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The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?

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NOTES AND COMMENTS

THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT:
HOW MUCH IS ENOUGH?

David Childers, along with his parents and his brother and sister, went to Yellowstone National Park to hike one winter afternoon. As an exuberant 11 year old child, David ran ahead of his parents. The government safety manual provided that if roads and trails could not be maintained as designed and built, they would either be closed or the public adequately warned. Therefore, the Childers assumed the trails they hiked upon that day were safe. But, when David fell to his death that day in Yellowstone, the discretionary function exception to the Federal Tort Claims Act (FTCA) protected the decisions made by the National Park Service as to the precise manner in which to warn the public as to the trails left open, but unmaintained, in the winter. The Childers' suit was therefore dismissed without any recovery for the loss of their son.

The purpose of the FTCA is to waive sovereign immunity so that private citizens can sue the United States Government for

1. Childers v. United States, 40 F.3d 973 (9th Cir. 1994) (holding the discretionary function exception to the FTCA protected the decisions of the National Park Service relating to the treatment of unmaintained trails in the park, resulting in the case being dismissed for lack of subject matter jurisdiction).
2. Id.
3. Id.
4. Id. at 976.
5. Id. at 976.
7. Childers, 40 F.3d at 976.
8. Id.
the torts its employees commit in the scope of their employment. This waiver of immunity is subject to 13 specific exceptions. The primary exception is the discretionary function exception which provides, in pertinent part, that the United States is not liable for any 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." The current state of the discretionary function exception is unsatisfactory. Courts have applied the exception on an ad hoc basis without any precise test. Such an application leaves litigants unable to predict the outcome of their case. Under current application, the discretionary function exception reaches too broadly. The purpose of the discretionary function exception would better be served by making a threshold inquiry as to whether the challenged action involved a uniquely governmental function. If no unique governmental function exists, the discretionary function exception should not be applicable.

I. BACKGROUND OF THE FTCA

Before adoption of the FTCA, members of the general public could not sue the federal government for negligent acts committed by government agents or officials. The common-law tradition of sovereign immunity prevented a citizen's suit regardless of its merits, reflecting the maxim that "the king could do no wrong." The only opportunity for relief pre-FTCA involved filing a request for compensatory relief through a private congressional claim bill. However, the administration of these claims became onerous and overwhelming. The Seventy-ninth Congress introduced the FTCA in 1946 in an attempt to provide a more man-

12. See Dalehite v. United States, 346 U.S. 15, 25 n.9 (1953) (which discussed the clumsy operation of the private claim bill procedure). For example, in the Seventieth Congress (1937), 2,268 private claim bills were introduced, totaling more than $100 million in damages. Of those claim bills, 362 were enacted with 144 in tort for a total of $562,000.
How Much Is Enough?

The FTCA generally authorizes suits against the United States for damages:

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.\(^{14}\)

The FTCA imposes liability on the United States for acts of its employees "in the same manner and to the same extent as a private individual under like circumstances."\(^{15}\) The FTCA generally allows suits for negligently inflicted injuries, but bars suits for most intentional torts.\(^{16}\) The FTCA provides thirteen specific exemptions to Government liability.\(^{17}\) These exceptions act as jurisdictional bars to a suit. When an exception applies, there is no waiver of sovereign immunity and the claim will be dismissed for lack of subject matter jurisdiction.

The primary exception, the discretionary function exception, provides that no liability shall lie for:

[a]ny claim based upon the act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.\(^{18}\)

The exception has two parts: (1) due care and (2) discretionary function. The due care prong is straightforward. The controlling inquiry is whether the employee used due care in implementing or applying a statute or regulation.\(^{19}\) Then, if the employee is subject to a specific statute or regulation, a typical negligence analysis would be conducted. Either the statute or regulation would set the applicable standard of care or, if not, the

\(^{19}\) United States v. Gaubert, 499 U.S. 315, 328 (1991) (stating that the first inquiry is "whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations.").
standard would be an objective inquiry of whether the employee used due care (was non-negligent) in applying the statute.\textsuperscript{20}

