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The "Constitutional-Claims Exclusion" Fallacy: The Courts' Attempt to "Back-Door" Constitutional Claims into the Federal Tort Claims Act

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ABSTRACT

When federal agents violate a citizen's constitutional rights, justice demands that someone be held accountable and the plaintiff be redressed for his injuries. While a plaintiff can sue the agents in their individual capacities, it is unclear whether the federal government itself can be held liable. Under the Federal Torts Claims Act (FTCA), plaintiffs can sue the federal government for the torts of its employees. But there are limitations and exceptions. For example, the FTCA applies only to state-law torts, not to federal constitutional violations. Further, the FTCA's "discretionary-function" exception immunizes federal agents' conduct when they act within their discretion. As a result, courts have traditionally barred plaintiffs from bringing federal constitutional claims against the federal government.

Recently, however, plaintiffs have employed a creative way to overcome both of these roadblocks in one fell swoop: they use their constitutional claim to defeat the discretionary-function exception. It's a simple two-step process. First, the plaintiff pleads a state-law tort claim—to which the FTCA applies. Second, he alleges a constitutional violation—not as a substantive claim—but solely as a means to negate the discretionary-function exception. The plaintiff argues that since unconstitutional acts are per se not discretionary, any constitutional violation removes the agents' conduct from the scope of the discretionary-function exception. This argument has won favor with the majority of the circuit courts that have addressed the issue.

This Comment argues that the conclusion drawn by the majority of the circuit courts is erroneous. The plain text of the FTCA forecloses any constitutional claims—whether they be substantive claims or back-door

attempts to defeat the discretionary-function exception. While it may seem unjust to permit the government to violate its citizens' constitutional rights with impunity, it is simply not the courts' role to rewrite the FTCA to reach a result the statutory text does not permit.

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COMMENT

THE "CONSTITUTIONAL-CLAIMS EXCLUSION" FALLACY: THE COURTS' ATTEMPT TO "BACK-DOOR" CONSTITUTIONAL CLAIMS INTO THE FEDERAL TORT CLAIMS ACT

Brent Dugwyler[†]

ABSTRACT

When federal agents violate a citizen's constitutional rights, justice demands that someone be held accountable and the plaintiff be redressed for his injuries. While a plaintiff can sue the agents in their individual capacities, it is unclear whether the federal government itself can be held liable. Under the Federal Torts Claims Act (FTCA), plaintiffs can sue the federal government for the torts of its employees. But there are limitations and exceptions. For example, the FTCA applies only to state-law torts, not to federal constitutional violations. Further, the FTCA's "discretionary-function" exception immunizes federal agents' conduct when they act within their discretion. As a result, courts have traditionally barred plaintiffs from bringing federal constitutional claims against the federal government.

Recently, however, plaintiffs have employed a creative way to overcome both of these roadblocks in one fell swoop: they use their constitutional claim to defeat the discretionary-function exception. It's a simple two-step process. First, the plaintiff pleads a state-law tort claim—to which the FTCA applies. Second, he alleges a constitutional violation—not as a substantive claim—but solely as a means to negate the discretionary-function exception. The plaintiff argues that since unconstitutional acts are per se not discretionary, any constitutional

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This Comment argues that the conclusion drawn by the majority of the circuit courts is erroneous. The plain text of the FTCA forecloses any constitutional claims—whether they be substantive claims or back-door attempts to defeat the discretionary-function exception. While it may seem unjust to permit the government to violate its citizens' constitutional rights with impunity, it is simply not the courts' role to rewrite the FTCA to reach a result the statutory text does not permit.

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I. INTRODUCTION

The Federal Tort Claims Act (FTCA) permits United States citizens to sue the federal government for torts committed by federal employees acting within the scope of their office or employment.[1] However, the FTCA contains several exceptions.[2] The most prominent of which is known as the "discretionary-function exception," under which the federal government is immune from liability for the discretionary acts of its employees.[3]

Over the past few decades, courts have disagreed over whether the discretionary-function exception applies when the federal employee's tortious act also violates the U.S. Constitution.[4] The majority of the U.S. Circuit Court of Appeals have found that the discretionary-function exception does not apply to unconstitutional acts because the government "has no 'discretion' to violate the Federal Constitution."[5] Two circuit courts have rejected that argument, finding the discretionary-function exception applies even if the conduct is "constitutionally repugnant."[6]

This Comment argues that the discretionary-function exception applies even when the federal employee's conduct is unconstitutional. Part II of this Comment discusses the background of the FTCA, the discretionary-function exception, and the so-called "constitutional-claims exclusion" of the

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[1] 28 U.S.C. § 1346(b).

[2] *See generally* 28 U.S.C. § 2680(a)–(f), (h)–(n).

[3] 28 U.S.C. § 2680(a).

[4] The Seventh and Eleventh Circuit Courts have found that the discretionary-function exception applies even when the federal employee's tortious act also violates the Constitution. Kiiskila v. United States, 466 F.2d 626, 627–28 (7th Cir. 1972); Shivers v. United States, 1 F.4th 924, 930–32 (11th Cir. 2021). The First, Third, Fourth, Fifth, Eighth, Ninth, and D.C. Circuits have found that the discretionary-function exception does not apply when the federal employee's tortious act violates the Constitution. Pooler v. United States, 787 F.2d 868 (3rd Cir. 1986), *abrogated in part on other grounds*, Millbrook v. United States, 569 U.S. 50 (2013); Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987); Nurse v. United States, 226 F.3d 996 (9th Cir. 2000); Medina v. United States, 259 F.3d 220 (4th Cir. 2001); Raz v. United States, 343 F.3d 945 (8th Cir. 2003); Limone v. United States, 579 F.3d 79 (1st Cir. 2009); Loumiet v. United States, 828 F.3d 935 (D.C. Cir. 2016).

[5] Owen v. City of Independence, 445 U.S. 622, 649 (1980); *see Pooler*, 787 F.2d 868; *Sutton*, 819 F.2d 1289; *Nurse*, 226 F.3d 996; *Medina,* 259 F.3d 220; *Raz*, 343 F.3d 945; *Limone*, 579 F.3d 79; *Loumiet*, 828 F.3d 935.

[6] *Kiiskila*, 466 F.2d at 627–28; *Shivers*, 1 F.4th at 930–32.

discretionary-function exception.[7] Part III examines the circuit courts' treatment of the constitutional-claims exclusion. Part IV analyzes the constitutional-claim exclusions argument and shows that the majority of the circuit courts' conclusion is erroneous for three principal reasons: (1) the plain text of the FTCA does not permit constitutional claims, (2) it is inconsistent with Supreme Court precedent, and (3) it implies a waiver of sovereign immunity that Congress did not expressly authorize. Part V describes the flawed process by which the majority of the circuit courts reached their conclusion. Finally, Part VI explains that any change to the FTCA that would permit a constitutional-claims exclusion must be enacted by Congress, not supplied by the courts.

II. BACKGROUND

In the United States, when a person is injured by a federal employee's tortious conduct, he may bring a tort claim against the employee who committed the tort and the federal government itself.[8] Suing the employee in his individual capacity, however, is often not a viable or desirable option for an injured plaintiff.[9] Federal employees are generally protected by qualified immunity, which shields an employee from liability if they acted reasonably and in good faith.[10] Moreover, even if the employee is not protected by qualified immunity, the employee may not have the resources to satisfy an award for monetary damages.[11]

As a result, a plaintiff's only option may be to sue the federal government for its employee's tort.[12] However, under the doctrine of sovereign immunity, a plaintiff may not sue a sovereign entity unless that sovereign consents.[13] For a substantial part of this nation's history, the doctrine of sovereign immunity

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[7] This Comment will refer to the "constitutional-claims exclusion" of the discretionary-function exception as the "constitutional-claims exclusion" for conciseness.

[8] MICHAEL D. CONTINO & ANDREAS KUERSTEN, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 3 (2023).

[9] *See id.*

[10] Mark C. Niles, *"Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1306 n.129 (2002).

[11] Stephen G. Giles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006).

[12] *See* CONTINO & KUERSTEN, *supra* note 8, at 3.

[13] *Id.* at 4 n.35.

barred citizens from suing the federal government for its employees' tortious acts.[14] Finding this practice unacceptable, Congress ultimately enacted the FTCA in 1946 to permit certain suits against the federal government.[15]

A. The Federal Tort Claims Act

Congress enacted the FTCA as a limited waiver of the United States' sovereign immunity.[16] Specifically, the FTCA permits suits against the United States

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[17]

Importantly, the FTCA did not create new causes of action where none existed before.[18] Rather, "[i]ts effect is to waive immunity from recognized causes of action."[19] Specifically, the FTCA provides that the United States can be held liable only when liability would attach to a *private actor under the law of the place where the tort occurred*.[20] The Supreme Court has explained that "law of the place" means state law.[21] Thus, the FTCA imposes liability on the United States only when its employees commit a state law tort for which they would otherwise be liable if they were a private actor.[22]

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[14] *Id.* at 1.

[15] *Id.*

[16] *See* Shivers v. United States, 1 F.4th 924, 928 (11th Cir. 2021) (quoting 28 U.S.C. § 1346(b)(1)).

[17] 28 U.S.C. § 1346(b)(1).

[18] Pornomo v. United States, 814 F.3d 681, 687 (4th Cir. 2016).

[19] Dalehite v. United States, 346 U.S. 15, 43 (1953) (quoting Feres v. United States, 340 U.S. 135, 142 (1950)).

[20] *See* 28 U.S.C. § 1346(b)(1).

[21] Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 478 (1994).

[22] *See* 28 U.S.C. § 1346(b)(1).

The FTCA also contains several exceptions designed to limit the scope of its waiver of sovereign immunity.[23] Congress included these exceptions to protect "the integrity and solvency of the public fisc" and to alleviate "the impact that extensive litigation might have on the ability of government officials to focus on and perform their other duties."[24] Perhaps the "broadest and most consequential"[25] of these exceptions is the discretionary-function exception.[26]

B. The Discretionary-Function Exception

The discretionary-function exception preserves the federal government's immunity when its employees' acts involve the exercise of discretion.[27] In 28 U.S.C. § 2680(a), Congress provided that the United States shall not be liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[28] The Supreme Court has provided guidance on how to properly interpret this statute.

