D.

is happening in the lower federal courts, because the government almost invariably prevails—by a rate of nearly nine to one—in this new regime of hypothetical policy creep.[40]

I. THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION

A. The Federal Tort Claims Act: Waiving Federal Sovereign Immunity for Common Law Tort Causes of Action

1. The FTCA Allows Claims Against the Federal Government Framed by State Tort Law

When government agents harm individuals by carelessness, governmental insulation from consequent tort liability would unjustly leave the costs of those injuries to be borne by the victims. Especially when the government is the source of the wrongful harm, compensation distributes "the costs of official misconduct from the unfortunate victim to a larger group."[41] In this way, corrective justice[42] through compensatory damages by the government means that "[t]he harmed person is made whole (or as whole as money damages allow). And the cost is distributed to the public generally (by being paid from the public treasury)."[43]

As the Supreme Court explained in *Rayonier Inc. v. United States*,[44] Congress understood that "when the entire burden [of government negligence] falls on the injured party it may leave him destitute or grievously harmed."[45] By instead charging such losses "against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight."[46]

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40 *See infra* subsection II.D.1 (showing the government prevailing in sixty-nine of seventy-eight cases).

41 PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 23 (1983) (explaining that "[w]e value compensation," not only because it deters or even provides corrective justice, but also because it distributes "the costs of official misconduct from the unfortunate victim to a larger group," *id.* at 22–23).

42 *See* United States v. Muniz, 374 U.S. 150, 154 (1963) (explaining that the FTCA "was designed . . . to avoid injustice to those having meritorious claims hitherto barred by sovereign immunity").

43 Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 781 (2019).

44 Rayonier Inc. v. United States, 352 U.S. 315 (1957).

45 *Id.* at 320.

46 *Id.*

The Federal Tort Claims Act was enacted in 1946 to waive the sovereign immunity of the United States for state tort claims.[47] As the Supreme Court confirmed in one of its earliest decisions on the statute, the FTCA "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."[48] More recently, the Supreme Court has reiterated this "'central purpose of the statute' which 'waives the Government's immunity from suit in sweeping language.'"[49]

The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, Congress determined "to build upon the legal relationships formulated and characterized by the States" with respect to principles of tort law.[50] The FTCA provides that the "United States shall be liable . . . [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances."[51] In other words, the federal government is liable under the FTCA on the same basis and to the same extent as for a tort committed under analogous circumstances by a private person in that particular state.[52]

2. The FTCA Is Even More Vital Today to Compensate Victims of Federal Negligence and Hold the Government Accountable

The FTCA has proven to be the most significant waiver of federal sovereign immunity for damages claims against the United States.[53] Today the FTCA provides compensation to thousands of victims of torts by federal agents each year, with payments approaching a billion dollars a year.[54]

The FTCA is even more vital to address federal official wrongdoing than when it was enacted seventy-five years ago. Two subsequent

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47 *See* Federal Tort Claims Act, ch. 753, 60 Stat. 842, 842–47 (1946). On the FTCA, see generally SISK, *supra* note 35, §§ 3.2–3.8, at 115–224; LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS (2024); PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT (2d ed. 2018).

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

49 Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (first quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984); and then quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).

50 Richards v. United States, 369 U.S. 1, 7 (1962).

51 28 U.S.C. § 2674 (2018); *see also* 28 U.S.C. § 1346(b)(1) (2018) (holding the United States liable "if a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

52 *See* United States v. Olson, 546 U.S. 43, 44 (2005).

53 On the FTCA, see generally SISK, *supra* note 35, §§ 3.2–3.8, at 115–224.

54 *Judgment Fund: Annual Report to Congress*, FISCAL DATA (Dec. 19, 2024), https://fiscaldata.treasury.gov/datasets/judgment-fund-report-to-congress/judgment-fund-annual-report-to-congress [https://perma.cc/RG5Z-FU5U].

legal developments have substantially circumscribed alternative remedies, leaving the FTCA to stand largely alone as a vehicle for compensatory damages for federal official wrongdoing.

First, Congress has since granted broad immunity to federal officers from individual liability for tortious conduct in the scope of employment.[55] Historically, federal officers who harmed individuals by tortious wrongdoing could be held liable individually for damages in court based on common law tort theories.[56] That changed in 1988, when Congress granted near-total immunity to federal officers from state tort liability under the Federal Employees Liability Reform and Tort Compensation Act[57]—commonly known as the Westfall Act.[58] When a federal employee acts within the scope of employment, the Westfall Act grants individual immunity from common law tort claims.[59] A tort lawsuit brought against the individual federal employee is converted into an FTCA action against the United States in federal court.[60]

With particular significance for our present discussion of the scope of the discretionary function exception, the individual immunity of the federal employee under the Westfall Act remains in effect, even if the United States avoids liability through exceptions to the FTCA.[61] Thus, "if the United States is found to be immune from liability under the FTCA due to the limitations or exceptions of that statute, the substitution of the United States as the sole defendant is not thereby undone nor may the individual employee be brought back into the lawsuit."[62] Pointedly, if the federal government escapes FTCA liability through an expansive application of the discretionary function exception, then the immunity to the federal employee and the substitution of the United States as the defendant are fatal to the claim.

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55 *See* 28 U.S.C. § 2679(b)(1) (2018).

56 *See* Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020) ("These common-law causes of action [against government officials] remained available through the 19th century and into the 20th."). *See generally* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3–6 (2017); Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1792–95 (2021).

57 Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, §§ 5–6, 102 Stat. 4563, 4564–65 (codified at 28 U.S.C. § 2679(b), (d) (2018)).

58 On the Westfall Act, see generally SISK, *supra* note 35, § 5.6(c)(2), at 411–12.

59 *See* § 2679(b)(1).

60 *See* § 2679(d).

61 *See* United States v. Smith, 499 U.S. 160, 161–62 (1991).

62 SISK, *supra* note 35, § 5.6(c), at 410–11; *see also id.* § 5.6(c), at 410–24. *But see* James E. Pfander & Rex N. Alley, *Federal Tort Liability After* Egbert v. Boule*: The Case for Restoring the Officer Suit at Common Law*, 138 HARV. L. REV. 985 (2025) (challenging Supreme Court doctrine that resolution of an FTCA claim other than on the merits of the same tort theory operates through the Westfall Act to oust a separate state law tort claim against the individual officer).

Under the FTCA and the Westfall Act, "scope of employment" is determined by state respondeat superior rules.[63] With the expansion of respondeat superior law in recent decades, the circumstances under which a federal employee will be held to have acted within the scope of employment—and thus under which the federal government will be substituted as the sole defendant to a tort claim—have expanded as well.[64] This evolution of legal doctrine has had profound consequences for the ability of plaintiffs to recover compensation for tortious harm caused by a federal government agent. As I've written elsewhere, "[i]ronically—or some might say, perversely—application of expansive state law expectations to the peculiar Westfall Act context may" result in narrowing tort recovery rather than broadening tort responsibility as was intended by the doctrinal change.[65] Through the federal government party substitution under the Westfall Act and then the availability of special FTCA defenses, "application of liberal state scope-of-employment rules sometimes may operate to narrow tort liability in the federal employee/Federal Government context."[66]

Second, the alternative remedy of a direct suit against a federal employee under the Constitution is fading. In the 1971 decision of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[67] the Supreme Court recognized an action for damages against federal law enforcement officers for violation of the right to be free from an unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution.[68] But the Supreme Court soon proved reluctant to extend this constitutional tort cause of action into new contexts, regularly finding that the *Bivens* remedy was displaced by alternative statutory schemes or that there were "special factors counselling hesitation."[69]

Most recently, in *Ziglar v. Abbasi*,[70] the Supreme Court declared that "expanding the *Bivens* remedy is now a 'disfavored' judicial

63 *See* Bolton v. United States, 946 F.3d 256, 260 (5th Cir. 2019); Shirk v. United States *ex rel.* Dep't of Interior, 773 F.3d 999, 1005 (9th Cir. 2014); Lyons v. Brown, 158 F.3d 605, 609 (1st Cir. 1998); RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1143 (6th Cir. 1996).

64 SISK, *supra* note 35, § 5.6(c)(4), at 418–21.

65 *Id.* at 419.

66 *Id.* at 419–20.

67 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

68 *Id.* at 389–90, 396–97. On the *Bivens* constitutional tort claim, see generally SISK, *supra* note 35, § 5.7, at 424–40.

69 *Bivens*, 403 U.S. at 396; *see, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 550–62 (2007); Schweiker v. Chilicky, 487 U.S. 412, 414–29 (1988).

70 Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

activity."[71] In *Egbert v. Boule*,[72] the Court made plain that any factual element that differs even slightly from the classic scenario of the *Bivens* case may be sufficient to transform the claim into one arising from a new context, which then transports the case into the disfavored realm.[73] In sum, the future of the *Bivens* remedy, at least in any new context, is highly doubtful.

The bottom line is that for most victims of tortious conduct by the federal government and its agents, it is the Federal Tort Claims Act or nothing. Professor Vicki Jackson has written hopefully that, while "Congress and the Court narrowed the availability of actions against federal government employees," at the same time, "Congress has expanded the arena of government liability for tort."[74] But that hope depends on a robust FTCA that is not dissipated through an "unduly generous" interpretation of the discretionary function exception to the FTCA.[75]

B. The Discretionary Function Exception: Preventing Judicial Second-Guessing of Government Policy Decisions

The federal government's amenability to tort liability under the FTCA is restricted by a series of exceptions set out in the statute.[76] Rejecting the argument that these exceptions should be construed in favor of the government as limitations on the waiver of sovereign immunity, the Supreme Court has warned that "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the [FTCA]" in compensating victims of government negligence.[77]

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71 *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

72 Egbert v. Boule, 142 S. Ct. 1793 (2022).

73 *See id.* at 1800–01, 1804–05.

74 Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 564 (2003) (emphasis omitted).

75 *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984)).

76 On the exceptions to the FTCA, see generally SISK, *supra* note 35, § 3.6, at 162–203.

77 *Dolan*, 546 U.S. at 492, 491–92 (quoting *Kosak*, 465 U.S. at 853 n.9). Although a full discussion is beyond the scope of this Article, the exceptions should be regarded as nonjurisdictional affirmative defenses by the government, because these provisions are stated in the FTCA as exceptions to liability, rather than as limits on the grant of jurisdiction to the courts. *See* SISK, *supra* note 35, § 3.6, at 162–65; 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, 93 (2015) (arguing the discretionary function exception is not jurisdictional but is instead an affirmative defense on which the United States bears the burden of proof). In this Article, the government's defense under the discretionary function exception is sometimes referred to as "immunity" or "policy immunity." Importantly, as the Supreme Court has affirmed, the exceptions to the FTCA are not

The first codified exception precludes liability "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[78] While the majority of the FTCA exceptions exclude liability "arising" from specified circumstances or claims,[79] § 2680(a) affords immunity only for government acts or omissions that are "based upon" a "discretionary function."[80]

During legislative deliberations in the decade leading to the enactment of the FTCA, Congress considered whether to exclude tort liability for specific regulatory agencies.[81] In the end, Congress decided to protect all governmental activities that were based on a discretionary function.[82] During congressional consideration of the legislation, a government spokesman explained this exception:

> It is . . . designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, the Federal Trade Commission, the Securities and Exchange Commission, the Foreign Funds Control Office of Treasury, or others. It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort.[83]

The same statement insisted that, "[o]n the other hand, the common-law torts of employees of regulatory agencies, as well as of all other

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to be construed strictly in the government's favor as supposed qualifications on the waiver of sovereign immunity. *See Dolan*, 546 U.S. at 491. Most accurately, the exceptions are substantive defenses available to the government to defeat liability under the FTCA.

78 28 U.S.C. § 2680(a) (2018). This provision also excludes liability based on "an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." *Id.* This due care exception precludes claims of tort liability against the United States based on an allegedly invalid statute or regulation. Thus, "the enactment of a statute or promulgation of a regulation cannot be characterized as a negligent act of governance." SISK, *supra* note 35, § 3.6(b)(1), at 166. This phrase rarely has been the subject of FTCA litigation.

79 28 U.S.C. § 2680(b), (c), (e), (h), (j), (k), (*l*), (m), (n) (2018); *see also infra* subsubsection II.A.1.a.

80 § 2680(a); *see also infra* subsection II.A.1.

81 *See* United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808–09 (1984). On the legislative history of the discretionary function exception, see generally Mark C. Niles, *"Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1301–04 (2002).

82 *Varig Airlines*, 467 U.S. at 809.

83 *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 33 (1942) (statement of Assistant Att'y Gen. Francis M. Shea), *quoted in Varig Airlines*, 467 U.S. at 809–10.

Federal agencies, would be included within the scope of the bill."[84] In other words, when the government's conduct simply reflected carelessness but was not grounded in public policy, the exception does not apply.[85]

Echoing this government declaration from the FTCA's legislative history, the Supreme Court has described this discretionary function exception as preventing "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[86] In this way, the exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals."[87] To focus on the single word that best describes the parameters of the discretionary function exception, it is all about "policy."[88]

The Supreme Court has set out a two-step analysis for application of the discretionary function exception:

First, the exception is only implicated if there was actually room for discretion by the governmental actor.[89] By contrast, if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," then no discretion remains and "the employee has no rightful option but to adhere to the directive."[90]

Second, even if there is room for discretion, not every choice falls within the exception, but only those of the type that Congress intended to protect by the exception, that is, social, economic, or political policymaking.[91]

C. The Rise of Speculative Policy Immunity in the Lower Federal Courts

In the last couple of decades, as stated by the reluctantly concurring judge in the angry mountain goat case with which this Article began, the "jurisprudence" of discretionary function immunity under the FTCA "has gone off the rails."[92] The lower courts have become all too willing to accept what the dissent in that same case described as "a few after-the-fact declarations [by government officials] submitted in

84 *Id.*

85 *See infra* Part II.