The discretionary function prong is more ambiguous. The FTCA does not contain a definition of a “discretionary function.” Since the FTCA’s adoption, courts have struggled over the meaning and breadth of the discretionary function exception. In 1953, the United States Supreme Court, in \textit{Dalehite v. United States}, broadly interpreted the exception and the meaning of “discretionary” as “acts of a governmental nature or function.”\textsuperscript{21}

\section*{II. Supreme Court Precedent}

\textit{Dalehite v. United States} was a consolidated action against the United States for damages arising from an explosion of ammonium nitrate fertilizer being stored in Texas Harbor.\textsuperscript{22} This was a test case, “representing some 300 separate personal and property claims in the aggregate amount of two hundred million dollars.”\textsuperscript{23} Claimants filed suit under the FTCA\textsuperscript{24} claiming negligence on the part of the entire body of federal officials and employees involved in the production of the Fertilizer Grade Ammonium Nitrate (FGAN).\textsuperscript{25} The FGAN “had been produced and distributed at the instance, according to the specifications and under the control of the United States.”\textsuperscript{26}

FGAN’s basic ingredient was ammonium nitrate, a highly volatile and fulminating compound, long used as a component in explosives.\textsuperscript{27} However it was chosen because ammonium nitrate functioned as a good fertilizer as well, due to its high free nitrogen content.\textsuperscript{28} By April 15, 1947, following three weeks of storage, over 2,850 tons of FGAN were loaded onto two different cargo ships docked in Texas Harbor.\textsuperscript{29} One of the ships carried an additional substantial cargo of explosives and the other over 2,000 tons of sulphur.\textsuperscript{30}

\begin{footnotesize}
\begin{enumerate}
\item[21.] \textit{Dalehite v. United States}, 346 U.S. 15, 28 (1953).
\item[22.] \textit{Id.}
\item[23.] \textit{Id.} at 17.
\item[24.] \textit{Id.}
\item[25.] \textit{Id.} at 18.
\item[26.] \textit{Id.}
\item[27.] \textit{Id.} at 21.
\item[28.] \textit{Id.}
\item[29.] \textit{Id.} at 22.
\item[30.] \textit{Id.} at 22-23.
\end{enumerate}
\end{footnotesize}
Early the next morning, smoke was sighted in the hold of one of the ships. The captain of the ship ordered all personnel off and the hatches closed. Steam was introduced into the holds, which was the normal fire-fighting procedure aboard ships. However, due to the oxidizing properties of FGAN, this introduction of steam actually aggravated matters. All efforts to control the fire failed and both ships exploded. The explosion leveled much of the city and caused many deaths and injuries. The petitioners charged the United States with bringing the catastrophe upon itself by shipping the FGAN, known to be explosive, to a congested area without warning of the possibility of explosion under certain conditions.

The Court began with an analysis of the historical precedent of the FTCA. The general principle is that no action lies against the United States unless the legislature has authorized it. The FTCA makes the United States liable "as a private citizen under like circumstances." The Supreme Court's prior decisions had "interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions." The United States Government argued the discretionary function exception barred all claims. Before applying the discretionary function exception, the Court looked to the Congressional Committee hearings for guidance.

It was not intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. The same holds true of other administrative
action not of a regulatory nature, such as the expenditure of Federal Funds, the execution of a Federal project and the like. 43

The Court found that while Congress decided to waive the Government's immunity from actions for injuries to person and property arising from tortious conduct, “it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.” 44 Although § 2680(a) precludes suits against the Government growing out of authorized activity, it was not intended to be a means “to test the validity of or provide a remedy on account of such governmental discretionary decision-making, even though negligently performed.” 45 The Court stated “[o]ne need only read [§] 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.” 46 The discretionary function exception covers all employees exercising discretion, including both negligence and wrongful acts. 47 The FTCA did not intend to relieve the Government from liability for such common-law torts as a car wreck caused by the negligence of an employee. The discretion protected by the section is that of an “executive or . . . administrator to act according to one’s judgment of the best course.” 48 The Court determined “discretion” to be “room for policy judgment and decision.” 49 The Court did not make a distinction between the executives or administrators who make the policy and the subordinates who carry out the operations of government. 50 It follows that both executives and subordinates could be covered under the discretionary function exception. 51