1. The Supreme Court's Two-Part Discretionary-Function Test

The Supreme Court in *United States v. Gaubert* adopted a two-part test for determining whether the challenged government action constitutes the exercise of a discretionary function.[29] First, the conduct must be "discretionary."[30] An act is "discretionary" if it "involve[s] an element of judgment or choice."[31] This part of the test is straightforward. Unless a government employee's actions are specifically mandated by a federal statute,

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[23] *See generally* 28 U.S.C. § 2680(a)–(f), (h)–(n).

[24] *See* Niles, *supra* note 10, at 1300.

[25] *Id.*

[26] 28 U.S.C. § 2680(a).

[27] *See id.*

[28] *Id.*

[29] United States v. Gaubert, 499 U.S. 315, 322–23 (1991).

[30] *Id.* at 322 (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

[31] *Id.* (quoting *Berkovitz*, 486 U.S. at 536).

regulation, or agency policy, their actions will be deemed "discretionary."[32] The more difficult task is interpreting the second part of the test, which requires the discretionary judgment to be "of the kind that the discretionary function exception was designed to shield."[33] Congress included the discretionary-function exception to the FTCA 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."[34] Accordingly, the exception protects only discretionary decisions "based on considerations of public policy."[35]

2. The Supreme Court's Broad Interpretation of the Discretionary-Function Exception

The Supreme Court in *Varig Airlines* addressed which employee decisions fall under the umbrella of "public policy."[36] Specifically, the Court considered whether the discretionary-function exception is limited to decisions made at the policymaking level or whether it extends to decisions made by low-level employees carrying out those policies.[37] The Court held that the discretionary-function exception "covers '[not] only agencies of government . . . but *all* employees exercising discretion.' Thus, the basic inquiry . . . is whether the challenged acts of a Government employee—*whatever his or her rank*—are of the nature and quality that Congress intended to shield from liability."[38] The *Varig Airlines* decision resolved much of the ambiguity regarding the scope of the discretionary-function exception: It protects the decisions of *all* federal employees, regardless of

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[32] *See* Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 707 (1997).

[33] *Gaubert*, 499 U.S. at 322–23 (quoting *Berkovitz*, 486 U.S. at 536) (citing United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984)).

[34] *Varig Airlines*, 467 U.S. at 814.

[35] Berkovitz v. United States, 486 U.S. 531, 537 (1988) (citing Dalehite v. United States, 346 U.S. 15, 26 (1953)).

[36] *See Varig Airlines*, 467 U.S. at 809–14.

[37] *Id.* at 813.

[38] *Id.* (first and second alterations in original) (emphasis added) (citation omitted) (quoting *Dalehite*, 346 U.S. at 33).

whether they formulate or implement policy.[39] As a result, the exception has been applied to the actions of low-level federal employees, including federal law enforcement officials who, for example, have been accused of violating citizens' constitutional rights while investigating crimes,[40] conducting surveillance,[41] and executing arrests.[42]

C. The "Constitution-Claims Exclusion" Argument

To defeat the government's discretionary-function defense, some plaintiffs have argued that a federal officer's unconstitutional acts are *per se* not discretionary,[43] and are thus outside the discretionary-function exception.[44] As a result, if a federal officer's tort involves a constitutional violation, his actions are not covered by the discretionary-function exception. This argument requires plaintiffs to follow two basic steps: first, plead a state-law cause of action—to which the FTCA applies.[45] This can be any run-of-the-mill claim, such as battery, trespass, or common law negligence. Second, allege a constitutional violation that overlaps with that state claim.[46] The plaintiff then argues that even if the federal officer's conduct involved an element of choice, and thus would otherwise be considered discretionary, if the conduct was unconstitutional, then it was *per se* not discretionary.[47] In other words, federal officers "never have discretion to violate the Constitution."[48]

To illustrate how this works, consider the facts of the 2021 Seventh Circuit case, *Shivers v. United States*.[49] There, a federal inmate brought an FTCA

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39 *See id.*

40 Limone v. United States, 579 F.3d 79, 83 (1st Cir. 2009).

41 *See, e.g.*, Raz v. United States, 343 F.3d 945, 947 (8th Cir. 2003).

42 *See, e.g.*, Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000).

43 Xiaoxing Xi v. Haugen, 68 F.4th 824, 839 (3rd Cir. 2023).

44 *Id.*

45 *See* Castro v. United States, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting).

46 *Id.*

47 *See Xiaoxing Xi*, 68 F.4th at 839.

48 *See id.*

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

claim against the United States after his cellmate violently attacked him.[50] The inmate brought a state-law FTCA claim alleging that prison officials negligently assigned him to a cell with a known violent inmate.[51] The government asserted that the prison officials acted within their "discretion."[52]

To defeat that defense, the inmate further alleged that the prison officials' decision to house the violent inmate in his cell also violated his Eighth Amendment rights.[53] The inmate asserted that "the allegations of unconstitutional conduct [should] only [be considered] as negating the discretionary function defense, not as part of the substantive FTCA claim."[54] He argued that "while '[t]he substantive basis for [his] FTCA claim remains [State] law,' an alleged constitutional violation 'means that the government cannot shield itself using the discretionary function exception.'"[55]

This is the essence of the constitutional-claims exclusion argument. It is not a substantive claim for a constitutional violation—that, the FTCA prohibits. Rather, the argument asserts that because government officials have no discretion to violate the Constitution, any unconstitutional act is outside the discretionary-function exception.[56]

III. THE CIRCUIT COURTS' TREATMENT OF THE "CONSTITUTIONAL-CLAIMS EXCLUSION"

There is currently a circuit split on whether there is a "constitutional-claims exclusion" to the discretionary-function exception. The First, Third,

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[50] *Id.* at 926.

[51] *Id.* at 926–27.

[52] *Id.* at 927.

[53] *Id.* at 929.

[54] *Id.*

[55] *Shivers*, 1 F.4th at 929 (first and second alteration in original) (quoting Supplemental Brief of Appellant at 19–20, 23, *Shivers*, 1 F.4th 924 (No. 17-12493-DD)).

[56] Xiaoxing Xi v. Haugen, 68 F.4th 824, 839 (3rd Cir. 2023).

Fourth, Fifth, Eighth, Ninth, and D.C. Circuits have adopted the exclusion.[57] The Seventh and Eleventh Circuits have rejected it.[58]

A. The Majority of the Circuit Courts Have Found a "Constitutional-Claims Exclusion"

The majority of circuit courts have found that violating the Constitution is outside the permissible discretion protected by the FTCA's discretionary-function exception.[59] The Third and Fifth Circuits each independently established this principle, in dicta,[60] and their proclamations eventually became the authority for the subsequent circuit courts' decisions.[61] Most of the circuit courts that followed the Third and Fifth Circuits relied solely on the weight of circuit authority to justify their conclusions. [62] However, in its 2016 opinion, the D.C. Circuit finally revealed the policy-based rationale for adopting the constitutional-claims exclusion: It would simply be "illogical"

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[57] Owen v. City of Independence, 445 U.S. 622, 649 (1980); *see* Pooler v. United States, 787 F.2d 868 (3rd Cir. 1986); Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987); Nurse v. United States, 226 F.3d 996 (9th Cir. 2000); Medina v. United States, 259 F.3d 220 (4th Cir. 2001); Raz v. United States, 343 F.3d 945 (8th Cir. 2003); Limone v. United States, 579 F.3d 79 (1st Cir. 2009); Loumiet v. United States, 828 F.3d 935 (D.C. Cir. 2016).

[58] Kiiskila v. United States, 466 F.2d 626, 627–28 (7th Cir. 1972); Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019); Shivers v. United States, 1 F.4th 924, 930, 936 (11th Cir. 2021).

[59] *Loumiet*, 828 F.3d at 943 (compiling cases from the First, Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits).

[60] In 1986, the Third Circuit in *Pooler* observed that "federal officials do not possess discretion to" violate constitutional rights. *Pooler*, 787 F.2d. at 871. A year later, the Fifth Circuit in *Sutton* explained that it had "not hesitated to conclude that [government] action does not fall within the discretionary exception of § 2680(a) when government agents exceed the scope of their authority as designated by statute or the Constitution." *Sutton*, 819 F.2d at 1293 (decided in 1987).

[61] The Eighth Circuit in *Raz*, 343 F.3d at 948 and the Ninth Circuit in *Nurse*, 226 F.3d at 1002 cited exclusively to the Third Circuit. The Fourth Circuit in *Medina*, 259 F.3d at 225 relied primarily on the Third Circuit. The First Circuit in *Limone*, 579 F.3d at 101 cited exclusively to the Fifth Circuit. The D.C. Circuit in *Loumiet*, 828 F.3d at 943 cited to the First, Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits.

[62] *See Raz*, 343 F.3d at 948; *Nurse*, 226 F.3d at 1002; *Medina*, 259 F.3d at 225; *Limone*, 579 F.3d at 101; *Loumiet*, 828 F.3d at 943.

to hold the government liable for ordinary torts but not constitutional violations.[63]

1. The Third and Fifth Circuit's Dictum: The Origin of the "Constitutional-Claims Exclusion"

The Third Circuit was the first circuit court to proclaim that federal officials do not possess discretion to violate the Constitution.[64] In the 1986 case *Pooler v. United States*, the Third Circuit considered whether a federal officer's decision to use an unreliable confidential informant to gather evidence on a suspect was within the discretionary-function exception.[65] The court held that it was because the officer had to exercise judgment as to the policy decision to use an informant.[66] However, in dicta, the court observed that the outcome might have been different had the officer violated constitutional rights or federal statutes because "federal officials do not possess discretion to commit such violations."[67]

The court made this assertion without reference to the statutory text, precedent, or legislative history.[68] A couple of years later, the Third Circuit reaffirmed its position in *United States Fidelity & Guaranty Co. v. United States*, where it observed that "conduct cannot be discretionary if it violates the Constitution."[69] While neither of these cases involved an allegation of a constitutional violation, the Third Circuits' proclamations nonetheless provided the basis for many of the subsequent circuit courts' decisions that did involve constitutional violations.[70]

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[63] *See Loumiet*, 828 F.3d at 944–45.