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

87 *Id.* at 808.

88 *See* Dalehite v. United States, 346 U.S. 15, 36 (1953) ("Where there is room for policy judgment and decision there is discretion.").

89 *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

90 *Id.*

91 *Id.* at 536–37.

92 Chadd v. United States, 794 F.3d 1104, 1114 (9th Cir. 2015) (Berzon, J., concurring).

litigation attempting to show why such a decision, had it been made, would have been justified by policy."[93] Regardless of whether the alleged tortious "conduct was 'the end product of a policy-driven analysis,'"[94] the lower courts will excuse the government from liability if the matter was "susceptible to policy analysis" as suggested through post hoc rationalizations invented by government lawyers.[95]

1. A Supreme Court Phrase Limiting Immunity to Decisions "Susceptible to Policy Analysis" Takes an Expansive Turn in the Lower Courts

The legal adventure into imagined policy justifications for harmful government conduct was supposedly initiated through a single phrase—"susceptible to policy analysis"[96]—uttered by the Supreme Court on a single occasion.[97] As discussed immediately below, this

93 *Id.* at 1128 (Kleinfeld, J., dissenting).

94 Sánchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86, 93 (1st Cir. 2012) (quoting Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999)).

95 *Id.*; *see* Kiehn v. United States, 984 F.2d 1100, 1105 (10th Cir. 1993) (stating that, if policy was potentially implicated, then "it is unnecessary for government employees to make an actual 'conscious decision' regarding policy factors" (quoting Johnson v. U.S., Dep't of Interior, 949 F.2d 332, 339 (10th Cir. 1991))).

96 United States v. Gaubert, 499 U.S. 315, 325 (1991).

97 The question whether policy considerations must be consciously considered to trigger the discretionary function exception had been surfaced by the dissent in an earlier Supreme Court decision. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Court considered tort claims arising from the Texas City Disaster, *see id.* at 15. Hundreds of people were killed and thousands injured by the explosion of ammonium nitrate fertilizer that was being loaded onto ships as part of efforts by the United States, as a new world leader, to redevelop devastated nations in Europe after World War II under the Marshall Plan. *See* Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 911–12 (2010). On the Texas City Disaster, the historical context of the post–World War II emergency in Europe, and the *Dalehite* decision, see generally Sisk, *supra*, at 908–20. For a comprehensive documentary on the disaster, see generally HUGH W. STEPHENS, THE TEXAS CITY DISASTER, 1947 (1997). In *Dalehite*, the Court held that the discretionary function exception to the FTCA barred claims arising from the federal fertilizer program including government plans for the manufacture and shipment of the fertilizer. *See Dalehite*, 346 U.S. at 24–38. The dissent contended that the government had failed to show that policymakers had consciously weighed policy factors in taking a calculated risk with this dangerous substance as part of the emergency plan to assist agriculture in post-war Europe. *Id.* at 57–58 (Jackson, J., dissenting). However, the majority never accepted the charge that the case involved speculative or post hoc policy rationalizations. And the record amply supported the conclusion that choices regarding manufacture and shipment of the fertilizer were deliberately reached as necessary given the emergency need to rejuvenate agriculture in Europe. For example, as the *Dalehite* majority recognized, while a coating applied to the fertilizer made it more combustible, *id.* at 46 (app. to majority opinion), the absence of the coating would make it difficult to spread on fields and thus presented a policy decision going to "the feasibility of the program itself," *id.* at 40 (majority opinion). Similarly, while bagging the fertilizer at high temperatures made it more volatile, the government had specifically

phrase originated in the Supreme Court's reasoning as a limitation on the discretionary function exception in the policy-permeated context of an extraordinary administrative action in the highly regulated field of financial institutions.[98] But this qualification instead has been inverted into an aggressive expansion of policy immunity for the U.S. government.

In its 1991 decision in *United States v. Gaubert*, the Supreme Court applied the discretionary function exception to a challenge to the federal government's supervision and ultimate takeover of a troubled financial institution.[99] In the process of regulatory intervention, federal regulators pushed for merger of the institution with another entity, demanded the replacement of the institution's management and board, actively influenced the day-to-day operation of the entity, and ultimately ordered it to be closed.[100]

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considered the alternative of cooling the fertilizer but concluded that it would significantly raise the costs and reduce the amount of fertilizer produced. *Id.* at 40–41. Moreover, the fertilizer program, initiated at the Cabinet level, *id.* at 37, was part of the Marshall Plan to stave off starvation in war-torn countries and reduce the national security risk that devastated nations might turn to communist appeals from the Soviet Union, *see* Sisk, *supra*, at 909–11. The government never suggested that policy judgments regarding aspects of the fertilizer program were merely hypothetical, but rather submitted to the Court that "[a]n important factor in exercising [official] judgment was the special governmental interest in obtaining as rapidly as possible fertilizer for war-torn regions." Brief for the United States at 219, *Dalehite*, 346 U.S. 15 (No. 308); *see also The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488, 491 (1953) (saying of the fertilizer manufacturing and shipment actions at issue in *Dalehite* that "[a]ll of these decisions were apparently reached by a conscious balancing of considerations"); Cornelius J. Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433, 452 (1957) (saying that the discretionary decision to accept the risks was necessarily made in *Dalehite* because "the foreign policy considerations involving the starving populations in occupied countries following World War II required the immediate production of fertilizer, even though it was dangerously explosive"). All of the government decisions at each stage in *Dalehite* "were based upon the government's decision to initiate a fertilizer production program in the first place." Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS. L. REV. 691, 719 (1997). In sum, the *Dalehite* decision provides no support to an interpretation of the discretionary function exception as covering purely hypothetical policy choices. As the Supreme Court subsequently described the *Dalehite* case, the exercise of discretion there at issue was anchored in a real—not hypothetical—policy choice, being "part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II." *Gaubert*, 499 U.S. at 323.

98 A broader conception of "susceptible to policy analysis" that expands the zone of the discretionary function exception appeared for the first time in a court of appeals decision that was rendered more than four decades after enactment of the FTCA and the statutory exception. *See* U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 121 (3d Cir. 1988).

99 *Gaubert*, 449 U.S. at 326.

100 *See id.* at 317–22. On *Gaubert*, see generally SISK, *supra* note 35, § 3.6(b)(5), at 172–75.

Because financial institutions are subject to unusually detailed and intrusive statutory and administrative rules, the *Gaubert* Court recognized that concrete decisions made to implement such regulatory provisions would presumptively be supported by the same policy considerations that animate those very statutes and regulations authorizing the government power.[101] The Court therefore viewed the day-to-day decisions made by federal regulators in supervising the troubled financial institution as inescapably implicating the same policies underlying the comprehensive financial regulatory scheme.[102]

In this regulatory context, the *Gaubert* Court stated that the "focus of the inquiry is not on the agent's subjective intent" in taking action, but rather on "the nature of the actions taken and on whether they are susceptible to policy analysis."[103]

This particular passage about policy susceptibility in *Gaubert* cannot be divorced from the policy-infused environment of federal regulation of private financial institutions.[104] The Court understood that the individual actions taken by government regulators with respect to a failing financial institution were performed in the larger service of the general regulatory purpose.[105] Given the obvious policy implications of the penultimate regulatory choice to seize control of a private financial institution, the Court appreciated that each step taken to implement that choice necessarily connected to the major policy choice.[106] Justice Scalia in concurrence agreed that all of the regulatory actions in the case were tightly linked to "the decision whether or not to take over [the] bank," which "surely" was protected by the discretionary function exception.[107]

Accordingly, the *Gaubert* Court directed that the FTCA plaintiffs claiming monetary losses from the federal takeover and operation of the financial institution had to show that "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."[108] Instead, the Court became "convinced that each of the regulatory actions in question involved the kind of

101 *See Gaubert*, 499 U.S. at 324–25.

102 *See id.* at 327–34.

103 *Id.* at 325.

104 *See* Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005) (saying that, on the spectrum of policy analysis, the regulation and oversight of a bank fall into the classification of being "fully grounded in regulatory policy" (quoting O'Toole v. United States, 295 F.3d 1029, 1035 (9th Cir. 2002))).

105 *See Gaubert*, 499 U.S. at 332 ("[T]hese day-to-day 'operational' decisions were undertaken for policy reasons of primary concern to the regulatory agencies . . . .").

106 *See id.* ("[R]egulators' actions . . . were directly related to public policy considerations regarding federal oversight of the thrift industry.").

107 *Id.* at 338 (Scalia, J., concurring in part and concurring in the judgment).

108 *Id.* at 325 (majority opinion).

policy judgment that the discretionary function exception was designed to shield."[109]

The *Gaubert* decision affirms a central theme of the Court's FTCA decisions in viewing the discretionary function exception as designed to prevent "liability arising from acts of a governmental nature or function"[110] and "to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."[111]

Most importantly, the "susceptible to policy analysis" statement originated in *Gaubert* as a boundary on the scope of the discretionary function exception. Even in the highly regulated and policy-conspicuous framework encountered in *Gaubert*, and even while insisting that the specific steps taken were presumptively part and parcel of the policy-saturated whole, the Court recognized that some collateral actions might fall outside of any meaningful policy justification. For this reason, the Court said, discretionary function exception immunity presumptively extended to those implementing actions that were susceptible to policy analysis as part of the overall regulation-authorized policy design.[112] But actions bearing no connection to the singular policy choice of government intervention into a troubled financial institution—those actions that were *not* "susceptible to policy analysis"—would still fall outside of discretionary function immunity.[113]

The Court offered the following example in a footnote attached directly to the "susceptible to policy analysis" phrase:

> If one of the officials involved in this case 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, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.[114]

In other words, careless driving of an automobile would go beyond what could be characterized as "susceptible to policy analysis," even if the vehicle were driven by a federal regulator on the way to enforce actions against the troubled financial institution.

The Supreme Court's use of the phrase simply was not an endorsement of any plea by the government for immunity based on hypothetical policy. Indeed, the government failed in its merits briefing in *Gaubert* to even hint at such a radical expansion of the discretionary

109 *Id.* at 332.

110 Dalehite v. United States, 346 U.S. 15, 28 (1953).

111 United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813–14 (1984).

112 *See Gaubert*, 499 U.S. at 324–25.

113 *See id.* at 325.

114 *Id.* at 325 n.7.

function exception. The word "susceptible" never appeared in the government's briefing.[115] In all of the discretionary function exception cases coming before the Supreme Court over many decades, the United States has never argued in a merits brief that the exception may be invoked whenever a policy choice could be imagined afterward. Quite to the contrary, as discussed further below,[116] soon after the FTCA was enacted, the government told the Supreme Court that the discretionary function exception protects "executive conduct which *actually* involves the exercise of judgment, choice, and discretion, and requires the *weighing in the public interest* of competing considerations."[117]

2. Lower Courts Regard the Absence of Policy Judgment as Irrelevant When Policy Analysis Was Theoretically Possible

As discussed above, nothing in *Gaubert* invites the courts to imagine policy justifications that exist only in the speculation of government litigators. That is, nothing in the language of *Gaubert* "switches the foundational question from whether the decision *was* 'based on considerations of public policy' to whether it hypothetically could have been."[118] Nor does the statutory language shift the focus away from government actions "based upon" a "discretionary function," which is what is protected by the statutory exception.[119]

Yet, that realm of speculative policy immunity in FTCA cases is where we find ourselves today in the lower federal courts. The astounding extent to which the lower courts are willing to blind themselves to the reality of nonpolicy dereliction and give conclusive weight to imaginary policy musings is confirmed by candid and blunt judicial language.

Courts have forthrightly declared that if "some plausible policy justification could have undergirded the challenged conduct," then "it is not relevant whether" any actual policy analysis occurred.[120] To repeat this extraordinary approach, whether "government agents . . . did or did not engage in a deliberative process before exercising their judgment" is "largely irrelevant."[121] If policy could have been at least

115 *See* Brief for the Petitioner, *Gaubert*, 499 U.S. 315 (No. 89-1793), 1990 WL 505727; Reply Brief for the United States, *Gaubert*, 499 U.S. 315 (No. 89-1793), 1990 WL 505729.

116 *See infra* sub-subsection II.A.1.b.

117 Brief for the United States, *supra* note 97, at 190 (emphases added).

118 Chadd v. United States, 794 F.3d 1104, 1114 (9th Cir. 2015) (Berzon, J., concurring) (quoting *Gaubert*, 499 U.S. at 323).

119 *See* 28 U.S.C. § 2680(a) (2018)*; infra* subsection II.A.1.

120 Sánchez *ex rel.* D.R.-S. v. United States, 671 F.3d 86, 93 (1st Cir. 2012) (quoting Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999)).

121 Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993).

implicated, then "it is unnecessary for government employees to make an actual 'conscious decision' regarding policy factors" for the government to invoke the discretionary function exception to FTCA liability.[122] Indeed, not only is the government excused from showing "that any decision actually involved the weighing of policy considerations, in order to claim immunity," but "the government is not required to prove . . . that an affirmative decision was made."[123]

Under this misguided doctrine, "policy analysis need not have actually occurred in the disputed instance, but rather the decision need only have been theoretically susceptible to policy analysis."[124] Or, as noted above, not only may policy analysis be theoretical, but whether a decision was made at all need likewise be only theoretical. As discussed below, when the legal test degrades into whether something could have happened in theory, then a judicial decision becomes disconnected from factual reality and unavoidably declines into subjectivity.[125]

3. Case Examples in Which Fiction Was Elevated to Provide Policy Immunity

The lower federal courts have mistakenly adopted a form of hypothetical policy immunity, which is increasingly prevalent in FTCA decisions. To illustrate, the discussion here focuses on one area of federal activity, management of parks, recreational areas, and historical sites, where courts regularly invoke the discretionary function exception to cover everyday failures in safety. In addition to the fiction of the iconic mountain goat that camouflaged government dereliction in the case with which this Article began,[126] two other examples are discussed below in which pretend government policy decisions excused federal tort accountability to those injured when visiting our nation's federal lands.