46. Id. at 32.
47. Id. at 33.
48. Id. at 34.
49. Id. at 36.
50. Id.

51. As will be discussed, the next Supreme Court decision that discussed the discretionary function exception, Indian Towing Company v. United States, 350 U.S. 61 (1955), made a distinction between operational and planning levels using Dalehite as precedence for making the distinction. However, the Dalehite Court
The Court first applied the discretionary function exception to the cabinet-level decision to initiate the fertilizer export program and found that it was clearly a discretionary act. Clearly, such matters of governmental discretion were excepted from the FTCA. The Court then turned to the specific acts of negligence alleged to have occurred at Texas Harbor. The District Court had found four specific acts of negligence in the manufacture of the FGAN: 1) temperature; 2) type of container; 3) type of labeling; and 4) paraffin coating. However, the Court found these alleged acts of negligence were a result of discretionary act made at a planning level and involved considerations important to the practicability of the FGAN program.

The evidence, as a whole, showed that FGAN could be handled safely in the manner it was handled in Texas Harbor. The ignition that led to this disaster was a “complex result of the interacting factors” and truly just an unfortunate accident. Thus, the acts of the Government in formulating a plan for manufacture of the FGAN and in carrying it out, were, under the circumstances, acts of discretion and could not result in liability. The federal government could rest easy after Dalehite, relying on its broad interpretation of “discretionary.”

That rest did not last long. In 1955, the Court introduced a new test to determine whether a government act was “discretionary.” In Indian Towing Co. v. United States, the Court fashioned a test based upon a distinction between operational and planning levels of government. Specifically rejected this distinction. Discretion includes determinations made by administrators and “[i]t necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.” Dalehite, 346 U.S. at 36.

52. Id. at 37.
53. Id. at 38.
54. Id.
55. Id. at 39-40.
56. Id. at 42. It was with here that the “operational vs. planning” distinction was hatched. The Indian Towing Court gave more weight than was due to the phrase “[t]he decisions held culpable were all responsibly made at a planning rather than operational level.” Id. The Dalehite Court merely made the distinction to emphasize the policy considerations that had to be made regarding the FGAN.
57. Id.
58. Id.
59. Id.
The petitioners sought recovery under the FTCA for damages alleged to have been caused by the negligent operation of a lighthouse light. Specifically, the petitioners alleged the Coast Guard was negligent in checking the system which operated the light, failing to properly check the connections, failing to repair, and failing to give warning that the light was not operating. The Court determined the question to be “one of liability for negligence at what this Court has characterized the ‘operational level’ of government activity.”

The Coast Guard was not required to provide light house service, but once the discretionary decision was made to operate a light house, the Coast Guard was obligated to use due care to keep the light in good working order. The discretionary decision was made in deciding to operate the lighthouse. The conduct of the Coast Guard thereafter, in the Court’s eyes, did not involve any discretionary judgment. The Court relied on Dalehite to distinguish between levels of conduct. There would be no liability for acts occurring during the “planning” level because that was where the discretionary policy judgment was made. In turn, there would be liability for acts taken during the “operational” level because no policy judgment was involved.

The Court’s reliance on the planning/operational distinction served to bar suits implicating government functions at the planning stage, but allowed suits implicating government functions at the operational stage. Over the next thirty years, lower courts adopted and applied this operational/planning test.

61. Id. at 62.
62. Id.
63. Id.
64. Id. at 64.
65. Id. at 69.
66. Id. at 64.
67. Id. at 64-69.
In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*⁶⁹ the Court departed from the operational/planning distinction and adopted a new test that would focus "on the nature of the conduct rather than the status of the actor."⁷⁰ The specific circumstances of *Varig Airlines* were particularly conducive to this new test.