[64] Pooler v. United States, 787 F.2d 868, 871 (3rd Cir. 1986).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* (The Court did not provide any citations to support its assertion that "federal officials do not possess discretion to [violate the Constitution].").

[69] U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3rd Cir. 1988). The Third Circuit reaffirmed its same holding in 2023. Xiaoxing Xi v. Haugen, 68 F.4th 824 (3rd Cir. 2023).

[70] The Ninth Circuit in *Nurse v. United States*, the Fourth Circuit in *Medina v. United States*, and the Eighth Circuit in *Raz v. United States* each cited to the Third Circuit's dictum

Like the Third Circuit, the Fifth Circuit also proclaimed, in dicta, that the discretionary-function exception does not cover unconstitutional acts.[71] In 1987, the Fifth Circuit heard *Sutton v. United States* where the plaintiff brought an FTCA action for malicious prosecution[72] but did not plead a constitutional violation.[73] Nonetheless, the Fifth Court explained that it had "not hesitated to conclude that such [government] action does not fall within the discretionary function [exception] of § 2680(a) when government agents exceed the scope of their authority as designated by statute or the Constitution."[74] The Fifth Circuit proceeded to list its previous decisions where it held that violations of federal regulations or policies were not within the discretionary-function exception.[75] Notably, the court did not cite any previous decisions involving violations of the Constitution.[76] The Fifth Circuit nevertheless deduced from its previous decisions that the discretionary-function exception does not apply to acts contrary to the Constitution.[77]

More than twenty years later, the Fifth Circuit finally applied its dicta to a case that involved an allegation of a constitutional violation.[78] In *Castro v. United States*, the plaintiff alleged that Border Patrol agents unlawfully detained her in immigration custody.[79] The plaintiff brought claims of

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in *Pooler* or *Fidelity & Guaranty* as their primary support for the assertion that unconstitutional acts are outside the discretionary-function exception. Nurse v. United States, 226 F.3d 996, 1002 (9th Cir. 2000); Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001); Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003). The more recent cases in the Fifth, First, and D.C. Circuits cited the Third Circuit and the other circuits that followed.

[71] Castro v. United States, 560 F.3d 381, 393 (5th Cir. 2009) (Smith, J., dissenting) (citing Sutton v. United States, 819 F.2d 1289, 1291 (5th Cir. 1987)), *rev'd*, Castro v. United States, 608 F.3d 266 (5th Cir. 2010) (en banc).

[72] Sutton v. United States, 819 F.2d 1289, 1290 (5th Cir. 1987).

[73] *Castro*, 560 F.3d at 393 (Smith, J., dissenting) (citing *Sutton*, 819 F.2d at 1291).

[74] *Sutton*, 819 F.2d at 1293.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Castro*, 560 F.3d at 389. In 2006, the Fifth Circuit in *Santos v. United States* held that the FTCA does not apply to constitutional violations. Santos v. United States, No. 05-60237, 2006 U.S. App. LEXIS 10261, at 10 (5th Cir. Apr. 21, 2006).

[79] *Castro*, 560 F.3d at 385.

negligence, intentional infliction of emotional distress, and false imprisonment against the United States under the FTCA.[80] The plaintiff further alleged that the Border Patrol agents' conduct violated her Fourth and Fifth Amendment rights.[81] The Fifth Circuit cited its earlier decision in *Sutton*, as well as the Third, Fourth, Eighth, Ninth, and D.C. Circuits' subsequent decisions holding the same, in concluding that a government official's "action does not fall within the discretionary function exception . . . when governmental agents exceed the scope of their authority as designated by statute or the Constitution."[82]

2. The First, Fourth, Eighth, Ninth, and D.C. Circuits Adopted the Third and Fifth Circuits' Dicta

After the Third and Fifth Circuits pronounced that unconstitutional acts are outside the scope of the discretionary-function exception, the First, Fourth, Eighth, Ninth, and D.C. Circuits eventually followed suit.[83] Without the plain statutory text or Supreme Court precedent on which to rely, these courts instead leaned on the Third and Fifth Circuits' baseless observations to support their conclusions.[84] The more circuits that eventually came on board, the stronger each subsequent circuit court's precedential authority appeared to be. Ultimately, when the D.C. Circuit fell in line with the majority of the circuit courts in 2016, its primary rationale was that it was following the weight of circuit authority.[85]

a. Ninth Circuit

In *Nurse v. United States*, the Ninth Circuit cited exclusively to the Third Circuit when it held that the discretionary-function exception did not apply

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[80] *Id.*

[81] *Id.*

[82] *Id.* at 389 (quoting Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987)).

[83] Nurse v. United States, 226 F.3d 996 (9th Cir. 2000); Medina v. United States, 259 F.3d 220 (4th Cir. 2001); Raz v. United States, 343 F.3d 945 (8th Cir. 2003); Limone v. United States, 579 F.3d 79 (1st Cir. 2009); Loumiet v. United States, 828 F.3d 935 (D.C. Cir. 2016).

[84] *See supra* note 61.

[85] *See Loumiet*, 828 F.3d at 944.

if federal employees violated the Constitution.[86] There, the plaintiff alleged that employees of the United States Customs Service "promulgated discriminatory, unconstitutional policies" that led to her unlawful detainment at two U.S. airports.[87] The plaintiff brought substantive FTCA claims for negligent supervision and negligent and intentional establishment of policies that resulted in unlawful arrests, detentions, and searches.[88] To rebut the government's discretionary-function defense, the plaintiff further alleged that the policies the employees enacted were unconstitutional—and federal employees do not have the discretion to create unconstitutional policies.[89] The Ninth Circuit agreed,[90] citing the Third Circuit's dictum as the sole basis for its conclusion that unconstitutional acts defeat the discretionary-function exception.[91]

b. Eighth Circuit

In *Raz v. United States*, the Eighth Circuit followed suit, citing exclusively to the Third Circuit to support its finding that federal agents do not possess the discretion to violate the Constitution.[92] There, the plaintiff brought an FTCA claim against the government for invasion of privacy and intentional infliction of emotional distress arising from invasive FBI surveillance.[93] To rebut the government's discretionary-function defense, the plaintiff further alleged that the FBI's surveillance measures violated his First and Fourth Amendment rights.[94] The Eighth Circuit concluded "that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [the plaintiff] alleged they were conducted in violation of

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[86] *Nurse*, 226 F.3d at 1002 (citing U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3rd Cir. 1988)).

[87] *Id.* at 1000, 1002.

[88] *Id.* at 1001.

[89] *Id.* at 1002 (citing *Fid. & Guar.*, 837 F.2d at 120).

[90] *Id.*

[91] *Id.*

[92] Raz v. United States, 343 F.3d 945, 948 (8th Cir. 2003).

[93] *Id.* at 947.

[94] *Id.* at 948.

his [constitutional] rights."[95] Like the Ninth Circuit, the Eighth Circuit cited the Third Circuit as its exclusive authority for the notion that the "discretionary-function exception would not apply if [the] complaint alleged that federal agents violated plaintiff's constitutional rights."[96]

c. Fourth Circuit

In *Medina v. United States*, the Fourth Circuit also relied on the Third Circuit's observation that unconstitutional conduct is not within the discretionary-function exception of the FTCA.[97] In that case, a Venezuelan diplomat alleged that an Immigration and Naturalization Service (INS) officer committed numerous offenses, including malicious prosecution, by attempting to have the diplomat deported.[98] The diplomat did not allege that the INS agent violated his constitutional rights.[99] Nevertheless, the Fourth Circuit in *Medina* began its analysis by quoting the Third Circuit: "[W]e begin with the principle that, 'federal officials do not possess discretion to violate constitutional rights or federal statutes.'"[100]

d. First Circuit

In *Limone v. United States*, the First Circuit cited the Fifth Circuit to justify its conclusion that unconstitutional conduct is "not within the sweep of the discretionary function exception."[101] There, the plaintiffs brought an FTCA claim for malicious prosecution, alleging that the FBI "fram[ed] them and . . . withheld exculpatory evidence."[102] To defeat the discretionary-function defense, the plaintiffs further alleged that the FBI agents' conduct violated the plaintiffs' due process rights.[103] The First Circuit began its analysis by citing the Fifth Circuit's proclamation that the discretionary-

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95 *Id.*

96 *Id.* (citing Pooler v. United States, 787 F.2d 868, 871 (3rd Cir. 1986)).

97 Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001) (citing U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3rd Cir. 1988)).

98 *Id.* at 222–23.

99 *Id.* at 225.

100 *Id.* (citing *Fid. & Guar. Co.*, 837 F.2d at 120).

101 Limone v. United States, 579 F.3d 79, 101–02 (1st Cir. 2009).

102 *Id.* at 102.

103 *Id.*

function exception "does [not] shield conduct that transgresses the Constitution."[104] Because the court found that the plaintiffs proved the substance of their constitutional allegations, it held that the discretionary-function exception did not apply.[105]

e. D.C. Circuit

In 2016, the D.C. Circuit became the most recent circuit to find a constitutional-claims exclusion to the FTCA.[106] In *Loumiet v. United States*, the plaintiff brought FTCA claims against the government arising out of an alleged retaliatory enforcement by federal administrative agents, including intentional infliction of emotional distress, invasion of privacy, abuse of process, malicious prosecution, negligent supervision, and civil conspiracy.[107] To rebut the government's discretionary-function defense, the plaintiff further alleged that the government's retaliatory prosecution violated his First and Fifth Amendment rights.[108]

The D.C. Circuit held that "the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription."[109] The court provided two general rationales for its holding. First, it leaned on "the clear weight of circuit authority" by citing the previous circuits that had "either held or stated in dictum that the discretionary-function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority."[110]

Second, the D.C. Circuit became the first circuit court to plainly express a policy-based reason for the constitutional-claims exclusion: immunizing the government for unconstitutional acts "would yield an illogical result."[111] It reasoned that "the FTCA would authorize tort claims against the government

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104 *Id.* at 101 (citing Castro v. United States, 560 F.3d 381, 389 (5th Cir. 2009)).