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122 Kiehn v. United States, 984 F.2d 1100, 1105 (10th Cir. 1993) (quoting Johnson v. U.S., Dep't of Interior, 949 F.2d 332, 339 (10th Cir. 1991)); *see also* Sydnes v. United States, 523 F.3d 1179, 1185 (10th Cir. 2008) (saying that, for application of the discretionary function exception, the court does not "ask 'whether policy analysis is the *actual* reason for the decision in question'" (quoting Duke v. Dep't of Agric., 131 F.3d 1407, 1413 (10th Cir. 1997) (Briscoe, J., concurring in part and dissenting in part) (emphasis added))).

123 Gonzalez v. United States, 814 F.3d 1022, 1033 (9th Cir. 2016).

124 Jude v. Comm'r of Soc. Sec., 908 F.3d 152, 159 (6th Cir. 2018); *see also* Herden v. United States, 726 F.3d 1042, 1049 n.5 (8th Cir. 2013) (en banc) (saying that "a decision maker need not actually consider social, economic, or political policy to trigger" the discretionary function exception).

125 *See infra* Section II.C.

126 *See supra* text accompanying notes 1–21.

In *Lam v. United States*,[127] a camper in a federally operated recreational area suffered a serious foot injury when a large oak tree fell into another that collapsed onto his tent.[128] The Army Corps of Engineers maintenance worker charged with identifying and removing hazardous trees had inspected this particular tree but failed to notice that its roots had rotted.[129] An expert arborist said that this failure was negligence because holes in the tree should have alerted him that the tree was hazardous.[130]

One year earlier, the same appellate court in *Kim v. United States*[131] had turned aside application of the discretionary function exception when two boys were killed because a tree limb fell on their tent in Yosemite National Park.[132] In *Kim*, as later in *Lam*, the government argued that park officials' evaluation of the safety hazard posed by that particular tree was a protected policy decision.[133] But, the court explained in *Kim*, while rating the hazards might involve "careful—perhaps even difficult—application of specialized knowledge," the evaluation called only for "scientific and professional judgment" rather than a choice rooted in public policy.[134]

In *Lam*, however, the court majority came to the opposite conclusion, saying that "competing policy considerations, such as safety, budget, staffing, wildlife and habitat preservation, impact on the natural vegetation, and aesthetics are all the type of policy decisions that are protected under the [discretionary function exception]."[135] Now the majority did not find that the inspecting federal employee had "analyzed or considered policies about managing trees in general or this oak tree in particular."[136] But the failure to "actually weigh[]" policy did not matter, because the discretionary function exception takes effect "so long as the challenged decision is one to which a policy analysis could apply."[137]

The fictionality of policy analysis in *Lam* is confirmed by the elementary facts of the case. The federal maintenance employee acknowledged that his duty was to inspect trees including this specific tree and, if he determined one was dangerous, to "remove it the same day or

127 Lam v. United States, 979 F.3d 665 (9th Cir. 2020).
128 *Id.* at 670.
129 *Id.* at 670–71.
130 *Id.* at 671.
131 Kim v. United States, 940 F.3d 484 (9th Cir. 2019).
132 *Id.* at 486, 488–91.
133 *Id.* at 487–90.
134 *Id.* at 489 (quoting Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005)).
135 *Lam*, 979 F.3d at 681.
136 *Id.* at 675.
137 *Id.* at 682 (quoting Gonzalez v. United States, 814 F.3d 1022, 1034 (9th Cir. 2016)).

first thing the next morning."[138] In other words, if the tree was indeed hazardous, it was to be promptly removed.

No "competing policy consideration[]" weighed against that extraction of a rotten tree—not "safety, budget, staffing, wildlife and habitat preservation, impact on the natural vegetation, [or] aesthetics."[139] There was no policy decision to be made, but only a targeted evaluation whether the tree was hazardous. Indeed, as Professor Richard Seamon wrote about another FTCA case involving a fallen tree in a national park, "It is exceedingly doubtful that the park rangers and maintenance personnel responsible for actually looking for rotted trees were authorized to consider public policy while doing so."[140]

As the dissenting judge in *Lam* said, "This case does not call on us to judge the wisdom of any social, economic, or political policy, but rather simply to perform the familiar role of determining whether the government agent exercised reasonable care."[141] The only choice available to the federal maintenance officer was to "exercise professional judgment in deciding which trees to remove."[142] Rather than risking judicial intervention into policy, the *Lam* case posed only questions of reasonableness in a safety decision—the kind of question for which the tort medium is well designed.

In *Shansky v. United States*,[143] another federal appellate court considered the case of a visitor to a national historic site who fell down the stairs at a refurbished nineteenth-century trading post that did not have a handrail.[144] The appellate court upheld the discretionary function defense for the government on the basis that "[a]esthetic considerations, including decisions to preserve the historical accuracy of national landmarks, constitute legitimate policy concerns."[145]

That park officials had "failed to mull particular safety issues when they planned the Trading Post's rehabilitation" was "of no practical

138 *Id.* at 671.

139 *See id.* at 681.

140 Seamon, *supra* note 97, at 771–72. Now, of course, especially in a large forest region, federal employees cannot be expected to inspect every tree. But that goes to the reasonableness of the action taken under tort law, which means that many claims against the federal government for a failure to identify and remove a natural hazard will fail on the merits. In the cases outlined above, the trees surrounding the campsites were finite in number, the campsites were discrete areas, and, especially in *Lam*, the specific tree was indeed inspected, *Lam*, 979 F.3d at 670–71, so policy concerns about feasibility and allocation of resources were not genuinely implicated.

141 *Lam*, 979 F.3d at 688 (Hurwitz, J., dissenting).

142 *Id.*

143 Shansky v. United States, 164 F.3d 688 (1st Cir. 1999).

144 *Id.* at 690.

145 *Id.* at 693.

consequence" to the *Shansky* court.[146] While no actual decision to elevate aesthetics or historical accuracy over safety was shown to have been made, the court's discretionary function exception "inquiry hinges instead on whether some plausible policy justification could have undergirded the challenged conduct. The critical question is whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis."[147]

In point of actual fact, and regardless of any impact on aesthetics or impairment of historical accuracy, the government had upgraded the trading post with other modern safety measures such as installation of sprinklers, an alarm system, and fire extinguishers.[148] But the hypothetical possibility that a handrail might offend aesthetic sensitivities and contradict historical veracity was enough to shield the government from liability for its carelessness in failing to even consider safety measures.

Now the *Shansky* court did want to be "perfectly clear" that speculation about policy hypotheticals was not open ended,[149] although this reservation suggested by the court was largely discarded before the opinion reached its close. The court assured us that it did "not suggest that any conceivable policy justification will suffice to prime the discretionary function pump. Virtually any government action can be traced back to a policy decision of some kind, but an attenuated tie is not enough to show that conduct is grounded in policy."[150] But the court later clarified that this constraint was rather minimal. Near the end of the opinion, the court allowed that, "in a rare case, the government's invocation of a policy justification may be so far-fetched as to defy any plausible nexus between the challenged conduct and the asserted justification."[151]

In sum, a "plausible" if fictional policy justification, as long as it is not "far-fetched" even though imaginary, is enough to spare the federal government from accountability for its carelessness. Not

146 *Id.* at 692.

147 *Id.*

148 *Id.* at 693–94.

149 *Id.* at 692.

150 *Id.* at 692–93; *see also* S.R.P. *ex rel.* Abunabba v. United States, 676 F.3d 329, 336 (3d Cir. 2012) ("[W]e have made clear that 'susceptibility analysis is not a toothless standard that the [G]overnment can satisfy merely by associating a decision with a regulatory concern.'" (quoting Cestonaro v. United States, 211 F.3d 749, 755 (3d Cir. 2000))).

151 *Shansky*, 164 F.3d at 695; *see also S.R.P.*, 676 F.3d at 336 (saying there need only be a "rational nexus" between the government decision and a policy (quoting *Cestonaro*, 211 F.3d at 759)).

surprisingly, as discussed below, this sets the stage for easy government wins in FTCA cases far more often than not.[152]

II. RE-GROUNDING THE DISCRETIONARY FUNCTION EXCEPTION IN POLICY JUDGMENT

If the discretionary function exception were to be extended to "all actions as to which the actor had such choices, it would literally swallow the FTCA's general waiver of immunity."[153] "[B]ut," the Supreme Court reminds us, "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."[154]

The defining boundary of the discretionary function exception is marked by policy judgment. Both the *text* (by requiring an exempt decision to be "based upon" a "discretionary function"[155]) and the *purpose* (to prevent judicial second-guessing of policy choices[156]) premise the exception on an actual and not merely hypothetical policy judgment. By historical understanding of the term of art, a "discretionary function" comes into play through a policy judgment that actively weighs values to pursue a governmental objective.

Moreover, to simultaneously uphold the promise of the FTCA to compensate those harmed by government negligence and protect against judicial encroachment into government discretionary choices, the discretionary function exception should be confined to a government decision that is genuinely "grounded in social, economic, and political policy."[157]

152 *See infra* Section II.D.

153 Peter H. Schuck & James J. Park, *The Discretionary Function Exception in the Second Circuit*, 20 QUINNIPIAC L. REV. 55, 65 (2000); *see also* O'Toole v. United States, 295 F.3d 1029, 1037 (9th Cir. 2002) (referring to the "danger that the discretionary function exception will swallow the FTCA").

154 Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957).

155 28 U.S.C. § 2680(a) (2018); *see also infra* subsection II.A.1.

156 *See infra* subsection II.A.2.

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

A. Preventing Judicial Second-Guessing of a Government Decision Causally Connected to a Policy Judgment

1. The Text Restricts the Exception to Government Decisions "Based Upon" a "Discretionary Function," That Is, Caused by a Policy Judgment

The text of the FTCA's discretionary function exception reads in full:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[158]

a. "Based Upon"

Of the thirteen continuing exceptions to governmental liability under the Federal Tort Claims Act, the substantial majority (nine) define the scope of an exception by whether the claim is "arising" out of a category of government activity, specified causes of action, or a foreign geographic area.[159] Even with the somewhat broader phraseology of "arising" for more than two-thirds of the exceptions, the Supreme Court has cautioned that "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the [FTCA]" with its "sweeping" waiver of sovereign immunity.[160]

By contrast, the discretionary function exception is distinctive in demanding an even tighter fit, by specifying that the exception is triggered only when the claim is "*based upon* the exercise or performance

158 28 U.S.C. § 2680(a) (2018).

159 § 2680(b), (c), (e), (h), (j), (k), (*l*), (m), (n). One of these nine is so expansive as to arguably fall into a different category from the other exceptions that preclude FTCA suits "arising" in, out of, or from various injuries, claims, locations, or government activities. Subsection (c) excepts from FTCA recovery "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer," subject to an exception. § 2680(c). As the Supreme Court has ruled, this phrase "arising in respect of" is most readily read as "sweep[ing] within the exception all injuries associated in any way with the 'detention' of goods." Kosak v. United States, 465 U.S. 848, 854 (1984); *see also id.* at 855 (saying that the "generality" of the language in § 2680(c) suggests that it is more encompassing than the more specific use of "arising out of" language in § 2680(b)).

160 Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (first quoting *Kosak*, 465 U.S. 848, 853 n.9 (1984); and then quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).

or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[161] A government decision to act or refuse to act cannot be "based upon" something that never happened, plainly excluding a hypothetical policy judgment that was never made. Nor can the temporal directive that the act when taken have been "based upon" a discretionary function be satisfied by an after-the-fact attempt to backdate a conjectural policy basis.

The text of the discretionary function exception is not open ended. The statute uses direct causal language—the stipulation for a "based upon" nexus. In *Safeco Insurance Co. of America v. Burr*,[162] the Supreme Court looked at the phrase "based on" in another federal statute and agreed that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition."[163] "Under this most natural reading" of the phrase,[164] the discretionary function exception applies only when a policy judgment was a "necessary condition" to the government's decision that is alleged to have caused harm to the tort plaintiff.[165]

The FTCA, with the text of the discretionary function exception, was enacted in 1946.[166] The contemporary definition of "based" from *Webster's Collegiate Dictionary* in 1945 is that which has a "base," which in turn is defined as "[t]he fundamental or essential part of a thing."[167] That dictionary also offers synonyms that include "ground" or "support."[168]

By saying that the excepted government act must be "based upon" the exercise of or failure to exercise a discretionary function, the text of the statute constructs a policy judgment as the essential foundation. When deliberately choosing to exercise a function that is discretionary (that is, one that is not mandated by law) or deliberately refraining from that exercise, the key government actor makes a choice "grounded in social, economic, and political policy."[169] Based on such

161 28 U.S.C. § 2680(a) (2018) (emphasis added).

162 Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007).

163 *Id.* at 63 (ruling that the Fair Credit Reporting Act, 15 U.S.C. § 1681m(a), requiring notice to a consumer subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report," did not apply "unless the [credit] report was a necessary condition of the increase" by the insurance company in rates).

164 *Id.*

165 *See id.*

166 Federal Tort Claims Act, ch. 753, § 421(a), 60 Stat. 842, 845 (1946).

167 *Based*, WEBSTER'S COLLEGIATE DICTIONARY (5th ed. 1945); *Base*, WEBSTER'S COLLEGIATE DICTIONARY, *supra*.

168 *Base*, WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 167.

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

public policy factors, the government agent may choose to employ or decline to employ that discretionary power.[170] By contrast, if no policy judgment supports the government action or inaction, then no discretionary function was brought into play, and, accordingly, the fundamental prerequisite to application of the exception is missing.