The Federal Aviation Act of 1958⁷¹ directs the Secretary of Transportation to promote the safety of civil aircraft by establishing minimum standards for aircraft design, materials, workmanship, construction, and performance. Appropriately, the Secretary has discretion to define the rules and regulations governing the inspection of aircraft before they receive their Federal Aviation Administration (FAA) compliance certificates.⁷² The FAA, as the Secretary's designee,⁷³ promulgated a comprehensive set of minimum safety standards which the manufacturers of aircraft must comply before marketing their products.⁷⁴ Thus, the Secretary's discretionary decision was to make the manufacturers comply with the minimum safety standards and enforce their compliance through review of a particular manufacturer's data by conducting "spot-check" of manufacturers' work.⁷⁵

In 1973, a commercial airplane owned by Varig Airlines crashed due to a fire that broke out in one of the aft lavatories.⁷⁶ The fire filled the cabin and cockpit with smoke, and 124 of the 135 persons on board died of asphyxiation.⁷⁷ The aircraft was a Boeing 707 which received its certification in 1958 from the Civil Aeronautics Agency (CAA), a predecessor of the Federal Aviation Administration (FAA), thus certifying that the aircraft's designs, plans, specifications, and performance data were in conformity with minimum safety standards.⁷⁸ Varig Airlines pointed to regulation 14 CFR § 4b.381(d) (1956),⁷⁹ which required that trash cans be made of fire-resistant materials and incorporate covers or other

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⁷⁵. *Id.* at 817.
⁷⁶. *Id.* at 799-800.
⁷⁷. *Id.* at 800.
⁷⁸. *Id.*
⁷⁹. *Id.* at 801.
provisions for containing possible fires.\textsuperscript{80} Thus, the CAA was negligent when it inspected the Boeing 707 and issued a certification when the trash cans in the aft lavatory did not comply with the minimum fire protection standards.\textsuperscript{81}

Varig Airline's action was consolidated with a separate action by John Dowdle, who purchased a DeHavilland Dove airplane that had been issued a certification from the FAA but crashed due to an in-flight fire in the forward baggage compartment of the aircraft.\textsuperscript{82} The cause of the fire was a gasoline-burning cabin heater installed in the airplane which did not comply with the applicable FAA regulations, much like the trash cans in Varig Airlines' airplane.\textsuperscript{83} There was no evidence that either the Boeing 707 trash can or the DeHavilland Dove cabin heater was actually inspected or reviewed by an FAA inspector. The respondents argued a negligent failure to inspect as well as negligence in the implementation of "spot-check" system for preserving air transportation safety.\textsuperscript{84}

The Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and thus the action was barred.\textsuperscript{85} The Court set a new standard for applying the discretionary function exception. The Court held "[f]irst, it is the nature of the conduct rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."\textsuperscript{86} The Varig court, upon re-reading Dalehite, agreed the exception covers all employees exercising discretion and not just the administrators or agencies of the government.\textsuperscript{87} The first prong of the new test became "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 tort liability."\textsuperscript{88} The second prong was whether the discretionary act was grounded in social, economic, or political policy, and was therefore protected by the discretionary function exception in order to prevent judicial "second-guessing" of legislative and administrative decisions.\textsuperscript{89}

\textsuperscript{80.} \textit{Id.}
\textsuperscript{81.} \textit{Id.}
\textsuperscript{82.} \textit{Id.} at 802.
\textsuperscript{83.} \textit{Id.} at 803.
\textsuperscript{84.} \textit{Id.} at 819.
\textsuperscript{85.} \textit{Id.} at 821.
\textsuperscript{86.} \textit{Id.} at 813.
\textsuperscript{87.} \textit{Id.}
\textsuperscript{88.} \textit{Id.}
\textsuperscript{89.} \textit{Id.} at 814.
When this new test was applied, the Court found the compliance reviews involved policy judgments regarding the degree of confidence in the particular manufacturer, the need to maximize compliance with the FAA regulations, and the efficient allocation of agency resources. The risks associated with the "spot-check" program were encountered in the "advancement of a governmental purpose and pursuant to a specific grant of authority in the regulations and operating manuals." The Court stated "[t]he FAA has a statutory duty to promote safety in air transportation, not to insure it." In Indian Towing, the Court held once a governmental agency undertook an activity it had a duty to use due care. But after Varig, once a governmental agency undertook an activity, if its actions involve any judgment in social, economic, or political policy, there is no resulting duty to use due care and the discretionary function exception bars the claim.