105 *Id.* at 102.

106 *See* Loumiet v. United States, 828 F.3d 935, 944 (D.C. Cir. 2016).

107 *Id.* at 939–40.

108 *Id.* at 942.

109 *Id.* at 943.

110 *Id.* at 943–44.

111 *Id.* at 944–45.

for conduct that violates the mandates of a statute, rule, or policy, while insulating the government from claims alleging on-duty conduct so egregious that it violates the more fundamental requirements of the Constitution."[112] While the D.C. Circuit was the first to assert this policy-based rationale, this reasoning undoubtedly influenced the other courts' creation and adoption of the constitutional-claims exclusion.

B. The Seventh and Eleventh Circuits Have Rejected the "Constitutional-Claims Exclusion"

The Seventh and Eleventh Circuits have declined to follow the weight of the circuit authority on this issue. Each held that the FTCA does not allow for a constitutional-claims exclusion to the discretionary-function exception.[113] They based their conclusions largely on the statutory text,[114] finding that the plain meaning of the FTCA forecloses constitutional claims.[115] Each further explained that the "constitutional-claims exclusion" is inconsistent with Supreme Court precedent.[116] Consequently, both courts dismissed the plaintiff's attempt to "back-door" a constitutional claim as a means to defeat the discretionary-function exception.[117]

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[112] Loumiet v. United States, 828 F.3d 935, 944–45 (D.C. Cir. 2016).

[113] *See* Kiiskila v. United States, 466 F.2d 626, 627–28 (7th Cir. 1972); Linder v. United States, 937 F.3d 1087, 1090–91 (7th Cir. 2019); Shivers v. United States, 1 F.4th 924, 930, 935 (11th Cir. 2021).

[114] *See Kiiskila*, 466 F.2d at 627–28, 628 n.4; *Linder*, 937 F.3d at 1090–91; *Shivers*, 1 F.4th at 930–31, 935.

[115] *See Kiiskila*, 466 F.2d at 627–28; *Linder*, 937 F.3d at 1090–91; *Shivers*, 1 F.4th at 930–31, 935.

[116] *See Shivers*, 1 F.4th at 931 (explaining how the constitutional-claims exclusion is inconsistent with the Supreme Court's interpretation of the discretionary-function exception in *Gaubert*); *Linder*, 937 F.3d at 1090–91 (explaining that the Supreme Court created a *Bivens* action, in part, because of the FTCA's "inapplicability to constitutional torts"). In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* the Court held that federal officials may be held personally liable for constitutional violations. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

[117] *See Shivers*, 1 F.4th at 933.

1. The Seventh Circuit

In 1972, the Seventh Circuit in *Kiiskila v. United States* was the first to observe that the FTCA does not apply to constitutional violations.[118] There, the plaintiff alleged that a commanding officer of a military reservation credit union violated her First Amendment rights by excluding her from the credit union.[119] The court held that the plaintiff's exclusion "was based upon [the officer's] exercise of discretion, *albeit constitutionally repugnant*, and therefore excepted her claim from the reach of the Federal Torts Claims Act."[120]

In 2019, the Seventh Circuit reaffirmed its holding in *Linder v. United States*, a case involving an alleged Sixth Amendment violation.[121] In *Linder*, the plaintiff, a deputy marshal, was suspended after he allegedly assaulted a citizen.[122] The U.S. Marshal in charge instructed other deputies not to speak to the plaintiff.[123] The plaintiff brought an FTCA claim against the United States, alleging malicious prosecution and intentional infliction of emotional distress.[124] The plaintiff further alleged that the U.S. Marshal violated his Confrontation Clause rights under the Sixth Amendment by instructing the other deputies to refrain from speaking with him.[125] The plaintiff argued that the discretionary-function exception should not apply because "no one has discretion to violate the Constitution."[126] The Seventh Circuit rejected that argument.[127]

The court observed that "the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations."[128] The court explained:

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118 *See Kiiskila*, 466 F.2d at 627–28.

119 *Id.* at 626–27.

120 *Id.* at 627–28 (emphasis added).

121 *Linder*, 937 F.3d at 1090–91.

122 *Id.* at 1088.

123 *Id.*

124 *Id.*

125 *Id.* at 1090.

126 *Id.*

127 Linder v. United States, 937 F.3d 1087, 1090–91 (7th Cir. 2019).

128 *Id.* at 1090.

> [The FTCA] applies to torts, as defined by state law—that is to say, "circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The Constitution governs the conduct of public officials, not private ones.[129]

As a result, the FTCA is "a means to seek damages for common-law torts, without regard to constitutional theories."[130]

The Seventh Circuit further explained that a constitutional-claims exclusion would be inconsistent with the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[131] where the Court created a cause of action against federal officers in their individual capacity for violations of constitutional rights.[132] The Seventh Circuit observed that "[t]he limited coverage of the FTCA, and its inapplicability to constitutional torts, is why the Supreme Court created the *Bivens* remedy against individual federal employees."[133] Accordingly, the Seventh Circuit found the discretionary-function applied and affirmed the district court's dismissal of the plaintiff's FTCA claim.[134]

2. The Eleventh Circuit

In 2021, the Eleventh Circuit joined the Seventh Circuit in rejecting the notion of a constitutional-claims exclusion to the FTCA's discretionary-function exception.[135] In *Shivers v. United States*, a prisoner who was violently attacked by his cellmate brought both an FTCA claim against the government and a *Bivens* claim against the individual officers.[136] The plaintiff alleged that federal prison officials negligently placed him in a cell with a known violent

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[129] *Id.* (citation omitted) (quoting 28 U.S.C. § 1346(b)(1)).

[130] *Id.*

[131] *Id.*; Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[132] *Bivens*, 403 U.S. at 397.

[133] *Linder*, 937 F.3d at 1090.

[134] *Id.* at 1090–92.

[135] Shivers v. United States, 1 F.4th 924, 930, 935 (11th Cir. 2021).

[136] *Id.* at 926–27.

offender in violation of his Eighth Amendment rights.[137] The district court dismissed the *Bivens* claim for procedural reasons and dismissed the FTCA claim based on the discretionary-function exception.[138] The plaintiff appealed to the Eleventh Circuit,[139] arguing that his allegations of a constitutional violation should negate the discretionary-function exception.[140] The Eleventh Circuit rejected that argument,[141] explaining that a plaintiff cannot "back-door" his constitutional claim into the case to defeat the discretionary-function defense.[142] The court cited several reasons for its conclusion.[143]

First, the court found that the statutory text precludes "the extra-textual 'constitutional-claims exclusion' for which [the plaintiff] advocate[s]."[144] The court explained that the text of the discretionary function exception is "unambiguous," "categorical," and "unqualified":[145] the exception "'*shall not apply* to . . . *[a]ny claim*' that arises from 'a discretionary function or duty on the part of a federal agency or any employee of the Government, *whether or not the discretion involved be abused*.'"[146] The court found "nothing in the statutory language that limits application of this exception based on the 'degree' of the abuse of discretion or the egregiousness of the employee's

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137 *Id.*

138 *Id.* at 927.

139 *Id.*

140 *Id.* at 929–30.

141 Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021).

142 *Id.* at 933 ("Shivers cannot back-door into this case his constitutional claim on the theory that the discretionary function defense is precluded as to *his FTCA state-law tort claim* simply because he alleges the prison employees' tortious acts were also unconstitutional.").

143 *Id.* at 930–36. In addition to the three reasons cited in this Comment, the Eleventh Circuit also explained how impractical a "constitutional-claims exclusion" would be in practice and dismissed the plaintiff's argument that the Fifth Circuit's dicta in *Denson v. United States*, 574 F.3d 1318 (2009), in which the Fifth Circuit explained that "government officials lack discretion to violate constitutional rights," should be controlling. *Shivers*, 1 F.4th at 934–35 (quoting *Denson*, 574 F.3d at 1336–37).

144 *Id.* at 930.

145 *Id.*

146 *Id.* (alteration in original) (quoting 28 U.S.C. § 2680(a)).

performance."[147] The court noted that Congress could have carved out an exception to encompass unconstitutional conduct, but it did not do so.[148]

Second, the court explained that the constitutional-claims exclusion is inconsistent with Supreme Court precedent.[149] Under the first prong of the Supreme Court's *Gaubert* test, an act must be "'discretionary in nature,' [which depends on] whether it involved 'an element of judgment or choice.'"[150] The Eleventh Circuit observed that "[t]he inquiry is not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one."[151] The court then analyzed the plaintiff's Eighth Amendment allegation under the Supreme Court's "specifically prescribed" test, which provides that "the discretionary function exception applies unless a source of federal law 'specifically prescribes' a course of conduct."[152] The court observed that "the Eighth Amendment itself contains no such specific directives as to inmate classification or housing placements."[153] Therefore, because the Eighth Amendment did not specifically prescribe a course of conduct for federal officials to follow, the discretionary-function exception applied.[154]

Third, the court borrowed the Seventh Circuit's reasoning that, because "the FTCA [only] applies to torts, as defined by state law, in 'circumstances where the United States, if a private person, would be liable," violations of the Constitution are not covered under the FTCA.[155] To wit, "the Constitution governs the conduct of only public officials, not private ones."[156] Further,

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147 Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021).

148 *Id.*

149 *Id.* at 930–31.

150 *Id.* (quoting United States v. Gaubert, 499 U.S. 315, 322 (1991)).

151 *Id.* (emphasis omitted).

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

153 Shivers v. United States, 1 F.4th 924, 931 (11th Cir. 2021).

154 *See id.*

155 *Id.* at 932–33 (emphasis omitted) (citing Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019) (quoting 28 U.S.C. § 1346(b)(1))).