A preeminent early FTCA scholar and former Department of Justice litigator during the first decade of the FTCA[171] also recognized the limitations on the discretionary function exception "in the very language in which the exception is stated."[172] Professor Cornelius Peck explained that

> [i]f the acts or omissions on which the plaintiff bases his complaint were not acts specifically directed, or risks knowingly, deliberately, or necessarily encountered, in the discretionary determination to perform or not to perform the function or duty, his complaint is not "based upon" the performance or failure to perform such functions and duties.[173]

Peck further observed that this text-based limitation to circumstances where a government official made a policy judgment is directly parallel to the due care provision that appears in the same statutory subsection of the FTCA.[174] The due care part of the exception excludes tort liability based upon "an act or omission of an employee of the [United States] Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."[175] As Peck noted, if the government employee fails to exercise due care to implement the statutory or regulatory directive, then "the claim is not based upon the statute or regulation, or the policy which they serve, but upon negligent conduct unrelated to, or not a part of, the statute or regulation."[176]

Notably, this understanding of the discretionary function exception as entailing respect for an actual policy judgment was the position taken by the Department of Justice at a point in time close to enactment of the FTCA. In the Brief for the United States in *Dalehite v.*

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170 *See infra* sub-subsection II.A.1.c.

171 *See* United States v. Bullard, 210 F.2d 255 (4th Cir. 1954); United States v. Savage Truck Line, Inc., 209 F.2d 442 (4th Cir. 1953).

172 Cornelius J. Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. & ST. BAR J. 207, 228 (1956).

173 *Id.*; *see also* Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 486 (1997) ("Discretionary function immunity ought to be reserved for (1) actual decisions (2) made by government officials possessing authority to direct policy (3) in consideration of legitimate policy factors.").

174 Peck, *supra* note 172, at 228–29.

175 28 U.S.C. § 2680(a) (2018).

176 Peck, *supra* note 172, at 229.

United States,[177] the first discretionary function exception decision by the Supreme Court, the government described the longstanding protection of executive "discretionary function" as meaning "that it is not the place of the courts to revise, supervise, or control executive conduct which *actually* involves the exercise of judgment, choice, and discretion, and requires the *weighing in the public interest* of competing considerations."[178]

In sum, the FTCA exception is triggered by the actual employment of discretionary judgment that weighed competing policy goals in the public interest.

b. "Discretionary Function or Duty"

When the government's action was "deliberately performed with appreciation of the risks involved to achieve the governmental purpose," then a "discretionary function" is implicated within the meaning of the FTCA.[179]

The phrase "discretionary function" was a legal term of art that Congress borrowed from the law of mandamus and damages suits against government officials. In its first discretionary function opinion, the Supreme Court identified "the discretion of the executive or the administrator to act according to one's judgment of the best course" as "a concept of substantial historical ancestry in American law."[180] The Court then cited to decisions involving discretionary functions in the context of mandamus proceedings and damages claims against federal officials.[181] As the Court later recognized for another provision of the FTCA, which precludes an award of "punitive damages" against the United States,[182] the choice of a term of art in this statute reflects Congress's adoption of the existing understanding of the concept.[183]

Both the government in its earliest briefing on the subject to the Supreme Court and commentators speaking in the period surrounding the FTCA's enactment recognized that "the term 'discretionary function or duty' draws much of its meaning from" well-defined "bodies of law which have historically used that very term in connection with liability for governmental activities."[184]

177 Dalehite v. United States, 346 U.S. 15 (1953).

178 Brief for the United States, *supra* note 97, at 190 (emphases added).

179 Peck, *supra* note 172, at 235.

180 *Dalehite*, 346 U.S. at 34.

181 *See id.* at 34 n.30.

182 28 U.S.C. § 2674 (2018).

183 *See* Molzof v. United States, 502 U.S. 301, 305–12 (1992).

184 Brief for the United States, *supra* note 97, at 35–36. The government included a third category of suits against municipalities or states, which pointed in the same direction as the other two discussed here. *Id.*; *see also* Peck, *supra* note 172, at 221–24 (discussing

As a first historical analogy, Congress presumably was familiar in 1946 with the understanding of executive discretion (as contrasted with ministerial duties) in mandamus law. In the then-classic mandamus case of *United States ex rel. Alaska Smokeless Coal Co. v. Lane*,[185] the Supreme Court refused mandamus in circumstances where "[m]anifestly judgment in all cases must be exercised—judgment not only of the law but what was done under the law, and its sufficiency to avail of the grant of the law."[186]

In this parallel field of mandamus actions against federal officials, as Professor Peck observed, it is not enough that the official "might have exercised discretion."[187] Rather it must be shown that "the decision he made was made in the exercise of discretionary powers given him, or that, in the exercise of the discretion given him, he decided to take no action."[188]

In *Wilbur v. United States ex rel. Kadrie*,[189] the Supreme Court ruled that, while the "chief use" of mandamus is to compel the performance of a ministerial duty, "[i]t also is employed to compel action, when refused, in matters involving judgment and discretion."[190] The court may not "direct the exercise of judgment or discretion in a particular way," but it may demand that a policy judgment be made.[191] Earlier, in *Decatur v. Paulding*,[192] the Court explained that the essence of nonministerial executive duties lies in the duty of the government official to "exercise his judgment."[193]

The second historical analogy of a damages claim against an individual government officer points in the same direction. In the early case of *Kendall v. Stokes*,[194] the Supreme Court stated:

> [A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even []though an individual may suffer by his mistake.[195]

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historical analogies for "discretionary function" in mandamus actions and damages actions against government officials).

185 United States *ex rel.* Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549 (1919).

186 *Id.* at 555.

187 Peck, *supra* note 172, at 222, 221–22.

188 *Id.* at 222 (emphasis omitted) (footnote omitted).

189 Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206 (1930).

190 *Id.* at 218.

191 *See id.*

192 Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

193 *Id.* at 515; *see also* Comm'r of Pats. v. Whiteley, 71 U.S. (4 Wall.) 522, 534 (1867) (stating that mandamus lies not only for ministerial acts but "where the exercise of judgment and discretion are involved and the officer refuses to decide").

194 Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845).

195 *Id.* at 98.

Likewise, in *Johnston v. District of Columbia*,[196] the Court described the discretionary function immunity from liability of certain officers as "involving the exercise of deliberate judgment and large discretion" based on public considerations.[197] As discussed further below[198] and illustrated in *Spalding v. Vilas*,[199] the officer's protected discretion may include the choice not "to exercise the authority with which he is invested," but the officer cannot be held liable for "duly authorized official conduct."[200]

Based on the "light" shown by these historical analogies, the government itself in the briefing to the Supreme Court in the first discretionary function exception case agreed that a "function or duty is 'discretionary'" when "a substantial factor entering into [the official's] exercise of that discretion is an interest special to the United States as a government."[201] Professor Peck likewise said that the discretionary function defense is established only if the acts or omissions by the government "were specifically directed, or risks knowingly, deliberately, or necessarily encountered[] by" a government employee seeking to "advance[] . . . a governmental objective and pursuant to discretionary authority."[202]

The demand for an actual policy judgment is a practical and not unrealistic expectation. In some instances, unexpressed policy factors are not merely hypothetical but necessarily encountered. Peck anticipated cases in which a policy-permeated governmental activity meant that a policy judgment necessarily was at play, without need for further investigation, akin to "defensive res ipsa loquitur."[203] Thus, "[f]or example, it should take no direct proof that a discretionary decision to establish a wildlife sanctuary would involve, either consciously or by unexpressed assumption, a decision to incur the risk that birds will eat the grain of farmers in the area."[204]

c. "The Exercise or Performance or the Failure to Exercise or Perform a Discretionary Function or Duty"

Importantly, the discretionary function exception to the FTCA protects against claims based on not only the exercise but also "the

196 Johnston v. District of Columbia, 118 U.S. 19 (1886).
197 *Id.* at 21.
198 *See infra* sub-subsection II.A.1.c.
199 Spalding v. Vilas, 161 U.S. 483 (1896).
200 *Id.* at 498–99.
201 Brief for the United States, *supra* note 97, at 36.
202 Peck, *supra* note 172, at 225, 225–26.
203 *Id.* at 227.
204 *Id.*

failure to exercise" a "discretionary function."[205] In this way, a negative policy judgment to refrain from taking affirmative governmental action is also protected from second-guessing through the medium of a tort action.

Although Professor Peck regarded the statutory language reference to "the failure to exercise or perform a discretionary function or duty"[206] as awkward, he agreed the phrase captures the "technical sense of 'refusal'" to exercise policy discretion in favor of someone seeking a governmental benediction.[207] Peck understates the linguistic potency of the statute in prescribing a protected "failure to exercise" as necessarily connected to a genuine policy judgment. The structure of the statutory exception with its but-for causation element,[208] along with the definition of "discretionary function" in longstanding bodies of law,[209] precludes an open-ended construction as protecting governmental inaction divorced from a policy judgment.

To begin with, as discussed above,[210] the exception is distinctively framed as precluding liability only for claims "*based upon* the exercise or performance or the failure to exercise or perform a discretionary function or duty."[211] Governmental indolence fails to lay the necessary foundation upon which a claim would be based, rather leaving the setting bare. A claim that invades governmental policy discretion cannot be "based upon" the absence of policy judgment. But it can be "based upon" the deliberate policy judgment to refrain from an action, that is, the "failure to exercise or perform a discretionary function or duty."

The case of the angry mountain goat[212] illustrates this crucial difference. Had the National Park Service made the decision not to remove or destroy the dangerous animal because of a policy judgment to preserve an iconic wild species for tourists to enjoy, the claim arising from the death of the hiker would arguably have been "based upon" the "failure to exercise" discretion in favor of public safety. Of course, no such policy existed because it would have contradicted the park's written policy manual that regarded the mountain goat as a nuisance species that could be eradicated for public safety.[213] The true reason for inaction was the familiar spectacle of bureaucratic inertia, which

205 28 U.S.C. § 2680(a) (2018).
206 *Id.*
207 Peck, *supra* note 172, at 229, 229–30.
208 *See supra* sub-subsection II.A.1.a.
209 *See supra* sub-subsection II.A.1.b.
210 *See supra* sub-subsection II.A.1.a.
211 § 2680(a) (emphasis added).
212 On the angry mountain goat case, see *supra* text accompanying notes 1–21.
213 *See supra* text accompanying notes 15–16.

again offers no foundation upon which a protected policy judgment would be based.

The congressional adoption of "discretionary function" as a legal term of art[214] disallows expansion of the FTCA exception to ordinary governmental neglect. Drawing from the caselaw on discretionary governmental acts in mandamus and damages claims against governmental officials, scholars of the period leading up to the enactment of the FTCA defined "discretionary function" as necessarily involving genuine choices. Professor Edwin Patterson described "discretion" as "involv[ing] intelligent choice between two courses of action, where the decision is doubtful or difficult of ascertainment."[215] On the eve of enactment of the FTCA, Professor Eugene Keefe discussed personal tort liability of governmental officials and wrote that "the best test in detecting the discretionary function is: Must the officer consider and arrive at a conclusion?"[216]

In briefing the issue under the FTCA, the United States government concurred that, based on the bodies of existing law when the FTCA was enacted, the "fundamental criterion" of the discretionary function exception is whether the government actor "whose act or omission is questioned has been endowed with the power of choice, and a substantial factor entering into his selection of a particular course of conduct is an interest special to the United States as a government."[217] Only under these considered circumstances, the government concluded, is "the function or duty . . . a 'discretionary' one."[218]

This conclusion tracks the Supreme Court's rulings from an early date in American history. For example, in *In re Life & Fire Insurance Co. of New York v. Heirs of Wilson*,[219] when outlining the limits of mandamus in a judicial context, the Court declared that "[a] motion for a new trial is always addressed to the discretion of the court, and this court will not control the exercise of that discretion."[220] This did not mean, however, that the sphere of protected discretion encompassed a nonjudgment. "[A] superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide."[221]

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214 *See supra* sub-subsection II.A.1.b.

215 Edwin W. Patterson, *Ministerial and Discretionary Official Acts*, 20 MICH. L. REV. 848, 854 (1922).

216 Eugene J. Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORDHAM L. REV. 130, 135 (1943).

217 Brief for the United States, *supra* note 97, at 192.

218 *Id.*

219 *In re* Life & Fire Ins. Co. of N.Y. v. Heirs of Wilson, 33 U.S. (8 Pet.) 291 (1834).

220 *Id.* at 303.

221 *Id.* at 304.

As discussed above regarding the historical analogies that give life to the legal term "discretionary function,"[222] executive administrators also were granted the privilege of discretion free from issuance of a decree of mandamus, but could be compelled to act when a decision was "refused, in matters involving judgment and discretion."[223] Likewise, in damages claims against public officers, the discretionary nature of a function entailed "deliberate judgment" based on public considerations.[224]

In this light, then, the very definition of "discretionary function" cannot be stretched to cover inaction that is disconnected from a policy judgment. As the government "urge[d]" in its briefing to the Supreme Court in the first discretionary function case, the "traditional class of 'discretionary' acts of public servants" embraced those considered choices when "a special governmental factor enters into the equation."[225]

In sum, delinquency in attention to a matter is not the "failure to exercise" a "discretionary function." Rather, simple neglect is the *absence* of a "discretionary function."