The Court confirmed the Varig Airlines analysis in Berkovitz v. United States. In Berkovitz, a two-month old infant was given a polio vaccine manufactured by Lederle Laboratories, a civilian laboratory licensed to produce the vaccine by the Division of Biologic Standards (DBS). The infant contracted a severe case of polio and was left almost completely paralyzed. The parents sued under the FTCA for the negligent licensing of Lederle to produce the vaccine and also for the negligent approval of release by the Bureau of Biologics of the Food and Drug Administration (FDA) of the particular lot of vaccine received by the infant.

The Court reiterated Varig Airlines stating "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." The Court restated the determinative test for whether the challenged conduct is discretionary. The first prong of the test is "whether the action is a matter of choice for the acting employee." This inquiry separates the "due care" part from the "discretionary function" part of the discretionary function excep-

90. Id. at 820.
91. Id. at 820.
92. Id. at 821.
93. Indian Towing, 350 U.S. at 69.
95. Id. at 533.
96. Id.
97. Id.
98. Varig Airlines, 467 U.S. at 813.
tion. As discussed earlier, if an employee has no choice but to follow a statute or regulation, he must do so with "due care." If the regulation mandates a specific course of conduct, the employee has no other option but to follow the rules. The employee's conduct cannot be the product of any discretion because he is not given any independent judgment. As the Berkovitz Court stated, "conduct cannot be discretionary unless it involves an element of judgment or choice." 100

The second prong of the test requires a court to determine "assuming the challenged conduct involves an element of judgment . . . whether that judgment is of the kind that the discretionary function exception was designed to shield." 101 The Court emphasized the need to "prevent judicial 'second-guessing' of legislative and administrative decisions." 102 The Court stressed "[t]he exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy." 103

As applied in Berkovitz, the discretionary function exception did not bar the cause of action. 104 The DBS is required to comply with statutory and regulatory provisions provided in the Public Health Service Act (PHSA). 105 The petitioners alleged the DBS issued a product license to Lederle Labs in violation of the PHSA, and thus disobeyed a specific statutory directive. 106 Petitioners further alleged the DBS stepped outside the discretionary function exception when it failed to follow the directive. They argued "[t]he agency ha[d] no discretion to deviate from th[e] mandated procedure." 107 With respect to the allegation of negligence by the Bureau of Biologics of the FDA, the discretionary function exception applied to the agency's decision in formulating a policy as to the appropriate way in which to regulate the releases of vaccine lots. 108 The Court posited three factual bases for the plaintiff's claim: 1) the Bureau had issued the license without making any

100. Id. See Dalehite, 346 U.S. at 34 (stating that the exception covered "the discretion of the executive or the administrator to act according to one's judgment of the best course.").
102. Id. at 536-537 (quoting Varig Airlines, 467 U.S. at 814).
103. Id. at 537.
104. Id. at 542.
106. Berkovitz, 486 U.S. at 542.
107. Id. at 544.
108. Id. at 546.
finding regarding compliance, 2) the Bureau had determined the vaccine was not in compliance but had issued the license anyway, and 3) the Bureau had determined that the vaccine was in compliance but that its determination was wrong. If the plaintiff's claim was based on either of the first two theories, the discretionary function exception would not apply because each involved the violation of a clear statutory duty. Because the Bureau's policy mandated a specific course of action, or left no room for policy judgment, the discretionary function exception would not bar a claim. The third theory, however, "hinges on whether the agency officials making that determination permissibly exercise[d] policy choice." If so, the Court held the discretionary function applies and the suit is barred. If the determination is made by the mere "application of objective scientific standards," a plaintiff's claim is not barred.

The Court found the Bureau's policy did mandate a specific course of action and adopted a policy to test all lots for compliance with safety standards and to prevent public distribution of any lot that does not comply. Thus, the government's motion to dismiss was denied and the case was remanded.

Although the Court did not utilize the discretionary function, the Court's Berkovitz test reaches as broadly, if not more so than their Dalehite decision. After Berkovitz, a court cannot evaluate government decisions for tort liability in matters grounded in social, economic, or political policy. Discretionary immunity, therefore, will apply when the employee makes a decision involving a policy judgment. This application is not a test at all. It begs the question, and leaves lower courts with the ability to make ad hoc decisions based upon particular facts. The Court has used terms that are more ambiguous than "discretionary" in formulating a definition for the word itself. After Berkovitz, an agency directive must merely leave room for an official to exercise policy judgment in performing a given act for the exception to apply. Clearly this test is overbroad and too unpredictable in application.