156 *Id.* at 932–33.

constitutional claims are violations of federal law, not state law.[157] The *Shivers* court added that the plaintiff

> can and should bring constitutional claims against individual prison officials under *Bivens* for their unconstitutional conduct . . . . But a prisoner's FTCA claim based on the government's tortious abuse of that function—even unconstitutional tortious abuse—is barred by the statutory discretionary function exception, as written and enacted.[158]

Thus, the court dismissed the plaintiff's FTCA claim.[159]

IV. THERE IS NO "CONSTITUTIONAL-CLAIM EXCLUSION" TO THE DISCRETIONARY-FUNCTION EXCEPTION

The majority of the circuit courts erred in permitting a "constitutional-claims exclusion" to the FTCA's discretionary-function exception. Their position is erroneous for three principal reasons. First, the plain text of the FTCA does not permit a constitutional-claims exclusion.[160] Second, a constitutional-claims exclusion is inconsistent with Supreme Court precedent.[161] Third, the circuit courts implied a waiver of sovereign immunity that Congress did not expressly authorize.[162]

A. The Plain Text of the FTCA Does Not Permit a "Constitutional-Claims Exclusion"

The starting point for statutory interpretation is the statute's plain meaning,[163] and "when the statutory language is plain, [the Court] must

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157 *Id.* at 928 (citing Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477–78 (1994)).

158 *Id.* at 933.

159 Shivers v. United States, 1 F.4th 924, 936 (11th Cir. 2021).

160 *See infra* Section IV.A.

161 *See infra* Section IV.B.

162 *See infra* Sections IV.C, V.

163 United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000) (citing United States v. Piervinanzi, 23 F.3d 670, 677 (2d Cir. 1994)).

enforce it according to [the statute's] terms."[164] The plain language of the FTCA forecloses a constitutional-claims exclusion to the discretionary-function exception.[165] The statutory language of the FTCA provides that the United States is liable only where "a private person[] would be liable . . . in accordance with the law of the place where the [tort] occurred."[166] Because constitutional claims apply to public persons under federal law, the FTCA does not apply to constitutional claims.[167] Further, 28 U.S.C. § 2680(a), which defines the discretionary-function exception, preserves the government's immunity for any discretionary acts.[168] It precludes liability for discretionary acts "whether or not the discretion involved be abused."[169] Congress did not carve out an exception for discretionary acts that also violate the Constitution.[170] Thus, both relevant texts of the FTCA foreclose constitutional claims against the United States.[171]

1. The Plain Meaning of the FTCA Precludes a "Constitutional-Claims Exclusion"

In 28 U.S.C. § 1346(b), Congress provided the basis for an FTCA claim against the United States:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States,

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164 Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) (first citing Dodd v. United States, 545 U.S. 353, 359 (2005); then citing Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004); then citing Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000); and then citing Caminetti v. United States, 242 U.S. 470, 485 (1917)).

165 Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021).

166 28 U.S.C. § 1346(b)(1).

167 Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

168 *See* 28 U.S.C. § 2680(a).

169 *Id.*

170 Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021).

171 *Id.*

> *if a private person*, would be liable to the claimant in accordance with *the law of the place* where the act or omission occurred.[172]

The two clauses that specifically preclude liability for constitutional claims are (1) "if a private person[] would be liable" and (2) "the law of the place where the act or omission occurred."[173]

a. Private persons are not liable for constitutional violations

The FTCA imposes liability on the United States only "under circumstances where the United States, [*as*] *a private person*, would be liable."[174] "The Constitution governs [only] the conduct of public officials, not private ones."[175] Therefore, the FTCA does not govern constitutional violations.[176] A private individual can be liable for his tort, but he cannot be liable for his constitutional violation. For example, a private citizen who breaks into his neighbor's home likely commits the tort of trespass; however, he did not violate his neighbor's Fourth Amendment right against unreasonable searches and seizures.[177] Thus, if a federal agent, acting within the scope of his office, makes an unlawful entry into a citizen's home, the United States can be liable for trespass—or any other state law claim—but it cannot be liable for a Fourth Amendment violation under the FTCA.[178]

b. The FTCA applies only to state law violations

The FTCA imposes liability on the United States only where it "would be liable to the claimant in accordance with the *law of the place* where the act or omission occurred."[179] The Supreme Court has consistently held that "law of

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172 28 U.S.C. § 1346(b)(1) (emphasis added).

173 *See id.*

174 *Id.* (emphasis added).

175 Linder v. United States, 937 F.3d 1087, 1090 (7th Cir. 2019).

176 *See* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477–78 (1994).

177 *See* U.S. CONST. amend. IV.

178 *See Meyer*, 510 U.S. at 477–78.

179 *Id.* (emphasis added).

the place" means state law.[180] "By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right."[181] Thus, the FTCA does not provide a source of liability for violations of the U.S. Constitution.

Of course, claimants do not bring their constitutional allegation as a substantive claim, but rather as a means to defeat the discretionary-function exception.[182] Nevertheless, a party who "teases apart the two issues"—that is, the state law claim and the constitutional claim—still has to prove the constitutional allegation.[183] Put another way, the only way to defeat the discretionary-function exception is to prove a violation of federal law—i.e., a violation of the U.S. Constitution—to which the FTCA does not apply.

2. The Plain Meaning of the Discretionary-Function Exception Forecloses a "Constitutional-Claims Exclusion"

The plain meaning of the discretionary-function exception also precludes a claim based on a violation of the Constitution. In 28 U.S.C. § 2680(a), Congress provided that the FTCA "shall not apply to . . . [a]ny claim" that arises from "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."[184] Before analyzing the text of the discretionary-function exception, it is important to examine how to properly interpret statutory exceptions.

When interpreting statutes, courts should give the same weight to a statute's exceptions as its operating provisions. The Supreme Court has explained that "[e]xceptions and exemptions are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect. That a law might temper its pursuit of one goal by accommodating others

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[180] *Meyer*, 510 U.S. at 478 (first citing Miree v. DeKalb Cnty., 433 U.S. 25, 29 n.4 (1977); then citing United States v. Muniz, 374 U.S. 150, 153 (1963); then citing Richards v. United States, 369 U.S. 1, 6 (1962); and then citing Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957)).

[181] *Id.*

[182] *See* discussion *supra* Section III.A.

[183] Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021).

[184] 28 U.S.C. § 2680(a).

can come as no surprise."[185] Congress does not enact legislation to pursue its "broad purpose" at all costs.[186] Exceptions and limiting provisions are therefore "no less a reflection of the genuine 'purpose' of the statute than the operative provisions."[187] Further, legislation often becomes possible only because of the inclusion of limiting provisions.[188] Thus, "[w]hatever the reason for a legislative compromise, [courts] have no right to place [their] thumbs on one side of the scale or the other."[189]

Congress enacted the FTCA as a *limited* waiver of sovereign immunity.[190] It included many exceptions, including the discretionary-function exception, to preserve part of the United States' sovereign immunity.[191] In other words, while Congress chose to expose the federal government to liability in some situations, it expressly chose to limit the government's exposure in others. Thus, courts should afford the discretionary-function exception—along with the other statutory exceptions and limitations—the same weight they afford the FTCA's operating provision.

a. Discretionary functions and duties

"Discretionary function" is a term of art used to describe those acts that involve an element of "choice."[192] When a federal officer's course of conduct involves choice, his actions are "discretionary" and will be protected under 28 U.S.C. § 2680(a).[193] The rationale for immunizing the government for its officials' discretionary acts is grounded in a reluctance to second-guess federal officials' decision-making.[194] More than thirty years before the FTCA

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185 BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1539 (2021).

186 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 21 (2012) (citing Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990)).

187 *Id.*

188 *BP P.L.C.*, 141 S. Ct. at 1539.

189 *Id.* (citing Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017)).

190 Shivers v. United States, 1 F.4th 924, 928 (11th Cir. 2021).

191 *See id.* at 930.

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

193 *See* 28 U.S.C. § 2680(a); *see also Berkovitz*, 486 U.S. at 536.

194 Varig Airlines, 467 U.S. 797, 814 (1984).

was enacted, the Supreme Court laid out its reasoning for protecting discretionary acts:

> [I]f the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their [own] judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government.[195]

Discretionary acts are to be distinguished from "ministerial acts", which are to be "performed in a prescribed manner and in obedience to a legal authority, without regard to one's own judgment or discretion."[196] Because ministerial acts require no independent decision-making on the part of a federal employee, there is no concern for second-guessing that employee's judgment. Accordingly, such acts are actionable under the FTCA. It is therefore important to determine whether or not a federal employee's action is mandated by a specific statute, regulation, or other agency prescription. If it is, the officer has no "choice" but to follow the prescription.[197] But where no such mandate exists, the officer's actions will be considered discretionary, and § 2680(a) will protect the officer's conduct.[198]

b. Regardless of abuse of discretion

The discretionary-function exception forbids FTCA claims for discretionary acts by federal employees "whether or not the discretion be abused."[199] As the Eleventh Circuit explained, this language "is unqualified—there is nothing in the statutory language that limits application of this exception based on the 'degree' of the abuse of discretion or the egregiousness

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[195] Louisiana v. McAdoo, 234 U.S. 627, 633 (1914).

[196] Cornell L. Sch., *Ministerial Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/ministerial_act (last visited Jan. 17, 2024).

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

[198] *See* 28 U.S.C. § 2680(a); *Berkovitz*, 486 U.S. at 535–36 (analyzing the application of the discretionary-function exception in 28 U.S.C. § 2680(a)).

[199] *Id.*

of the employee's performance."[200] So long as a federal officer is acting within his discretion, he will be protected by 28 U.S.C. § 2680(a), even if he acted arbitrarily or discriminatorily.[201] "The inquiry is not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one."[202] Thus, if a federal officer's violation of a citizen's constitutional rights includes a discretionary act, the officer's conduct will be protected by the discretionary-function exception, even if the officer abused that discretion.