Before leaving this topic, it should be acknowledged that Professor Peck feared that an alternative historical analogy that emerged after the enactment of the FTCA in 1946 might be misused to expand protection of discretion to a broader immunity.[226] This thread leads to Judge Learned Hand's 1949 decision in *Gregoire v. Biddle*.[227] To remove the chilling effect of personal liability on "the unflinching discharge" of a government officer's duties, this decision refused to deny discretionary immunity to a defendant official when the plaintiff alleges the official acted with malice or "personal motive not connected with the public good."[228] Thus, immunity continued when an action for the public good "would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."[229]

Far from affording immunity to a government decision that was not supported by a policy decision, *Gregoire* does not invite imagination or submission of hypothetical policy justifications. Rather, the ruling assumes the honesty of the officer's policy choice and refuses to remove discretionary function immunity based on matters personal to

222 *See supra* sub-subsection II.A.1.b.
223 Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218 (1930).
224 Johnston v. District of Columbia, 118 U.S. 19, 21 (1886).
225 Brief for the United States, *supra* note 97, at 194.
226 Peck, *supra* note 172, at 225–26.
227 Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).
228 *Id.* at 581.
229 *Id.*

the officer. In this way, Judge Hand's decision harkens back to the Supreme Court's longstanding ruling in *Spalding v. Vilas*[230] that the courts will not conduct an inquiry into assertions that malice rather than the public good animated an official's discretionary decision. The Court recognized that an official's "apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages" would "seriously cripple the proper and effective administration of public affairs."[231] The question in both *Gregoire* and *Spalding* was not whether the government officer had failed to act but the honesty of the policy justification offered by the officer.

The refusal to countenance claims of malice when evaluating a discretionary decision is separately addressed in the FTCA's discretionary function exception by the text that the protection applies "whether or not the discretion involved be abused."[232] Extrapolating further from this arguable alternative thread of damages decisions to shed light on the meaning of the "failure to exercise" a discretionary function thus not only is misplaced but renders redundant the explicit reference to "abused" discretion.

In any event, this particular thread of damages suits is displaced by the FTCA itself and thus fails as a historical analogy for understanding the meaning of "discretionary function" in the FTCA. The driving concern behind a broader immunity that cannot be displaced by claims of malice in cases like *Gregoire* and *Spalding* is the worry that government officers would be deterred from acting from fear of personal liability. As the Supreme Court later said in *Barr v. Matteo*,[233] the immunity extended to federal executive officials from common law liability is grounded in governmental efficiency:

> [O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[234]

The *Barr* Court quoted at some length from Judge Hand's *Gregoire* decision in support of this proposition.[235]

230 Spalding v. Vilas, 161 U.S. 483 (1896).
231 *Id.* at 498.
232 28 U.S.C. § 2680(a) (2018).
233 Barr v. Matteo, 360 U.S. 564 (1959).
234 *Id.* at 571.
235 *See id.* at 571–72 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

As Professor Peck observed, "[T]he enactment of the Federal Tort Claims Act itself has made the analogy inexact."[236] From the time of its 1946 enactment, the FTCA substantially removed the fears of individual federal officials of personal liability. The FTCA imposes liability, not on the individual officer, but on the collective federal government and from public funds. Moreover, once a judgment has been obtained in a tort action against the United States under the FTCA, the judgment operates as "a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."[237] Thus, as Peck concludes, "[T]here have been removed from the scales important factors which led to according the [broader personal] immunity—the undesirability of public office and the timidity and lack of bold and fearless action which would be induced by a possible personal liability."[238]

Not surprisingly, then, the fear of personal liability for a federal officer has never been adduced as a historical concern by which to construe the discretionary function exception to the FTCA. As the government itself said at the outset in the first discretionary function exception case before the Supreme Court, the "essence" of the applicable historical bodies of law was "the fundamental principle" that "it is not the place of the courts to revise, supervise, or control executive conduct which actually involves the exercise of judgment, choice, and discretion, and requires the weighing in the public interest of competing considerations."[239] Indeed, during the legislative proceedings leading to enactment of the FTCA, a government spokesman explained it was not intended by the FTCA that "the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort."[240]

As discussed in the next subsection of this Article,[241] the Supreme Court has repeatedly identified the animating rationale for the exception in a manner that dovetails with the historical analogy of mandamus actions. As previously discussed, the restrictions on mandamus protected only discretionary choices actually made to take or refrain from governmental action.[242] In this way, the body of mandamus law

236 Peck, *supra* note 172, at 223.

237 28 U.S.C. § 2676 (2018). *See generally* James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 418–21 (2011).

238 Peck, *supra* note 172, at 224.

239 Brief for the United States, *supra* note 97, at 190.

240 *Tort Claims*, *supra* note 83, at 28 (statement of Assistant Att'y Gen. Francis M. Shea), *quoted in* United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 809–10 (1984).

241 *See infra* subsection II.A.2.

242 *See supra* sub-subsection II.A.1.b.

reflected what Professor Peck described as the "sensitive approach to the relation between the judiciary and other branches of the Government."[243]

One of the earliest federal court rulings just a few years after enactment of the FTCA anticipated the Supreme Court's later interpretation of the discretionary function exception as designed to avoid judicial second-guessing of executive policy decisions. In the 1950 decision of *Coates v. United States*,[244] the federal appellate court said the caselaw "clearly establish[es] that the term 'discretionary function or duty' has a long history of precise meaning in a legal sense."[245] In particular, the court referred to "separation of powers" as "mov[ing] the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment."[246] Drawing on the law of mandamus, the court derived the implication of "discretionary function[]" as "disclaim[ing] judicial power to interfere with, to enjoin or mandamus, or inquire into the wisdom or unwisdom or 'negligence' in their performance within the scope of authority lawfully granted."[247]

The Supreme Court's later FTCA decisions have cemented the parallel to the concept of "discretionary" in mandamus law. For example, under mandamus law of the period leading up to enactment of the FTCA, an official could be compelled by mandamus or injunction when that official lacked discretion because a statute specifically directed the course of action. Indeed, as the Court stated just sixteen years before the FTCA was enacted, a duty is regarded as ministerial and therefore may be compelled by mandamus where "the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command."[248] In *Berkovitz v. United States*,[249] the Supreme Court said the same for the FTCA, agreeing that if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," then no discretion remains and "the employee has no rightful option but to adhere to the directive."[250]

As another example, the Supreme Court confirmed in *United States v. Gaubert*[251] that the discretionary function exception does not

243 Peck, *supra* note 172, at 230.
244 Coates v. United States, 181 F.2d 816 (8th Cir. 1950).
245 *Id.* at 817.
246 *Id.* at 818.
247 *Id.*
248 Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218, 218–19 (1930).
249 Berkovitz v. United States, 486 U.S. 531 (1988).
250 *Id.* at 536.
251 United States v. Gaubert, 499 U.S. 315 (1991).

permit a planning-versus-operational level division, whereby decisions by higher governmental officials are protected but not those by lower-level officials.[252] Building directly on mandamus law at the time of enactment of the FTCA, Professor Peck agreed that "[i]t should not be by the office of the person, but by the nature of the thing done that the applicability of the discretionary function exception is determined."[253]

* * *

The reading of the discretionary function exception as requiring a causal link to a considered policy judgment is not only demanded by the text of the statute but commended by multiple statements in FTCA decisions by the Supreme Court. The Supreme Court has repeatedly articulated the standard in terms that focus on concrete policymaking choices. The Court has tied the policy immunity of the discretionary function exception to that which is "grounded" in policy,[254] "based on considerations of public policy,"[255] or involving the "exercise of policy judgment."[256] Only if one takes the once-uttered phrase "susceptible to policy analysis"[257] out of its context in a policy-suffused regulatory action where it served as a limit on the exception[258] could one suggest that the Supreme Court has even hinted at hypothetical policy factors as justifying immunity. By contrast, the repeated references to policy judgment, grounding in policy, and being based on policy considerations preclude an interpretation of the discretionary function exception as elevating imagination.

In sum, the Supreme Court's repeated directives sharpen the focus directly toward policy judgment. In the first lower court decision after the Supreme Court's holding in *United States v. Gaubert*,[259] the appellate court summarized the Supreme Court's rulings in this way: "Policy considerations . . . remain the touchstone for determining whether the discretionary function exception applies."[260]

252 *See id.* at 325.

253 Peck, *supra* note 172, at 237.

254 United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984); *Gaubert*, 499 U.S. at 324.

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

256 *Gaubert*, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3).

257 *Id.* at 325.

258 *See supra* subsection I.C.1.

259 United States v. Gaubert, 499 U.S. 315 (1991).

260 Andrulonis v. United States, 952 F.2d 652, 654 (2d Cir. 1991).

2. The Fear of Judicial Second-Guessing Vanishes When No Policy Judgment Was Made

The Supreme Court has repeatedly identified the purpose of the discretionary function exception as preventing judicial second-guessing of public policy decisions by the federal government.[261] But the risk of judicial intrusion into the realm of political considerations vanishes when the government officials exercised no policy judgment. As Bruce Peterson and Mark Van Der Weide put it, when there has been no actual consideration of policy, "there is no second guessing of agency choices because there was no first guessing."[262]

Professors Kristin Hickman and Richard Pierce explain that the FTCA's discretionary function exception reflects the commonsense appreciation that "[t]he process of governing almost always helps some and hurts others, but those who are hurt should not necessarily be entitled to damages from the government."[263] When people suffer harm as a result of policy initiatives by the federal government (at least those that fall within constitutional bounds[264]), the remedy lies in democratic governance. As Professor Harold Krent has written, if we did otherwise, then "[t]he judiciary would become the final arbiter of 'good' government."[265]

"Duly authorized government personnel, not judges or juries, decide what counts as reasonable public policy."[266] Writing more than sixty years ago, Professor Louis Jaffe reasoned that something like the discretionary function exception to the FTCA "must obtain, if only because . . . a court cannot undertake to determine whether complex governmental decisions are 'reasonable.'"[267] As I've said previously, "If the courts were to accept common-law review on the merits of an

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261 *See, e.g.*, *Gaubert*, 499 U.S. at 323; *Berkovitz*, 486 U.S. at 536–37; United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984).

262 Peterson & Van Der Weide, *supra* note 173, at 489.

263 3 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 22.4, at 2858 (7th ed. 2024); *see also* Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 739 (1947) ("[S]omeone gains and someone loses from every governmental decision, though it is hoped that all will be gainers in the long run.").

264 On the inapplicability of the discretionary function exception to the FTCA when the government violates a constitutional stricture, because no government official has discretion to transgress constitutional lines, see Sisk, *supra* note 56, at 1828–31.

265 Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 895 (1991); *see also* Niles, *supra* note 81, at 1312 (saying if policy judgments could be second-guessed by judges, "the democratic process would be replaced, at least in certain instances, by government through litigation").

266 Loumiet v. United States, 828 F.3d 935, 941 (D.C. Cir. 2016).

267 Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 237 (1963).

allegedly negligent or otherwise wrongful governmental action that hinges on disputed questions of policy, the traditional legal standard of reasonableness would too easily shade into an evaluation of political wisdom."[268]

But when government officials have reached no policy judgment, then evaluation of safety measures by ordinary tort standards involves no judicial intrusion into political policymaking. Again, the Supreme Court has specified the purpose of the discretionary function exception to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[269]

In the words of the Court then, those government actions "grounded" in public policy are protected from judicial intrusion. Speculative, hypothetical, post hoc imaginings are the antithesis of being "grounded."

A policy choice is the gravamen of political authority. If the government makes a controversial policy choice, the remedy lies not in judicial decrees on legal standards but in political structures of legislative reform or executive change. If the National Park Service determines that the preservation of a species of animals, such as a mountain goat, is a higher policy priority than protecting human safety, the wisdom of that choice may not be litigated in the vehicle of a tort action. But the absence of a policy choice removes the matter from the realm of political discretion. When bureaucratic inertia left an angry mountain goat unrestrained to threaten and eventually kill a visitor to the park, no risk of judicial second-guessing of policy judgment was presented.[270]

Nearly every human activity encountered within government could be redirected in a particular circumstance to serve a policy goal. But that hardly means that every official activity in every setting is guided by policy analysis. Outside of regulatorily intensive governmental activity in which every choice is infused with public policy,[271] government conduct that is not actually motivated by policy judgments is simply ordinary conduct comparable to that engaged in by a private actor. Non-policy-motivated government conduct that is parallel to private activity[272] is precisely the kind of behavior that is properly

268 Sisk, *supra* note 97, at 919.

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

270 On the angry mountain goat case, see *supra* text accompanying notes 1–21.

271 *See supra* subsection I.C.1.

272 *See* United States v. Olson, 546 U.S. 43, 44 (2005) (explaining that the FTCA holds the federal government liable on the same basis as a private person would be held liable for a tort committed under analogous circumstances).

measured by legal standards of reasonableness underlying the tort theory of negligence.[273]

3. Requiring a Genuine Policy Judgment Does Not Make the Discretionary Function Exception Subjective nor Allow Intrusion into Policy Deliberations

Sensibly requiring that the invocation of policy immunity under the discretionary function exception be grounded in a genuine policy basis does not open the door to intrusive judicial inquiries into the subjective deliberations of government officials.[274] "[L]abels," such as "malicious and bad faith," do not advance an FTCA plaintiff's claim, as "subjective intent is irrelevant" to the discretionary function exception analysis.[275] The Supreme Court has clarified that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation."[276] The motivation of the acting federal agent or the quality of the policy judgment is beyond the scope of the FTCA. After all, the discretionary function exception by its terms applies even when "the discretion involved be abused."[277]

Moreover, the Court has protected from disclosure ''documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'"[278] Importantly, however, the Court has emphasized that the rationale of guarding against chilling intrusions into the deliberative process cannot extend "to documents that embody a final decision, because once a decision has been made, the deliberations are done."[279]

As Professor Cornelius Peck remarked sixty years ago, requiring the government to show that a decision was truly "based upon" a policy judgment ordinarily imposes no substantial burden on the government: "[P]roof usually need be no more than [the government's official] statement."[280] Bruce Peterson and Mark Van Der Weide likewise

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273 *See infra* notes 363–64 and accompanying text.

274 *See* Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1137 (10th Cir. 1999) (worrying that requiring a showing of a policy choice to apply the discretionary function exception would "require a court to permit discovery and make factual findings regarding [agency] employees' state of mind and intent").

275 Zelaya v. United States, 781 F.3d 1315, 1330 (11th Cir. 2015) (quoting Reynolds v. United States, 549 F.3d 1108, 1112 (7th Cir. 2008)).