109. Id. at 543.
110. Id. at 544.
111. Id. at 546-47.
112. Id. at 545.
113. Id.
114. Id.
115. Id. at 547.
116. Id. at 548.
In *Gaubert*, the Court’s latest visit with the discretionary function exception, it officially rejected the operational/planning distinction in *Indian Towing* in favor of Berkovitz’s broader interpretation of the discretionary function test.\(^{117}\) A shareholder of an insolvent savings and loan association brought an action against the United States under the FTCA.\(^{118}\) *Gaubert* alleged negligent supervision of directors and officers and negligent involvement in the day-to-day operations by the Federal Home Loan Bank Board (FHLBB), who, pursuant to the Home Owners’ Loan Act of 1933, undertook to advise and oversee aspects of operation of *Gaubert*'s savings association.\(^{119}\)

The Court made the primary inquiry as to whether the challenged actions were discretionary or controlled by directive.\(^{120}\) There was no specific statute that governed the FHLBB’s conduct, rather the agency had broad statutory authority to supervise financial institutions.\(^{121}\) To that end, the Court found "[t]he relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use."\(^{122}\) Further, the Court found the advice the FHLBB gave to *Gaubert* regarding the operation of the savings and loan association was "within the purview of the policies behind the statutes."\(^{123}\) Therefore, the Court found the discretionary function applied, because there was room for a policy judgment.

In addition, the Court created a presumption for barring claims with the discretionary function by stating "if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."\(^{124}\) The mere "existence of a regulation creates a strong presumption that the discretionary act . . . involves consideration of . . . [public] policies."\(^{125}\)

Justice Scalia concurred in the *Gaubert* judgment but wrote separately because he realized the breadth of the exception under
the majority's test and felt it necessary to establish clearer guidelines for the discretionary function exception. He agreed with the majority that an across the board distinction made at the operational/planning level is inappropriate. However, he believed an appropriate test should look to the level at which the decision was made because not only is it necessary for application of the discretionary function exception that the decision maker be an official who possesses the relevant policy responsibility, but also the decision maker's close identification with policymaking can be strong evidence that...the subject matter of the decision is one that ought to be more informed by policy considerations.

Since regulations themselves cannot be challenged under the FTCA, it follows that all regulations that Congress did not intend to be subject to judicial intervention involve policy judgments.

The test proposed by Justice Scalia also contained "a similar presumption, though not an absolute one, that decisions reserved to policymaking levels involve such judgments—and the higher the policymaking level, the stronger the presumption." Justice Scalia's input is logical and follows the language of the FTCA itself. In fact, the FTCA shall not apply to acts of a governmental employee "exercising due care, in the execution of a statute...whether or not such statute...be valid." It follows, if the challenged action involves a policy judgment, and the employee is authorized to exercise that judgment, then the discretionary function exception will apply regardless of the negligence involved in the actual exercise of the judgment. Thus rightfully, "'action' within the purview of the relevant policy is neither a necessary nor a relevant sufficient condition for invoking the discretionary function exception."

Justice Scalia's recommendation helps define the necessary degree of judgment for finding discretion. However the current test when viewed in conjunction therewith still remains too broad. Under current application, the discretionary function exception protects all governmental actions and decisions as long as they can be classified as decisions based on social, economic or political policy considerations. The discretionary function exception over-

126. Id. at 335.
127. Id.
128. Id. at 336.
129. Id. at 337.
takes the FTCA when the Berkovitz/Gaubert test is applied. An inspection of recent Circuit Court decisions shows the lack of guidance the Berkovitz/Gaubert discretion test provides. The overbreadth of the exception becomes clear because in cases where the discretionary choice does not involve a uniquely governmental function and the exception is applied, the purpose of the Act is not being served. Recent Circuit Court cases were selected that seemed to epitomize the shortcomings of the current application of the discretionary function exception. Due to the magnitude of case law in the area, it is not implied that the few cases cited are solely representative of the profusion of case law in each circuit.