B. A "Constitutional-Claims Exclusion" Is Inconsistent with Supreme Court Precedent

The argument that unconstitutional acts are outside the scope of the discretionary-function exception is also inconsistent with Supreme Court precedent. While the Supreme Court has not directly addressed whether constitutional claims can defeat the discretionary-function exception, it has provided guidance on how to interpret constitutional claims under the FTCA.[203] First, in *Federal Deposit Insurance Corp. v. Meyer*, the Court analyzed the text of the FTCA and concluded that it precludes constitutional claims.[204] Second, in *United States v. Gaubert*, the Court created a limitation to those acts covered under the discretionary-function exception but did not include unconstitutional acts in the limitation.[205] Third, in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, the Court created a cause of action against federal officers in their individual capacity for unconstitutional acts, partly because the FTCA did not allow for such claims against the government.[206]

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[200] Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021).

[201] *See* Avery v. United States, 434 F. Supp. 937, 944 (D. Conn. 1977).

[202] *Shivers*, 1 F.4th at 931 (emphasis omitted).

[203] *See generally* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471 (1994) (holding that the federal government is not liable under the FTCA for constitutional tort claims); United States v. Gaubert, 499 U.S. 315 (1991) (providing a two-step test for determining whether a federal officer's act is discretionary).

[204] *Meyer*, 510 U.S. at 477–78.

[205] *See Gaubert*, 499 U.S. at 322–23.

[206] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389–92 (1971); *id.* at 409–10 (Harlan, J., concurring).

1. The United States Has Not Rendered Itself Liable for Constitutional Tort Claims Under the FTCA

The Supreme Court in *Federal Deposit Insurance Corp. v. Meyer* made clear that "the United States simply has not rendered itself liable under [the FTCA] for constitutional tort claims."[207] In *Meyer*, the plaintiff alleged that a federal agency violated his due process rights by wrongfully terminating his employment.[208] The Court explained that the FTCA grants jurisdiction only "over a certain category of claims for which the United States has waived its sovereign immunity and 'rendered' itself liable."[209] The Court then analyzed the plain text of the FTCA statute to determine whether the United States had rendered itself liable under the plaintiff's constitutional claim.[210]

The Court focused on the "law of the place" element of the statute,[211] noting that it had "consistently held that § 1346(b)'s reference to the 'law of the place' means the law of the State—the source of substantive liability under the FTCA. By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right."[212] As a result, the Court held that the plaintiff's "constitutional tort claim [wa]s not 'cognizable' under § 1346(b)."[213]

Despite *Meyer*, courts have permitted constitutional claims under the FTCA—of course, not as substantive claims but as back-door attempts to defeat the discretionary-function exception.[214] In his dissenting opinion in the Fifth Circuit's *Castro v. United States* decision, Judge Smith explained how plaintiffs may use such artful pleadings to subvert the Court's holding in *Meyer*: "First, allege a constitutional violation, thereby avoiding the

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

[208] *Id.* at 473–74.

[209] *Id.* at 477 (citing Richards v. United States, 369 U.S. 1, 6 (1962)).

[210] *Id.* at 476–80.

[211] *Id.* at 477–78.

[212] *Id.* at 478 (citations omitted) (first citing Miree v. DeKalb Cnty., 433 U.S. 25, 29 n.4 (1977); then citing United States v. Muniz, 374 U.S. 150, 153 (1963); then citing Richards v. United States, 369 U.S. 1, 6 (1962); and then citing Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957)).

[213] Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477 (1994).

[214] *See* discussion *supra* Section III.A.

discretionary function exception. Second, plead a state cause of action that overlaps with that constitutional violation, then seek damages under that state cause of action. *Voila*! No more sovereign immunity."[215] This sleight of hand undermines the plain text and purpose of the FTCA and the Supreme Court's holding in *Meyer*. As Judge Smith put it: "If all violations of the federal constitution render the discretionary function exception inapt, *Meyer* is effectively voided."[216]

2. The Constitution Does Not "Specifically Prescribe" Conduct for Federal Officials to Follow

The Supreme Court in *Gaubert* created a limiting principle to the discretionary-function exception. The Court explained that a federal employee has no discretion "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'"[217] Notably, the Court did not include the Constitution in its list.[218] Nevertheless, some of the circuit courts have interpreted the Court's limiting principle to include constitutional violations.[219] But it is a tried and true maxim of statutory interpretation that "[t]he expression of one thing is the exclusion of another."[220] Because the Court enumerated only federal statutes, regulations, or policies in its rule,[221] by implication, it excluded the Constitution.[222] Put another way: "The omission of 'Constitution' from the Court's explicit list of

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215 Castro v. United States, 560 F.3d 381, 392, 394 (5th Cir. 2009) (Smith, J., dissenting).

216 *Id.*

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

218 *See id.*

219 *See Castro*, 560 F.3d at 389; Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 254 (1st Cir. 2003).

220 *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY 1961 (11th ed. 2019). *Expressio unius est exclusio alterius* is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." Crews v. State, 183 So. 3d 329, 333 & n.8 (Fla. 2015) (quoting BLACK'S LAW DICTIONARY 701 (10th ed. 2014)).

221 *Gaubert*, 499 U.S. at 322.

222 *See* BLACK'S LAW DICTIONARY, *supra* note 220.

sources that can create a 'mandate' that nullifies the discretionary function exception should be dispositive here."[223]

Further, it would have been illogical for the Court to include the Constitution in its list because the Constitution does not "specifically prescribe" conduct for federal officials to follow. A federal employee who violates a plaintiff's constitutional rights does not act contrary to a specific prescription. For example, the prison officials in *Shivers* who negligently placed an inmate with a known violent offender may have violated the Constitution, but they did not violate any *specific* prescriptions of the Constitution.[224] "[T]he Eighth Amendment itself contains no . . . specific directives [regarding] inmate classifications or housing placements."[225]

To further illustrate this point, consider the following hypothetical. Assume FBI agents are executing a search warrant on a suspect's residence. The warrant is a standard "knock and announce" warrant, but the FBI agents, in an effort to catch the suspect off-guard, bust down the door and enter the residence without knocking or announcing their presence. Did the federal agents violate the Constitution? Probably.[226] But did they violate a *specific prescription* of the Constitution? Arguably, no.

The constitutional provision implicated here would be the Fourth Amendment, which protects people against "unreasonable searches and seizures."[227] While the Fourth Amendment provides a standard that governs federal officials' conduct, it does not "specifically prescribe" a course of action for federal officials to follow. That is, it does not provide a definitive rule to which federal agents must adhere. In fact, the courts have spent the past couple hundred years attempting to flesh out when exactly a search or seizure is "unreasonable." As a result, the Constitution would not have provided any specific directives for the FBI agents to follow when executing the search warrant.

Contrast the Fourth Amendment with a federal statute that *does* specifically prescribe conduct for federal officials to follow. In 18 U.S.C.

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223 *Castro*, 560 F.3d at 393 (Smith, J., dissenting).

224 Shivers v. United States, 1 F.4th 924, 931 (11th Cir. 2021).

225 *Id.*

226 *See* U.S. CONST. amend. IV.

227 *Id.*

§ 3109, Congress set out a specific course of action for federal officials to follow when executing a search warrant.[228] It details when federal officials may use force to enter a residence: Federal officials "may break open any . . . door or window of a house . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance."[229] The FBI agents' conduct in this case clearly violated the statute. Because the statute specifically required that federal officials announce their presence before breaking into a residence,[230] the FBI had *no discretion* to do otherwise. This is what the Supreme Court had in mind when it laid out its rule that a federal official has no discretion if a "federal *statute*, *regulation*, or *policy* specifically prescribes a course of action for an employee to follow."[231] Because the Court omitted the Constitution from its list[232]—and the Constitution does not *specifically prescribe* a course of action to follow—the circuit courts erred in adding it to the list.

3. A "Constitutional-Claims Exclusion" Would Eviscerate *Bivens*

If the United States was liable for the constitutional violations of its officers, it would effectively negate the *Bivens* remedy.[233] In *Bivens*, the Supreme Court held that an individual injured by a federal agent's alleged violation of the Fourth Amendment may bring an action for damages against the agent.[234] There are a couple of important distinctions between a *Bivens* claim and an FTCA claim. First, the FTCA applies only to violations of state law,[235] whereas *Bivens* actions apply to violations of the federal

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[228] *See* 18 U.S.C. § 3109 (outlining various requirements for executing and obtaining search warrants).

[229] *Id.*

[230] *See id.*

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

[232] *See id.*

[233] Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 485 (1994).

[234] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

[235] *See* 28 U.S.C. § 1346(b); *Meyer*, 510 U.S. at 477–78 ("[Section] 1346(b)'s reference to the 'law of the place' means law of the State . . . .").

Constitution.[236] Second, the FTCA imposes liability on the United States,[237] whereas a *Bivens* action imposes liability on the federal employee in their individual capacity.[238]

A *Bivens* analysis is instructive for two purposes. First, the Court created a *Bivens* action, in part, because a direct action against the federal government for constitutional violations was not available.[239] Second, if the federal government was liable for the constitutional torts of its employees, there would not be a need for a *Bivens* action.[240]

In *Bivens*, the plaintiff alleged that agents of the Federal Bureau of Narcotics violated his Fourth Amendment rights when they entered and searched his apartment without a warrant and arrested him without probable cause.[241] The Court held that the agents were personally liable for violating the plaintiff's constitutional rights.[242] One of the reasons for imposing liability on the agents was that it was the plaintiff's only possible source of a remedy.[243] The Court observed that "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."[244] *Bivens* was decided in 1971, twenty-five years after the FTCA was enacted.[245]

The Court implied a *Bivens* cause of action for another reason: to deter them from violating the Constitution.[246] However, one of the problems plaintiffs face in *Bivens* actions is qualified immunity, which shields government officials from liability unless the plaintiff has "clearly

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236 *See Bivens*, 403 U.S. at 397.

237 28 U.S.C. § 1346(b).

238 *See Bivens*, 403 U.S. at 397.

239 *Id.* at 410 (Harlan, J., concurring).

240 *See* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 485 (1994).

241 Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

242 *See id.* at 397.

243 *Id.* at 409–10 (Harlan, J., concurring).

244 *Id.* at 410 (Harlan, J., concurring).