276 United States v. Gaubert, 499 U.S. 315, 325 (1991).

277 28 U.S.C. § 2680(a) (2018).

278 NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C 1966)).

279 U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777, 785 (2021).

280 Peck, *supra* note 172, at 216, 222.

dismiss the "straw man" that expecting an actual policy judgment would lead to courts denying the discretionary function exception whenever the government decisionmaker failed to demonstrate that every possible factor was considered.[281] Instead, "[s]o long as the government decisionmaker actually did consider a policy factor in making the decision, the decision would be immune from tort suits."[282] As they further explain, the proper approach "does not ask judges to make difficult distinctions between careful and non-careful evaluation, ill-conceived and well-conceived judgments, and full and partial consideration of policy factors."[283]

The question here is not the motivation of the government employee nor the narrative of the preceding deliberative steps taken before reaching a final decision. That a policy judgment was arguably in bad faith (that is, an abuse of discretion) or was adopted only after a contested internal debate about competing values or was arguably incomplete in policy assessment is neither here nor there for purposes of the discretionary function exception. The dispositive question is not the subjective purpose behind the decision nor the wisdom of a policy choice made—for which the discretionary function exception precludes the medium of a tort suit—but only whether a policy judgment actually was made.

When a contemporaneous policy rationale was articulated, then the government action is grounded in policy, and the FTCA as a vehicle for challenging that policy comes to a screeching halt.

But if not, then not.

B. Upholding the Fundamental Principle that Government Decisions Be Justified on the Grounds Actually Invoked

As recently as 2023, the Supreme Court reiterated the "'simple but fundamental rule of administrative law' that reviewing courts 'must judge the propriety of [agency] action solely by the grounds invoked by the agency.'"[284]

Notably, the Federal Tort Claims Act[285] and the Administrative Procedure Act (APA)[286] were enacted by Congress in the same year, 1946, to serve complementary purposes. When a party prospectively challenges ongoing governmental conduct or regulation, the APA

281 Peterson & Van Der Weide, *supra* note 173, at 457, 457–58.

282 *Id.* at 458.

283 *Id.* at 488 n.148.

284 Calcutt v. Fed. Deposit Ins. Corp., 143 S. Ct. 1317, 1318 (2023) (alteration in original) (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

285 Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946).

286 Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

authorizes a judicial action for specific relief, such as an injunction.[287] However, claims for relief in the nature of "money damages" are expressly excluded from the APA.[288] If, however, a party seeks money damages from the United States for past tortious wrongdoing, then a tort claim may be available under the FTCA.[289]

The expectation of the so-called *Chenery* rule that an agency "defend its actions based on the reasons it gave when it acted,"[290] rather than on a post hoc rationale devised for litigation, should be observed in the parallel FTCA setting. As discussed immediately below, each of the three judicial explanations for the *Chenery* rule apply with full, perhaps greater, force for the discretionary function exception to the FTCA.[291] Moreover, declaring immunity for a hypothetical policy rationale amounts to an unconstitutional advisory opinion on the legal implications of a policy not yet officially adopted by the government.[292]

1. Public Accountability Demands Candid Policy Choices

First, the Supreme Court demands that an agency be candid about the contemporaneous policy rationale to uphold public accountability. In *Department of Homeland Security v. Regents of the University of California*,[293] the Court said that contemporary justification "promotes 'agency accountability' by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority."[294] A plurality of the Court explained in *Bowen v. American Hospital Ass'n*[295] that while the Court has "recogni[zed] . . . Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation," that delegation of power "carries with it the correlative responsibility of the agency

287 *See* 5 U.S.C. § 706 (2018). On judicial relief available and limitations under the APA, see generally SISK, *supra* note 35, §§ 4.10–4.12, at 377–98.

288 *See* 5 U.S.C. § 702 (2018).

289 *See supra* Section I.A.

290 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020). On the Supreme Court's repeated endorsement of the *Chenery* rule that an agency's actions must be defended based on contemporary reasons, see 1 HICKMAN & PIERCE, *supra* note 263, § 6.5, at 854–55.

291 *See infra* subsections II.B.1–3.

292 *See infra* subsection II.B.4.

293 *Regents*, 140 S. Ct. 1891.

294 *Id.* at 1909 (quoting Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643 (1986) (plurality opinion)). On the "importance of public accountability" as demanding the agency articulate its basis for a decision, see Harold J. Krent, *The Roberts Court and the Resurgence in Process Review of Administrative Action*, 26 TEX. REV. L. & POL. 269, 274, 273–74 (2021).

295 *Bowen*, 476 U.S. 610 (plurality opinion).

to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both."[296]

If anything, that need for public accountability is greater in the FTCA discretionary function exception context. The discretionary function exception shields the federal government from tort liability because Congress determined that government policymaking should be guided by democratic political checks rather than reviewed by legal standards in the courts. That the judicial branch's power of decree is removed by the discretionary function exception makes it all the more important that government officials offer genuine policy reasons to allow a meaningful debate in the political branches.

Moreover, a proliferation of discretionary function exception dismissals means, of course, that no tort liability judgment will be rendered nor a settlement reached. As a direct consequence, the annual report to Congress on judgments or settlements paid by the government[297] will omit that case, short-circuiting the ability of Congress to monitor harm to people caused by negligent governmental behavior. The absence of a feedback loop further compromises public accountability.

Essential political accountability is frustrated if government officials can disclaim the real reason why a government action was or was not taken by promoting an after-the-fact hypothetical policy reason.

If, for example, the government truly wishes to elevate the preservation of the supposedly iconic mountain goat in the national park, even when obviously dangerous to human life, then it should say so and be prepared to defend that policy choice.[298] If a genuine policy judgment is made, the public debate can be fully engaged, and the presidential administration, Congress, or the public can direct their political critique at the policy choice adopted. But, of course, in the angry mountain goat case, the government made no actual choice to uplift protection of that invasive species above public safety—which is precisely the point. Imaginary policy justifications obscure genuine accountability.

2. No Confidence Should Be Given to Post Hoc Convenient Litigation Positions

Second, as part of the *Chenery* rule, the Supreme Court has repeatedly stated "that a court should decline to defer to a merely 'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to

296 *Id.* at 627.

297 *See supra* note 54 and accompanying text.

298 On the angry mountain goat case, see *supra* text accompanying notes 1–21.

'defend past agency action against attack.'"[299] In *Regents*, the Court further explained that "[c]onsidering only contemporaneous explanations for agency action also instills confidence that the reasons given are *not* simply 'convenient litigating position[s].'"[300]

In other words, as Professor Kevin Stack well states the clear rule, "The agency itself, not its counsel or Department of Justice (DOJ) lawyers defending the action, must state reasons sufficient to justify the agency's action, and that statement must accompany the action itself, not follow later."[301] To be sure, there may be occasions on which limited discovery will be necessary to ascertain whether a policy judgment was made at the time, but reconstructing administrative history is different from inventing history.

One cannot really fault the post hoc arguments formulated by Department of Justice counsel litigating discretionary function exception cases, given the open invitation to clever government lawyering made by the untethered expansion of the "susceptible to policy analysis" phrase into a doctrine of imagination. Nonetheless, the new cottage industry of tardy policy hypotheticals is deleterious to objective adjudication and discouraging to those seeking to find government compensation for their harms.

Judge Kleinfeld in the angry mountain goat case rightly condemned the decision of a case based on "a few after-the-fact declarations [by government officials] submitted in litigation attempting to show why such a decision, had it been made, would have been justified by policy."[302]

3. Post Hoc Declaration of Possible Policy Factors Undermines the Policymaking Authority of the Government

Third, the *Chenery* rule's demand for deference only to the contemporary policy grounds for an agency decision prevents the courts from "intrud[ing] upon the domain which Congress has exclusively entrusted to an administrative agency."[303] Limited to the "grounds propounded by the agency for its decision," the court may not

299 Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (alteration in original) (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

300 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (second alteration in original) (emphasis added) (quoting *Christopher*, 567 U.S. at 155).

301 Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 961 (2007).

302 Chadd v. United States, 794 F.3d 1104, 1128 (9th Cir. 2015) (Kleinfeld, J., dissenting).

303 Immigr. & Naturalization Serv. v. Orlando Ventura, 537 U.S. 12, 16 (2002) (quoting SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)).

"'substitut[e] what it considers to be a more adequate or proper basis.'"[304] As Professor Stack writes, "for a court to substitute or supply reasons for the agency action would amount not to a form of deference to the agency, but rather to a usurpation of the agency's role."[305]

The purpose of the discretionary function exception to the FTCA is to "prevent [judicial] 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[306] The imaginary policy search conducted under the misguided "susceptible to policy analysis" approach directly contradicts that statutory objective.

The willingness to accept after-the-fact rationales in the name of protecting government policymaking from judicial intrusion is false judicial modesty. As one court of appeals recognized, before the diversion into imaginary policy justifications took hold, "where there is no policy judgment, courts would be 'second-guessing' by implying one."[307]

Rather than properly deferring to a genuine policy choice by the government, the post hoc search for hypothetical policy justifications substitutes the imaginations of government litigators and judges for that of the government officials authorized to make policy judgments. Indeed, the articulation of hypothetical policy bases becomes an illegitimate public declaration of a nonexistent government policy.

Importantly, when a government official or agency does not make a policy-based decision, that in itself has important public policy implications. By choosing not to override public safety concerns to achieve a policy goal, the official or agency accepts that ordinary standards of reasonableness for evaluating safety are appropriately applied. No court should countenance a belated policy rationale that overturns a government choice not to insulate harmful behavior from judicious evaluation through negligence standards. The court should not substitute its own preferred political appraisal by judicially envisioning a superseding government policy that was never adopted.

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304 Calcutt v. Fed. Deposit Ins. Corp., 143 S. Ct. 1317, 1321 (2023) (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

305 Stack, *supra* note 301, at 980; *see also* ALFRED C. AMAN, JR., LANDYN WM. ROOKARD & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 12.8.1, at 417–18 (4th ed. 2023) (explaining the *Chenery* Court's refusal to bypass the grounds invoked by the agency for its decision by "substitut[ing] a rationale supporting those results that it believed was more appropriate," *id.* at 418).

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

307 Dube v. Pittsburgh Corning, 870 F.2d 790, 800 (1st Cir. 1989).

4. By Resolving Litigation Through Hypothetical Government Policy Choices, the Judiciary Is Asked to Render an Improper Advisory Opinion

Indeed, by asking a court to entertain the fantasy of a nonexistent policy rationale, the government effectively asks the judiciary to provide an advisory opinion to the executive branch.[308] By evaluating a plea of executive immunity for a hypothetical policy rationale, the court does not resolve a present-day controversy but rather offers instruction on the legal effect of a projected policy judgment that might be reached in the future. But the federal courts may not "give 'opinion[s] advising what the law would be upon a hypothetical state of facts'"[309] nor "decide abstract, hypothetical or contingent questions."[310]

In *United States v. Fruehauf*,[311] the Supreme Court identified the elements that signal a matter is insufficiently fixed and concentrated to allow judicial resolution without a detour into abstract or contingent advice:

> Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give.[312]

These unsavory ingredients of contingent abstraction are overflowing in the discretionary function soup of immunity that is posited on hypothetical policy grounds.

When a discretionary function exception affirmative defense is raised by the government in an FTCA action, the court encounters "a multifaced situation" requiring "explor[ation of] every aspect." Even when the government has adduced an actual and present justification that it characterizes as a policy judgment, the court still must evaluate (1) whether the executive has discretion to make that choice under the governing statute and regulations[313] and (2) whether that

308 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) ("[F]ederal courts do not issue advisory opinions.").

309 Chafin v. Chafin, 568 U.S. 165, 172 (2013) (alteration in original) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

310 Ala. State Fed'n of Lab. v. McAdory, 325 U.S. 450, 461 (1945).

311 United States v. Fruehauf, 365 U.S. 146 (1961).

312 *Id.* at 157.

313 *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988) (explaining that the government has no discretion if a federal statute, regulation, or policy directs the course of action).

particular rationale qualifies as the kind of "social, economic, and political policy" that is protected by the discretionary function exception.[314]

The government's susceptible-to-policy-analysis overreach asks a court to adjudge the nature of an executive protocol, its scope and application, and its statutory or regulatory parameters on the basis of a hypothetical policy that has never existed. Because the nonexistent policy has not been clearly defined and concretely applied, the necessary inquiry for discretionary function immunity cannot be "precisely framed" and instead becomes an "unfocused" exercise in make-believe. To resolve these discretionary function exception questions based on an imaginary policy rationale contravenes the Article III premise that "federal courts do not adjudicate hypothetical or abstract disputes."[315]

Moreover, by disposing of a case on hypothetical policy grounds, the court assumes the quasi-executive function of declaring a government policy judgment that was never actually made. The court's premature assessment of that policy pretermits the crucial governmental deliberation regarding "conflicting and demanding interests,"[316] including weighing the public consequence if the government holds itself immune from the harm that its conduct has imposed. When courts reach beyond matters "of a Judiciary Nature"[317] to grant an imprimatur to policy choices that were never actually weighed and adopted by the executive branch, the separation of powers is offended.

C. Ambiguous Resort to Imaginary Reasoning Results in Subjective Court Decisions

When courts stray from applying legal standards to formulating hypotheticals, inconsistency follows, and subjectivity is inevitable and corrosive to the judicial role. Adherence to the rule of law provides a surer path and restores impartial judicial outcomes.

The federal courts understandably have bemoaned the "difficulty of charting a clear path through the weaving lines of precedent" on

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

315 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

316 *Fruehauf*, 365 U.S. at 157.