III. CIRCUIT-BY-CIRCUIT ANALYSIS

In Irving v. United States, the First Circuit was faced with an unusual situation. In 1979, Gail Irving was injured when her hair got caught in an unguarded rotating shaft of a "die-out machine" located near her work station. In 1981, she filed a claim under the FTCA alleging negligence on the part of the Occupational Safety and Health Administration (OSHA) in inspecting and preventing the undisputed safety violation of the unguarded rotating shaft. The government made a motion to dismiss under the discretionary function exception in February 1982, and the court denied the motion. The Supreme Court's Varig Airline decision was handed down in 1984, and the government renewed its motion to dismiss at that time, but the district court denied its second motion also. The bench trial on the merits was concluded in February of 1985, however the district court waited until January of 1988 to dismiss the suit without reaching the merits. The district court reversed its earlier rulings and concluded the discretionary function exception applied. On the plaintiff's first appeal, the appellate court vacated the dismissal and remanded the matter for further consideration in light of the recent Berkovitz decision.

132. Irving v. United States, 49 F.3d 830 (1st Cir. 1995).
133. Id. at 832.
134. Id.
135. Id. See 532 F. Supp. 840 (D.N.H. 1982), vacated and remanded, 49 F.3d 830 (1st Cir. 1995).
136. Irving, 49 F.3d at 832.
137. Id.
138. Id.
139. Id.
The district court did not follow the Appellate Court’s instruction. The district court did not discuss whether the challenged action involved a matter of choice for the acting employee or whether the challenged action involved a permissible exercise of policy judgment. Instead, the district court relied entirely on a “post-Berkovitz OSHA case in which the Fifth Circuit had found the discretionary function exception to apply, and ruled that the suit was within the scope of the exception.” On the plaintiff’s second appeal, the appellate court agreed with the plaintiff’s allegation of specific OSHA safety violations, and the court vacated and remanded for a second time. Thus “an issue of fact still linger[ed] in the record: whether OSHA policy left the thoroughness of the inspections a matter of choice for its compliance officers.”

After this remand, the district court waited until June of 1994 to ignore the Circuit Court’s instructions. The district court, instead of answering the lingering fact question of discretion, addressed the merits of the claim and found the “offending rotating shaft was permissibly ‘guarded by location.’” This finding of guarded by location meant, at the time of the OSHA inspections, the machine was in a different location, nearer to the wall. The appellate court applied the clear-error standard of review and once again vacated and remanded the judgment of the district court. Nothing emphasizes the state of confusion in the lower federal courts more than a trial being held over ten years after the original trial, for injuries suffered fifteen years ago. The lower district court obviously could not understand the Berkovitz/Gaubert test as it applied to Miss Irving’s case, otherwise it would have followed the instructions given by the appellate court.

The Second Circuit in Lewis v. Babcock Industries, Inc., discussed the Military Contractor Defense to a products liability claim. A pilot brought his claim against contractors, alleging a defect in the cables necessary for a safe and effective evacuation from a jet fighter. The discretionary function exception resembles the military contractor defense because both require “that a government official had made the type of policy decision consid-

140. Id. at 833.
141. Id. See Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988).
142. Irving, 49 F.3d at 833 (quoting Irving I, 909 F.2d 598, 605 (1st Cir. 1990).
143. Id.
144. Id. at 835.
145. Lewis v. Babcock Indus., Inc., 985 F.2d 83 (2d Cir. 1993).
nered a discretionary function under the [FTCA]."\textsuperscript{146} In this case, the court found the necessary discretion because the government did not "merely 'rubber stamp' [the] design," but rather played an integral part in ordering and reviewing the test data on the specific cables.\textsuperscript{147} Like the Berkovitz/Gaubert test, the fact that a choice had to be made seems sufficient to satisfy the need for discretion, because such choice would presumptively be bound in policy considerations.\textsuperscript{148}

In \textit{Fisher Bros. Sales, Inc. v. United States}, the Third Circuit was faced with a twist on the discretionary function exception when it was required to decide when a claim becomes "based on" the exercise of a discretionary function.\textsuperscript{149} The Commissioner of the FDA refused entry of Chilean grown fruit based on a laboratory report indicating the presence of cyanide in the produce.\textsuperscript{150} The fruit growers and others claimed the laboratory report was negligently prepared, violated procedures, and the Commissioner was therefore negligent in relying upon it.\textsuperscript{151}

The court reiterated the Supreme Court's Berkovitz/Gaubert test and found the "Commissioner's decisions both involved an element of judgment or choice, and were the kind of choices 'that the discretionary function exception was designed to shield.'"\textsuperscript{152} The Commissioner, the court found, was required to evaluate and reconcile conflicting findings, reports, and anonymous telephone calls.\textsuperscript{153} The Commissioner erred on the side of precaution and the court found his decision protected by the discretionary function exception.