245 *Id.* at 388; 28 U.S.C. § 1346(b).

246 Carlson v. Green, 446 U.S. 14, 21 (1980).

established" that her constitutional rights have been violated.[247] Plaintiffs who allege constitutional violations under the FTCA do not have to meet this higher standard. Rather, they need only "allege"[248] or "plausibly allege" [249] that the government official violated their constitutional rights. Under this lower standard, "the United States may be liable for conduct even where its officers cannot be."[250] Plaintiffs will then have no need to bring a *Bivens* action against the individual officer.[251] They could bypass qualified immunity and sue the government directly for its officer's constitutional violations.[252] Under this theory, the *Bivens* action would be eviscerated and, with it, its deterrent effect on officer misconduct.[253]

C. Presumption Against Waiver of Sovereign Immunity

Finally, courts should not imply a waiver of sovereign immunity because Congress has not expressly authorized it. "The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."[254] The United States is an heir to a system in which the sovereign, the king, was not amenable to suit.[255] As William Blackstone put it: "[T]he king himself can do no wrong."[256] The king was only amenable to suit if he voluntarily created a court of chancery and gave it jurisdiction over him.[257] Like the king, the United States

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[247] Castro v. United States, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting); *see, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[248] Raz v. United States, 343 F.3d 945, 947–48 (8th Cir. 2003).

[249] Loumiet v. United States, 828 F.3d 935, 946 (D.C. Cir. 2016).

[250] *Castro*, 560 F.3d at 394 (Smith, J., dissenting).

[251] Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 485 (1994).

[252] *Id.*

[253] *Id.*

[254] Price v. United States, 174 U.S. 373, 375–76 (1899).

[255] *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the H. Subcomm. on Admin. L. & Governmental Rel. of the H. Comm. on the Judiciary*, 100th Cong. 21 (1988) (statement of Wayne Owens, Member, H. Comm. on the Judiciary).

[256] 1 WILLIAM BLACKSTONE, COMMENTARIES *244.

[257] SCALIA & GARNER, *supra* note 186, at 281.

is only amenable to suit if it so consents.[258] When it does, its waiver of immunity must be clear. The Supreme Court has consistently held that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."[259]

The FTCA represents a *limited* waiver of sovereign immunity.[260] "Under the FTCA, the United States has consented to certain types of suits, but the waiver of immunity is far from complete, and there are a number of exceptions . . . [that] must be strictly construed in favor of the government."[261] Courts must therefore strictly construe the FTCA's discretionary-function exception. This is especially the case where, as here, the language of the exception is plain and unambiguous.[262] The United States did not waive its sovereign immunity for discretionary acts.[263] It explicitly retained its sovereign immunity for discretionary acts "*whether or not the discretion involved be abused*."[264] Because matters of sovereign immunity are left solely to the political branches,[265] the courts should not imply a waiver for discretionary acts *that also violate the Constitution* because the United States did not so consent.[266]

V. THE MAJORITY OF THE CIRCUIT COURTS' FLAWED POLICY-BASED APPROACH

Despite the fact that the "constitutional-claims exclusion" has no legal basis, the majority of the circuit courts nonetheless saw fit to write it into the FTCA.[267] To reach such a conclusion, these circuit courts ostensibly sought

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258 *Id.* at 281.

259 *Id.* at 282 (quoting Franconia Assoc. v. United States, 536 U.S. 129, 141 (2002)).

260 Shivers v. United States, 1 F.4th 924, 928 (11th Cir. 2021).

261 Castro v. United States, 560 F.3d 381, 393 (5th Cir. 2009) (Smith, J., dissenting) (citation omitted) (quoting Truman v. United States, 26 F.3d 592, 594 (5th Cir. 1994)).

262 *See* 28 U.S.C. § 2680(a).

263 *See id.*

264 *Id.* (emphasis added).

265 *Castro*, 560 F.3d at 393 (Smith, J., dissenting) (citing *Truman*, 26 F.3d at 594).

266 *See* 28 U.S.C. § 2680(a).

267 *See* discussion *supra* Section III.A.

to achieve what they believed to be the most sensible or "logical"[268] outcome. It is not difficult to understand why the circuit courts would have been tempted to do so. Interpreting the FTCA in accordance with the plain text leads to seemingly unjust outcomes. Faced with the choice of faithfully interpreting the FTCA—and thereby permitting the government to escape liability for violating a citizen's constitutional rights—or finding a workaround to grant the citizen a remedy, these circuit courts opted for the latter. All it took was a couple of the circuits to baselessly proclaim that "conduct cannot be discretionary if it violates the Constitution"[269] for the others to be given license to disregard the plain text of the FTCA and adopt what they believed to be the more sensible "constitutional-claims exclusion" theory.[270]

A. The Majority of the Circuit Courts Created a "Constitutional-Claims Exclusion" Out of Thin Air

The notion that a constitutional violation defeats the discretionary-function exception may be sound policy, but it lacks legal support. The question then remains: How did the majority of the circuit courts reach such a conclusion? Simply put, they made it up. Because a "constitutional-claims exclusion" finds no support from the statutory text[271] or Supreme Court precedent,[272] the majority of the circuit courts necessarily relied on their own say-so to reach such a conclusion. And upon what was this house of cards built? The baseless musings of the Third and Fifth Circuits.[273] The Third

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[268] *See* Loumiet v. United States, 828 F.3d 935, 944–45 (D.C. Cir. 2016) (explaining that immunizing the government for constitutional violations would yield an "illogical result").

[269] U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988); *see also* Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[Government] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.").

[270] *See* discussion *supra* Section III.A.

[271] *See* discussion *supra* Section IV.A.

[272] *See* discussion *supra* Section IV.B.

[273] Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986) (observing that "federal officials do not possess discretion to" violate constitutional rights); *Sutton*, 819 F.2d at 1293 ("[W]e have not hesitated to conclude that such [government] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution.").

Circuit, in deciding an FTCA case without a constitutional violation allegation, nevertheless observed that "*if* the complaint were that agents of the government . . . violated constitutional rights . . . the outcome would be different since federal officials do not possess discretion to commit such violations."[274] The Fifth Circuit made a similar observation when deciding a case that did not turn on whether a constitutional right was violated.[275]

Even though the Third and Fifth Circuits' observations were void of legal support or analysis, they became the basis for the remaining circuits' conclusions.[276] The more circuit courts that followed, the stronger their authority appeared to be. When the D.C. Circuit joined the others in 2016, its primary justification was that it was following the weight of the circuit courts.[277] But the basis of a sound legal decision should not merely be the weight of authority. Instead, it should be the substance of that authority—and the only "substance" behind the notion of a "constitutional-claims exclusion" is the courts' own say-so.

B. The Majority of the Circuit Courts Exercised Will Instead of Judgment

By finding a constitutional-claims exclusion to the FTCA, the majority of the circuit courts substituted their own judgment for that of the legislature. The plain text of the FTCA precludes actions against the federal government for the unconstitutional acts of its officers.[278] Congress has had ample time to revise the FTCA to permit such claims if it so desired but has declined to do so.[279] Nevertheless, the circuit courts saw fit to intervene and soften the effects of what they seemingly believed to be a harsh statute. In so doing, they exercised *will* instead of *judgment*.[280] They interpreted the FTCA's

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274 *Pooler*, 787 F.2d at 871 (emphasis added).

275 *Sutton*, 819 F.2d at 1293.

276 See *supra* note 61.

277 Loumiet v. United States, 828 F.3d 935, 943 (D.C. Cir. 2016).

278 *See* discussion *supra* Section IV.A.

279 *See* Jennifer L. McMahan & Mimi Vollstedt, *Researching the Legislative History of the Federal Tort Claims Act*, 59 U.S. ATTY'S BULL. 52, 54–55 (2011) (listing a series of eleven amendments to the FTCA from 1947–2000, but no amendment has extended the FTCA to permit claims for unconstitutional acts).

280 *See infra* Section V.B.2.

discretionary-function exception to reach what *they* believed to be the best outcome—not according to what Congress plainly intended.[281]

1. The Purpose of Statutory Interpretation Is to Give Effect to the Will of the Legislature

The American democratic system requires that the legislature make laws[282] and that the courts interpret them.[283] In *The Federalist* 78, Alexander Hamilton explained that "[t]he courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body."[284] As Chief Justice John Marshall put it: "Judicial power is never [exercised] for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[285] Put another way, the court's role is to determine "what the law *is*, not what the law should be."[286]

The words that Congress has chosen are the best evidence of Congress's will.[287] When interpreting a statute, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."[288] This is especially the case when the statutory language, as here,[289]

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281 *Id.*

282 *See* U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States.").

283 *See id.* art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."); THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts.").

284 THE FEDERALIST NO. 78 (Alexander Hamilton).

285 Osborn v. Bank of the U.S., 22 U.S. 738, 866 (1824).

286 Hon. Brett M. Kavanaugh, The Role of the Judiciary in Maintaining the Separation of Powers, Joseph Story Lecture at The Heritage Found. 4 (Oct. 25, 2017) (transcript available with The Heritage Foundation).

287 *See* Dewey v. United States, 178 U.S. 510, 520 (1900) ("[O]ur duty is to give effect to the will of Congress . . . . But we must ascertain that will from the words Congress has chosen to employ . . . .").

288 SCALIA & GARNER, *supra* note 186, at 56.

289 *See* discussion *supra* Section IV.A.

is plain and unambiguous.[290] "Wherever, then, [Congress's] language admits of no doubt, their plan and obvious intent must prevail."[291] Courts must adhere to this principle even when the statutory text leads to undesirable results. The Supreme Court has consistently emphasized its "unwillingness to soften the import of Congress'[s] chosen words even if [it] believe[s] the words [would] lead to a harsh outcome."[292] This results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill."[293] As such, the plain meaning of the FTCA must prevail, regardless of how harsh a court finds it to be.

a. The words that Congress chose are the best evidence of its will.