317 *See TransUnion*, 141 S. Ct. at 2203 (endorsing James Madison's explanation at the Constitutional Convention that federal courts would be limited to deciding "only matters 'of a Judiciary Nature'" (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1966))).

the discretionary function exception.[318] As one court admitted, even while searching for a theoretical policy justification to shield the federal government, "the determination as to where one draws the line between a [policy] justification that is too far removed, or too ethereal, or both, and one that is not, is case-specific, and not subject to resolution by the application of mathematically precise formulae."[319]

When left adrift in this way, judges are more likely to swim in the direction that flows with their personal experiences or beliefs.

An empirical study by FTCA scholar Robert Longstreth examined hundreds of decisions of both federal district courts and courts of appeals for a two-year period at the end of the first decade of the twenty-first century.[320] The study found that the indeterminate rubric of "susceptible to policy analysis" was sufficiently subjective that partisan influences emerged. Republican-appointed judges were more likely than Democratic-appointed judges (by a margin of 12.6%) to hold that the discretionary function exception barred a claim.[321] Drilling down to the second prong of the test, which has been converted into an expansive susceptible-to-policy-analysis inquiry in the lower federal courts, the partisan disparity was even starker: "Democratic-nominated judges found the discretionary function exception inapplicable because the conduct at issue was not susceptible to policy analysis at a rate nearly three times higher than did Republican-nominated judges: 19.8% to 6.8%."[322]

(To be sure, the general influence of the party of the appointing President should not be overstated. Today, two of the three judges who have most strongly and recently raised the alarm against hypothetical policy analysis under the discretionary function rubric were appointed by Republican presidents.[323])

The Longstreth study on the discretionary function exception observes that the party-of-appointing-President variable likely would not emerge as an influence "[i]f existing precedent and norms adequately

318 Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005); *see also* Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999) (referring to "some disarray" in application of the discretionary function exception).

319 *Shansky*, 164 F.3d at 693.

320 *See* Robert C. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. ST. THOMAS L.J. 398, 404–06 (2011) (examining decisions by 245 judges in cases between January 1, 2009, and February 18, 2011).

321 *Id.* at 404–05.

322 *Id.* at 406.

323 *See* Chadd v. United States, 794 F.3d 1104, 1128 (9th Cir. 2015) (Kleinfeld, J., dissenting); Herden v. United States, 726 F.3d 1042, 1051 (8th Cir. 2013) (en banc) (Melloy, J., dissenting); Gonzalez v. United States, 814 F.3d 1022, 1043 (9th Cir. 2016) (Berzon, J., dissenting).

constrain the expression of judicial policy preferences."[324] My own empirical work, in collaboration with Professor Michael Heise, on the subject of religious liberty decisions in the lower federal courts, likewise found that the source of a partisan divide may be found in "the absence of constraining legal doctrine [that] leaves judges without clear guideposts in resolving Establishment Clause disputes."[325]

In our ongoing longitudinal empirical study of religious liberty decisions using a fully specified model of variables, we have observed the persistence of ideological influence in Establishment Clause decisions in the lower federal courts.[326] In our most recent iteration of our empirical examination of religious liberty decisions in the lower federal courts, we studied all digested Establishment Clause decisions by federal circuit and district court judges from 2006 through 2015.[327] Holding all other variables constant, Democratic-appointed judges were found to uphold claims challenging government conduct on Establishment Clause grounds at a 45.1% rate, while the observed probability of success fell to 33.0% before Republican-appointed judges.[328]

Importantly, however, this was a substantial narrowing of the partisan gap from our study of the preceding period of 1996–2005, in which we had found that a Republican-appointed judge would accept an Establishment Clause claim only 25.4% of the time, while a Democratic-appointed judge would accept the claim at the significantly higher rate of 57.3%.[329] Thus, for the earlier period of study, an Establishment Clause claimant's chances for success were approximately 2.25 times higher before a judge appointed by a Democratic President than one appointed by a Republican President.[330] In the next ten-year period, the Establishment Clause claimant advantage before a Democratic-appointed judge had fallen to about one-third higher than before a Republican-appointed judge.[331]

Based on our analysis, this reduction in the differential between judges appointed by Presidents of different parties appeared to be due to stronger legal controls in the form of Supreme Court precedent, which appeared as the single most significant, robust, and powerful influence on the outcome variable.[332] When the Supreme Court set

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324 Longstreth, *supra* note 320, at 399.

325 Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1240 (2012).

326 *See* Gregory C. Sisk & Michael Heise, *Cracks in the Wall: The Persistent Influence of Ideology in Establishment Clause Decisions*, 54 ARIZ. ST. L.J. 625 (2022).

327 *Id.* at 629.

328 *Id.* at 638.

329 Sisk & Heise, *supra* note 325, at 1216.

330 *Id.*

331 Sisk & Heise, *supra* note 326, at 652.

332 *Id.* at 629.

forth clearer rules for Establishment Clause disputes with less ambiguous standards, greater stability in decisions with less subjectivity followed.[333]

As we put it in our empirical study, "legal controls may meaningfully confine subjective discretion and reduce the influence of extralegal factors in federal court decision-making."[334] The same could be achieved in FTCA cases. By refusing to "shield[] [government decisions] from suit merely because it is possible to identify policy issues behind the government program at issue,"[335] flights of fancy would be brought down to the ground.

D. Expanding Policy Immunity Undermines the Remedial Purpose of the FTCA

The Supreme Court has repeatedly affirmed the legislative goal of meaningful compensatory relief underlying the Federal Tort Claims Act. The Court has explained the congressional purpose behind the FTCA as "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."[336] The Court has said Congress through the FTCA "could, and apparently did, decide that [leaving the loss from government employee negligence on the injured party] would be unfair when the public as a whole benefits from the services performed by Government employees."[337] Indeed, the government spokesman testifying in the legislative hearings leading to enactment of the FTCA said that

> [t]he basic principle on which this legislation is predicated is that of relief in respect of tort claims . . . and ought not to be a matter of grace from the legislative branch, but it ought to be a matter of right, just as it is between one private individual and another.[338]

The Supreme Court has specifically warned that "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the [FTCA]" in compensating victims of government negligence.[339] In the Court's words, when enacting the FTCA,

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333 *See id.* at 659–60.

334 *Id.* at 629.

335 Herden v. United States, 726 F.3d 1042, 1051 (8th Cir. 2013) (en banc) (Melloy, J., dissenting).

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

337 Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957).

338 *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 76th Cong. 16 (1940) (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen.).

339 Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984)); *see also* O'Toole v. United States, 295 F.3d 1029, 1037 (9th

Congress provided "much-needed relief to those suffering injury from the negligence of government employees."[340] And the Court observed that "Congress used neither intricate nor restrictive language in waiving the Government's sovereign immunity."[341]

When injudiciously applied, the discretionary function exception turns the Federal Tort Claims Act into an empty statutory promise of relief for those harmed by governmental carelessness. By elevating hypothetical policy musings into a form of statutory immunity, the federal government is insulated from liability for ordinary failures of due care. As one appellate judge warned, "Such a fantasy-grounded approach would severely undermine a central purpose of the FTCA, namely, the compensation of individuals who might otherwise be left 'destitute or grievously harmed' by the improper implementation of government policy."[342]

By being regularly and broadly employed to conceal official negligence with fictional policy-grounded immunity, the discretionary function exception has become the exception that swallows the rule. As one judge put it twenty-five years ago, "[T]he discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act."[343]

1. As Policy Immunity Drifts into Hypothetical Waters, Government Victories Surge

Every litigator understands that the greatest constraint on advocacy and the most objectively stabilizing aspect of litigation lies in the evidentiary record.[344] To be sure, there often is some play in the facts, the story told by witnesses can be ambiguous, and a narrative can be shaped to fit a theme. Nonetheless, a winning strategy must be designed to fit or at least not contradict an evidentiary grounding.

Consider then, if the lawyer for one side were granted the freedom to add fictional elements to fill every hole in their theory of the

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Cir. 2002) ("[I]n order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly.").

340 United States v. Muniz, 374 U.S. 150, 165 (1963).

341 *Id.* at 152.

342 Gonzalez v. United States, 814 F.3d 1022, 1042 (9th Cir. 2016) (Berzon, J., dissenting) (quoting *Rayonier*, 352 U.S. at 320).

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

344 *See* Dan Herbert, *Representing Clients in Difficult Cases*, LITIGATION, Fall 2024, at 19, 21 ("We are not magicians. As lawyers, we do not make the facts. The actions of our clients happened well before we got involved. The facts are the facts . . . .").

case. As fairness dissipated and the adversary process ran aground, this advocate's prospects of victory obviously would rise exponentially.

That scenario is precisely what an extravagant susceptible-to-policy-analysis inquiry offers to government litigators in FTCA cases. Freed from the obligation to connect a defense of policy immunity to a genuine policy judgment made by the responsible government officers acting at the time of the episode, government lawyers can construct an alternative reality in which harmful government conduct is justified by hypothetical policy exigencies. The only constraint remaining on government litigators is the limit of imagination.

Not surprisingly, then, when the government invokes the discretionary function defense in response to an FTCA tort claim, the government prevails at a very high rate.

In a study of summary judgment and dismissal rulings by district court judges in FTCA cases from 1946 through 2007, Stephen Nelson found an overall success rate for the federal government of 74.08%.[345] Significantly, the success rate for the defendant United States in FTCA cases moved upward after the Supreme Court's decision in *United States v. Gaubert*.[346] That of course is the decision that included the phrase "susceptible to policy analysis"[347] which in turn moved lower courts to transform the discretionary function exception inquiry into the fanciful.[348] Before *Gaubert*, the government prevailed in 69.9% of cases; afterward, the victory rate rose to 76.3%.[349]

An uncomplicated empirical frequency study conducted for this Article confirmed an even higher rate of government success in cases before the federal courts of appeals that specifically address the discretionary function under the susceptible-to-policy-analysis rubric. During the latest full ten-year period, 2014 through 2023, the federal courts of appeals decided eighty-four FTCA cases raising the question whether the government's action was susceptible to policy analysis.[350] In six cases, the courts avoided the policy exercise question by finding

345 Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 283, 290 (2009).

346 United States v. Gaubert, 499 U.S. 315, 334 (1991).

347 *Id.* at 325.

348 *See supra* subsection I.C.1.

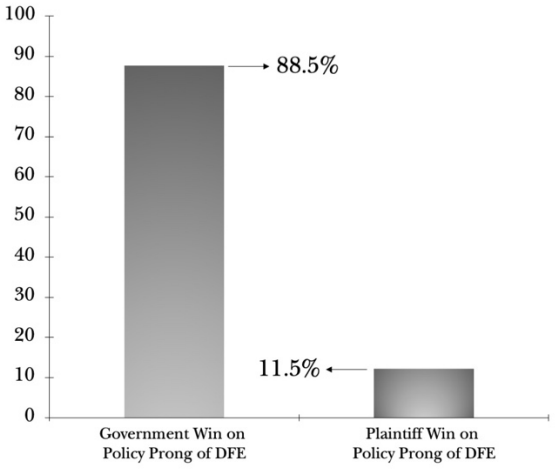
349 Nelson, *supra* note 345, at 292–93.

350 These eighty-four cases are the universe of both published and unpublished decisions in the federal courts of appeals on the discretionary function exception and susceptibility to policy analysis that are available on Westlaw. The cases were discovered through a search on Westlaw for "discretionary /150 suscept! /s policy" with the date restriction. The search returned one hundred cases, but sixteen of these did not involve an FTCA claim against the United States. An appendix of the cases and their outcomes is filed with the editor.

that the government was subject to a nondiscretionary mandatory duty and thus rejecting the discretionary function exception on the first prong for at least one of the claims.[351]

Focusing solely on the second policy prong, in which the federal courts of appeals without exception invoked the susceptible-to-policy-analysis inquiry,[352] the government prevailed in sixty-nine of seventy-eight cases. Thus, when the government invited the court to consider even the possibility of policy grounds, the government succeeded at a rate of 88.5%.

Figure 1: Federal Government Success Rate on DFE Policy Prong, U.S. Courts of Appeals, 2014–2023



In sum, the potency of the discretionary function exception—especially if triggered whenever a policy justification can be imagined—is manifest.

And government litigators are conspicuously aware that the FTCA landscape has shifted heavily in the government's direction. In the first twenty years after the *Gaubert* decision referred to "susceptible to policy analysis," the government invoked the discretionary function

351 On the two prongs for the discretionary function exception, see *supra* Section I.B.

352 In each of the cases listed in which the government prevailed on the second prong, the deciding court of appeals recited the susceptible-to-policy-analysis rubric as governing the determination of whether the discretionary function exception applied. To be sure, some of the cases might have been resolved in the government's favor even if the exception were construed to require an actual policy decision. Typically, however, when a court of appeals refers to a policy choice in its decision, the context suggests that it is based on after-the-fact assertions by the government in litigation or prior precedents assuming policy bases for categories of government activity, rather than a concretely established and preceding policy judgment made before the incident.

exception in almost twice as many cases as it had in the preceding forty-four years.[353]

In a Department of Justice publication in 2011, an assistant director in the Torts Branch published an article titled *The Federal Tort Claims Act Is a* Very Limited *Waiver of Sovereign Immunity*.[354] And the reason he adduced was the discretionary function exception. This government litigator's conclusion that "the scope of the [FTCA's] waiver is quite narrow, due largely to the discretionary function exception,"[355] is borne out by the results in the lower federal courts. But this is impossible to reconcile with the Supreme Court's declaration that the exceptions should not be given "unduly generous interpretations" lest they override the "sweeping" waiver of sovereign immunity in the FTCA.[356]

2. Ordinary Carelessness Is Regularly Transmuted into Hypothetical Policy Immunity

Ordinary neglect by government actors should not be restyled as unreviewable policy judgments by postulating public policy considerations that theoretically could have been, but in fact were not, adopted. Garden-variety miscarriages of public safety should not be transfigured into fictional policy reflections, leaving victims of government carelessness to bear their own losses. The discretionary function exception is not a license for government to be careless and neglectful.