The statutory language that Congress chose is clear and unequivocal: the government will not be liable for "*an*[*y*] act or omission . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . *whether or not the discretion involved be abused*."[294] Congress's use of such broad and sweeping language demonstrates its intent to shield the government from liability for a wide range of discretionary acts. Congress chose not to include any limitations or exemptions to the discretionary-function exception.[295] Consequently, it has led to some harsh outcomes.[296] But it is simply not the court's role to "soften the import of Congress'[s]

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[290] Shivers v. United States, 1 F.4th 924, 930 (11th Cir. 2021) (explaining that the FTCA text is "plain and broad"); *see* Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) ("[W]hen the statutory language is plain, we must enforce it according to its terms.").

[291] Evans v. Jordan, 8 F. Cas. 872, 873 (C.C.D. Va. 1813) (No. 4,564), *aff'd*, 13 U.S. (9 Cranch) 199 (1815).

[292] Lamie v. United States, 540 U.S. 526, 538 (2004); *see* Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 134–35 (2015).

[293] *Lamie*, 540 U.S. at 538 (quoting United States v. Locke, 471 U.S. 84, 95 (1985)).

[294] 28 U.S.C. § 2680(a) (emphasis added); *see* discussion *supra* Section IV.A.

[295] *See generally* 28 U.S.C. § 2680(a); *Shivers,* 1 F.4th at 930 ("[T]he language Congress chose . . . is unqualified—there is nothing in the statutory language that limits application of this exception based on the 'degree' of the abuse of discretion or the egregiousness of the employee's performance.").

[296] *See* Seamon, *supra* note 32, at 694.

chosen words" to reach a more desired or sensible result that the plain text enacted by Congress does not permit.[297]

Additionally, Congress has had ample opportunity to limit the scope of the discretionary-function exception if it so desired. Specifically, Congress has had the chance to mitigate much of the discretionary-function exception's "harshness" by exempting the decisions of low-level officials, like federal law enforcement, from its protections—but has declined to do so.[298]

b. Congress has further demonstrated its will by rejecting a proposed limitation to the discretionary-function exception.

Since the FTCA's passage in 1947, the discretionary-function exception has arguably been its most consequential and controversial component.[299] The exception's sweeping protections have shielded the government from liability for a host of bad acts.[300] Consequently, litigants and the courts alike have called on Congress to amend the FTCA to limit the scope of the exception's protections.[301] In 1988, four years after the Supreme Court in *Varig Airlines* affirmed the discretionary-function exception's broad coverage—by explaining that the exception protects *all* federal employees[302]—some members of Congress attempted to amend the exception to limit the scope of its protections.[303]

The proposed bill sought to scale back the discretionary-function exception's protections to cover only those who formulate policy—not those who implement it. [304] Specifically, the bill would have precluded claims against the United States for acts

> based upon . . . a discretionary function or duty on the part of a Federal agency or an employee of the Government,

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297 *See Lamie*, 540 U.S. at 538.

298 *See infra* Section V.B.1.b.

299 *See* Niles, *supra* note 10, at 1300.

300 *See* Seamon, *supra* note 32, at 694.

301 *See* Begay v. United States, 768 F.2d 1059, 1066 (1985).

302 *See* Varig Airlines, 467 U.S. 797, 813 (1984).

303 *See* H.R. 3872, 100th Cong. (2d Sess. 1988).

304 *See id.*

> whether or not the discretion involved is abused, *except that the provisions . . . [would] apply only if the discretionary function or duty involves the formulation of policy rather than the implementation of the policy at an operational level.*[305]

Thus, the amended discretionary-function exception would have shielded only the actions of high-level government officials who formulate policy and not low-level "operational" employees who implement it.[306] It therefore would not have protected the actions of any of the federal officers accused of violating citizens' constitutional rights in the aforementioned circuit court cases.[307] However, Congress chose not to move forward with the amendment. Instead, the bill died in subcommittee.[308] As a result, the original discretionary-function exception remains: the government is immune from liability for the discretionary acts of *any* of its employees.[309]

c. Congress's rejection of the proposed bill demonstrates its support for a broad interpretation of the discretionary-function exception.

When Congress revisits a statute in response to judicial precedent and fails to change the statute, the precedent is given enhanced precedential force.[310] This is especially the case where Congress "has actually . . . revised [part of] the statute and left the precedent in place."[311] Where "Congress . . . reenacts or materially amends the statute, makes no material change in the provision that has been interpreted, and leaves the precedent in place, courts are, properly, more reluctant to reconsider the underlying precedent."[312] In this

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305 *Id.* (emphasis added).

306 *See id.*

307 *See* discussion *supra* Section III.

308 *US Congress HR3872*, TRACKBILL, https://trackbill.com/bill/us-congress-house-bill-3872-a-bill-to-amend-section-2680-a-of-title-28-united-states-code-to-narrow-the-discretionary-function-exception-to-the-federal-tort-claims-act/190832/ (last visited Feb. 6, 2024).

309 *See* 28 U.S.C. 2680(a); Varig Airlines, 467 U.S. 797, 813 (1984).

310 WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 176 (2016).

311 *Id.* at 177.

312 *Id.*

case, the bill to amend the discretionary-function exception was proposed alongside two other FTCA amendments.[313] One of the other amendments, the Federal Employees Liability Reform and Tort Compensation Act of 1988, passed through both the House and Senate and became law.[314] But Congress did not adopt the amendment that would have narrowed the scope of the discretionary-function exception.[315] Therefore, courts should interpret Congress's inaction as acquiescence to the Court's broad interpretation of the discretionary-function exception, because Congress revisited the FTCA in response to *Varig Airlines*, adopted a separate FTCA amendment, but declined to amend the discretionary-function exception.[316]

In addition to the 1986 failed amendment, Congress has had ample opportunity to limit the discretionary-function exception—even to specifically exempt constitutional claims from its protection—but it has declined to do so. Congress has made its intent clear: it does not have the desire—or perhaps the political will—to limit the scope of the discretionary-function exception or to permit constitutional claims under the FTCA. As a result, courts should not write in exemptions or exclusions, such as the constitutional-claims exclusion, into the discretionary-function exception that would narrow its protections beyond what Congress has permitted.

2. The Majority of the Circuit Courts Subverted the Will of the Legislature By Writing a "Constitutional-Claims Exclusion" Into the FTCA

By writing a constitutional-claims exclusion into the FTCA, the majority of the circuit courts have therefore subverted the will of the legislature. To reach the conclusion that unconstitutional acts are outside the scope of the discretionary-function exception, the majority of the circuit courts

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313 *See Hearing*, *supra* note 255, at I.

314 *H.R.4612: Federal Employees Liability Reform and Tort Compensation Act of 1988*, CONGRESS.GOV, https://www.congress.gov/bill/100th-congress/house-bill/4612/actions (last visited Feb. 4, 2024) (protecting federal employees from common law tort lawsuit while engaged in their duties for the government); *see also* McMahan & Vollstedt, *supra* note 279, at 54–55 (listing a series of eleven amendments to the FTCA from 1947–2000).

315 *US Congress HR3872*, *supra* note 308.

316 *See* ESKRIDGE, *supra* note 310, at 176–77.

necessarily departed from the plain text enacted by Congress.[317] In so doing, they were free to reach what they believed to be a more sensible result than the text would otherwise permit. But, of course, therein lies the problem. It is not the court's job to decide what is or is not sensible.[318] When a judge interprets a statute to reach what he believes to be the most sensible outcome, he is exercising *will* instead of *judgment*.[319] Further, what one person thinks is sensible will be different from what another thinks is sensible.[320] That is precisely why we "elect [representatives to] write our laws—and expect courts to observe what has been written."[321]

It is not difficult to understand why the courts chose to write a constitutional-claims exclusion into the FTCA. Indeed, it seems rather unjust for a plaintiff to be left without a remedy when his constitutional rights have been violated. Surely, Congress must not have intended to immunize such conduct—or so the argument goes. As the D.C. Circuit put it: It would be "illogical" to hold the government accountable for "conduct that violates the mandates of a statute, rule, or policy, while insulating [it] from . . . conduct so egregious that it violates the more fundamental requirements of the Constitution."[322] Others have noted that unconstitutional actions should be excluded from the scope of the discretionary-function exception because "there are no other avenues for a citizen to seek redress from the government for tortious actions by employees that violated their constitutional rights."[323] However, these are policy questions that must be taken up by Congress, not decided by the courts.

Moreover, that there are no other avenues for a citizen to seek redress from the government for violations of their constitutional rights is of no moment here. Prior to the enactment of the FTCA, citizens were generally unable to

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317 *See* discussion *supra* Section IV.A.

318 SCALIA & GARNER, *supra* note 186, at 22.

319 *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

320 SCALIA & GARNER, *supra* note 186, at 22.

321 *Id.*

322 Loumiet v. United States, 828 F.3d 935, 944–45 (D.C. Cir. 2016).

323 Laney Ivey, Comment, *It's Time to Resolve the Circuit Split: Unconstitutional Actions by Federal Employees Should Not Fall within the Scope of the Discretionary Function Exception of the FTCA*, 73 MERCER L. REV. 1351, 1373 (2022).

sue the government for *any* tort.[324] That is the essence of sovereign immunity. Congress passed the FTCA as a *limited* waiver of that sovereign immunity,[325] and it did not waive immunity for constitutional claims.[326] It is therefore not the role of the courts to expand the waiver of sovereign immunity to cover claims to which the United States—through its elected representatives in Congress—never consented.

VI. CONCLUSION

The majority of the circuit courts' adoption of the "constitutional-claims exclusion" is understandable—it provides redress for a citizen whose constitutional rights were violated. That seems to be the most just outcome. But it simply does not comport with the law. The FTCA is clear: It does not provide liability for constitutional violations. Perhaps it should. Indeed, it seems rather illogical to hold the government liable for run-of-the-mill torts but not for constitutional violations. But that is a question for Congress—not the courts—to decide.

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324 *See* CONTINO & KUERSTEN, *supra* note 8, at 4.

325 Shivers v. United States, 1 F.4th 924, 928 (11th Cir. 2021).

326 *See* 28 U.S.C. § 1346(b).