As one judge perceptively wrote in an FTCA discretionary function exception case, the measures by which we typically evaluate whether an alleged tortfeasor acted with reasonable care can too readily be repackaged as policy factors.[357] Legal alchemy could transmute even a basic medical malpractice case into an occasion for the exercise of public policy judgment. As this dissenting judge observed:

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353 Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 430 (2012) (drawing data from the study by Nelson, *supra* note 345, at 301); *see also* Peterson & Van Der Weide, *supra* note 173, at 448 ("This phrase ['susceptible to policy analysis'] is now raised by the government's lawyers in countless negligence lawsuits against the United States, and it has greatly restricted the federal government's tort liability for all but the most mundane transgressions.").

354 David S. Fishback, *The Federal Tort Claims Act Is a* Very Limited *Waiver of Sovereign Immunity—So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, U.S. ATT'YS' BULL., Jan. 2011, at 16.

355 *Id.* at 16.

356 Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (first quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984); and then quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).

357 Herden v. United States, 726 F.3d 1042, 1053 (8th Cir. 2013) (en banc) (Melloy, J., dissenting).

> [Consider] the complex considerations inherent in the provision of medical care. Behind every individual medical treatment recommendation is a technical medical diagnosis coupled with a calculus that balances the cost-effectiveness of tests, procedures, and medications against the individual patient's wellness goals, the ethical strictures of the profession and society, and larger public-health concerns. . . . Nevertheless, the presence of social, economic, and political concerns inherent in medical decisions are not sufficiently "real and competing" in the context of individual patient treatment to trigger application of the discretionary-function exception under the FTCA.[358]

The tilting of the FTCA litigation landscape heavily in the direction of the government can be traced back to the government's frequent success in repurposing the very elements of negligence into a policy defense. For example, in an FTCA failure-to-warn case, the court recited:

> To issue warnings, the Government would need to "evaluate available information, assess the sufficiency and reliability of evidence, resolve conflicting data, determine the overall nature of a[ny] health threat[s]," consider how to identify potentially exposed individuals, decide what type of medium or combinations of mediums would be the best way to convey the risk to those exposed, and weigh practicality and economic constraints.[359]

The court was hardly wrong to list these factors, but its argument proves too much. These are not public policy considerations but rather the legally recognized factors by which to measure whether failing to convey a warning was reasonable under the circumstances, that is, the stuff of ordinary tort law.

Policy creep of this nature threatens to displace nearly every claim of negligence that could be framed against the government under the FTCA.[360]

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358 *Id.* (quoting C.R.S. *ex rel.* D.B.S. v. United States, 11 F.3d 791, 802 (8th Cir. 1993)).

359 Clendening v. United States, 19 F.4th 421, 436 (4th Cir. 2021) (alterations in original) (quoting Seaside Farm, Inc. v. United States, 842 F.3d 853, 859 (4th Cir. 2016)).

360 A particularly insidious example of policy creep may be found in the government's regular insistence that any additional expense to safety measures that would have avoided the harm implicates economic policy. To be sure, even for the federal government, funding is not always elastic. For example, an agency-wide decision to adopt a spot-check approach to enforce regulations on airplane manufacturers was a policy determination on how to "accommodate[] the goal of air transportation safety and the reality of finite agency resources." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 820 (1984). But the courts have been rightly skeptical that the minimal budgetary impact that underlies nearly any choice of action constitutes the type of economic policy that could trigger the discretionary function exception to the FTCA. *See* Gibson v. United States, 809 F.3d 807, 813 (5th Cir. 2016) ("[B]udgetary constraints on their own are often an insufficient policy goal to trigger the exception's protections."). As one court said,

Courts rightly insist that an FTCA plaintiff may not "collapse[] the discretionary function inquiry into a question of whether the [government] was negligent."[361] The questions whether the government actor "was negligent, and whether the safety precautions taken were reasonable, are separate inquiries from the analysis of the discretionary-function exception."[362]

The opposite is also true. The basic tools of tort law to ascertain negligence should not be bootstrapped into public policy, especially when no judgment was made to give priority to a policy goal above that of public safety. Absent such a policy choice to override the risk, balancing safety against efficiency of purpose should be recognized as simply reciting the same reasonableness factors that go into any evaluation of whether an individual or enterprise has been negligent.[363]

While the common law tort measure of negligence weighs cost and efficiency against risks to safety, the balancing standard is one of reasonable care as evaluated by ordinary community expectations applied to a discrete episode of harm. As one district judge wisely said, the discretionary function exception should be "held generally inapplicable to torts arising from conduct of government actors which can be judged by general standards of reasonableness without requiring courts to pass upon policy justifications."[364]

"Were we to view inadequate funding alone as sufficient to garner the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly." O'Toole v. United States, 295 F.3d 1029, 1037 (9th Cir. 2002). As one judge warned, if cost of safety measures always counts as economic policy, then "the discretionary function exception truly has swallowed up the FTCA's waiver of immunity because there are precious few governmental decisions that cannot be seen as an effort to save costs." Smith v. Wash. Metro. Area Transit Auth., 290 F.3d 201, 216 (4th Cir. 2002) (Michael, J., concurring in part and dissenting in part).

361 Rosebush v. United States, 119 F.3d 438, 442 (6th Cir. 1997).

362 Kohl v. United States, 699 F.3d 935, 942 (6th Cir. 2012).

363 *See id.* at 943 (characterizing the decision on how to use a winch in opening a destroyed vehicle door in an experiment as susceptible to policy analysis because it involved "judgments about how to respond to hazards, what level of safety precautions to take, and how best to execute the experiment in a way that balanced the safety needs of the personnel and the need to gather evidence" in the experiment). *But see id.* at 947 (Merritt, J., dissenting) ("I fail to see how the decision to winch the door off the van [which injured the plaintiff] required any sort of policy judgment."); *Smith*, 290 F.3d at 215–16 (Michael, J., concurring in part and dissenting in part) (observing that unreasonably balancing the risk of accidents against the cost of safety measures is the very definition of negligence and that using the discretionary function exception to immunize such decisions would have "swallowed up the FTCA's waiver of immunity," *id.* at 216).

364 Gonzalez v. United States, 690 F. Supp. 251, 254 (S.D.N.Y. 1988).

By contrast, a government policy judgment reflects a values-driven choice of a public interest strategy[365] to "effectuat[e] agency policy goals."[366] As discussed earlier,[367] the very definition of "discretionary function" introduces a special governmental factor or interest. Adoption of a prevailing government objective may establish a government priority that elevates agency policy over safety. Such a policy choice thereby supersedes ordinary standards of negligence, which then brings the matter inside the insulation of the discretionary function exception. But, again, as the Supreme Court has admonished, the discretionary function exception by its purpose "protects *only* governmental actions and decisions based on considerations of *public* policy."[368]

Two recent cases arising from the common activity of designing or managing a building illustrate how mundane questions of safety have been reframed as public policy that shields the government from being held accountable for ordinary negligence.

In *Alberty v. United States*,[369] a pedestrian who was injured when leaving a federal building alleged negligent design and maintenance of the walkway.[370] The court held the FTCA claim was barred by the discretionary function exception because "[t]he design of the walkway—an integral component of the building's east exit and facade—is susceptible to policy analysis. It involves social, economic, and political policy considerations like public safety, cost of design and materials, and aesthetics."[371]

In *Wilburn v. United States*,[372] a woman working with a waste-removal cart was injured at a federal hospital when the elevator doors closed on her.[373] She alleged the government negligently failed to forward complaints about the door so that the elevator door openings would be changed.[374] Not requiring any "evidence of a reasoned policy decision," the court hypothesized that "the decision not to change the

365 *See* Griffin v. United States, 500 F.2d 1059, 1066 (3d Cir. 1974) (describing policy-making for purposes of the discretionary function exception as "balancing competing policy considerations in determining the public interest").

366 O'Toole v. United States, 295 F.3d 1029, 1035 (9th Cir. 2002).

367 *See supra* sub-subsections II.A.1.b–c.

368 Berkovitz v. United States, 486 U.S. 531, 537 (1988) (emphases added).

369 Alberty v. United States, 54 F.4th 571 (8th Cir. 2022).

370 *Id.* at 574.

371 *Id.* at 577; *see also* Chantal v. United States, 104 F.3d 207, 212–13 (8th Cir. 1997) (applying the discretionary function exception to case involving an injury at a federal museum due to a poorly designed step as involving a balance between safety and aesthetics); Hite v. U.S. Dep't of the Interior, 735 F. Supp. 3d 585, 587–88 (E.D. Pa. 2024) (applying the discretionary function exception to a slip-and-fall case involving uneven and unleveled bricks in a sidewalk at a federal historical center in downtown Philadelphia).

372 Wilburn v. United States, 745 F. App'x 578 (6th Cir. 2018).

373 *Id.* at 579–80.

374 *Id.* at 580.

elevator-door speed could have been" made as policy deliberation, such as deciding that "slowing the elevator doors would have resulted in inefficiencies" or that "changing the door speed was too expensive."[375]

In these cases, the court articulated the same factors of safety, efficiency, cost, and aesthetics that are regularly considered by private entities when designing and operating a facility. And this weighing "is grist for the mill of tort adjudication when the balance struck was unreasonable."[376] In deciding these cases, the courts mistook ordinary considerations of reasonable care for the arena of public policy. By this reasoning, the discretionary function exception could eventually swallow government liability for automobile accidents, which the Supreme Court has adduced as clearly outside of policy immunity.[377] We now might expect the government to assert that choices about what training to provide drivers, when to conduct inspections of government motor vehicles, or how soon to replace failing brakes amount to policy choices about safety and use of limited government resources.

One court has been so bold to announce a general rule that government "[d]ecisions concerning the proper response to hazards are protected from tort liability by the discretionary function exception."[378] Another court very recently (at the end of 2023) declared that even if the government's considerations in creating a slip-and-fall hazard at a national memorial were "all about safety," and nothing else, "safety concerns are a typical policy consideration we identify when applying the discretionary-function exception."[379]

If that is the conclusion—that government decisions regarding public safety from hazards on federal property, including hazards created by the government itself, are categorically susceptible to policy analysis—then the FTCA has truly been eviscerated.

The Supreme Court has admonished that the courts may not "narrow [a] waiver that Congress intended."[380] That contraction is exactly

375 *Id.* at 582.

376 SISK, *supra* note 35, § 3.6(b)(7), at 177.

377 *See supra* text accompanying note 114.

378 Rosebush v. United States, 119 F.3d 438, 443 (6th Cir. 1997) (holding that the discretionary function exception covered government failure to take safety measures with respect to a fire pit at a government campground). *But see id.* at 445 (Merritt, J., dissenting) ("I fail to see a social, economic, or political policy behind a decision regarding whether to place gratings or railings or signs near a fire pit to make it safer for the public.").

379 Hilger v. United States, 87 F.4th 897, 899–900 (8th Cir. 2023). *But see* Young v. United States, 769 F.3d 1047, 1059 (9th Cir. 2014) (ruling that "considerations of safety" for visitors to public lands do not, at least by themselves, qualify as "public policy" (quoting Faber v. United States, 56 F.3d 1122, 1125 (9th Cir. 1995))).

380 United States v. Idaho *ex rel.* Dir., Idaho Dep't of Water Res., 508 U.S. 1, 7 (1993) (quoting Smith v. United States, 507 U.S. 197, 203 (1993)).

what is now happening. Because the lower federal courts transmogrify legal standards of negligence into government policy factors that in turn are backdated to cloak nonpolicy neglect, the promise of meaningful remedies under the FTCA is being frustrated.

In an era when the doors to other remedies for federal officer wrongdoing are closing,[381] the public is losing the considerable advantage granted by Congress through the FTCA to employ ordinary and readily accessible standards of tort law to uphold government accountability and to assure remedies to those harmed by careless government conduct. As Professors John Goldberg and Benjamin Zipursky note, one of the great "strengths" of the tort law is that "it stands ready to hold us to familiar and widely acknowledged responsibilities."[382] We need that now more than ever.

CONCLUSION

President Abraham Lincoln said that "[i]t is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[383] For decades, the Federal Tort Claims Act had been one of the most enduring and successful means by which Congress has extended justice to hold the federal government accountable for wrongful harm.

But the legislative promise in the FTCA increasingly has been suffocated beneath a blanket of judicially conceived immunity. The courts are insulating not only genuine policy judgments by government actors, but also the conjectures of government lawyers about policy paths that could have been taken. Under this susceptible-to-policy-analysis approach, the United States government escapes accountability through after-the-fact speculation regarding policy factors that *could* have played a role (but actually did *not*) in the harmful government conduct.

Government policy judgments may have profound effects, sometimes even accepting a greater risk to human life in pursuit of what officials think is a greater public good. If, for example, federal officers declare a government priority to preserve a parcel of federal lands in its natural state and not disturb a species of wild animals, that policy judgment may not be second-guessed by the courts, even if unfortunate consequences unfold. As Professor Cornelius Peck explained, liability cannot be imposed under the FTCA when the claim "necessarily brings into question the decision of one who, with the authority to do so, determined that the acts or omission involved should occur or the

381 *See supra* subsection I.A.2.

382 JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 48 (2020).

383 CONG. GLOBE, 37th Cong., 2d Sess. app. at 2 (1861).

risk that eventuated should be encountered for the advancement of governmental objectives."[384]

But when a hiker on a trail in a national park perishes under the sharp horns of an angry mountain goat that was left unrestrained by bureaucratic inattention to the risks posed by this invasive species,[385] the courts should not close judicial eyes. Loss of human life is always a tragedy. But accountability for a tragic death should not be hidden behind imaginary policy justifications. We should not countenance official carelessness that only pretends to be government policymaking.

384 Peck, *supra* note 97, at 452 (emphasis omitted).

385 On the angry mountain goat case, see *supra* text accompanying notes 1–21.