The plaintiff's made an additional charge and alleged their complaint was "based on" the actions of the laboratory technicians and not the decision of the Commissioner of the FDA.\textsuperscript{154} The Commissioner would not have made his discretionary decision but for the negligence of the laboratory technicians.\textsuperscript{155} The court found the claim contrary to the purpose of the prevention of judicial second-guessing. The court stated "every policy decision

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 86.
\item \textsuperscript{147} \textit{Id.} at 87.
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Fisher Bros. Sales, Inc. v. United States}, 46 F.3d 279 (3d Cir. 1995).
\item \textsuperscript{150} \textit{Id.} at 283.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.} at 285 (quoting Berkovitz, 486 U.S. at 536).
\item \textsuperscript{153} \textit{Fisher Bros. Sales, Inc.}, 46 F.3d at 285.
\item \textsuperscript{154} \textit{Id.} at 286.
\item \textsuperscript{155} \textit{Id.}
\end{itemize}
involves an exercise of the policymaker's judgment about the reliability, adequacy, and significance of the information available to him... and... no decision-maker can have one hundred percent confidence in the information before him... at any given point in time.” 156 The court held “the discretionary function exception was intended to make sure every Commissioner's judgment will not be skewed by” considerations involving possible litigation and liability for each one of his decisions.157.

The court stated the purpose of the discretionary function exception eloquently, but did not sufficiently address the plaintiffs' claim. As the dissent pointed out in analyzing the actions taken here by the FDA, one must consider carefully whether it is implicit in the order for tests to be performed that the tests are both scientifically accepted and reliable. If it is implicit, I would not extend the discretionary function exception to actions which predictably follow from the test results. The discretionary function exception should not protect an official's decisions brought about by the results of accepted and reliable tests, just as it will not protect an official's release of a noncomplying lot of polio vaccine.158

The dissent likened the claim to that in Berkovitz, where the DBS wrongfully licensed the production of polio vaccine because “judgment guided purely by scientific or other objective principles does not involve discretion for purposes of the discretionary function exception.”159 Thus, if the court were to adjudicate the complaint, the court would not be second-guessing a policy-based decision, but it would be “measuring the technicians' conduct against the procedures they were to have followed and principles of good laboratory practice.”160 The dissent further relied on the “due care” prong of the discretionary function exception and stated

156. Id. at 287.
157. Id.
158. Id. at 289. The en banc argument brought a 7-6 decision in favor of finding the discretionary function exception applied. The six dissenters found the plaintiffs allegations satisfied the Berkovitz pleading requirements, while the seven judges in the majority did not. Again this shows a clear confusion in the lower courts regarding the application of the Berkovitz test.
159. Id. at 290. The dissent cited Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974) and Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992) in support of their proposition. Both of these decisions found the alleged discretionary judgments were actually governed by objective scientific principles and therefore could not be grounded in public policy.
"'once the government makes a policy decision ... it must proceed with due care in the implementation of that decision.' Thus the testing of the fruit for cyanide had to be conducted with due care. "[T]he removal from the market of cyanide-contaminated grapes may be discretionary but the proper performance of established tests to detect the contamination is not." The difference in opinion between the majority and dissent marks the difference among the circuits themselves regarding the application of the discretionary function exception. The confusion is over which official's decision is to be tested as discretionary. The Gaubert majority would place a presumption of discretion in every official decision, whereas Justice Scalia would look to the official's position of employment and decide if the decision truly required discretion or as the third circuit stated "require[d] only performance of [an objective], scientific evaluation." The social, economic, and political policy factors that Congress intended to shield from liability would have no place in the decision-making process of an official engaged in objective scientific or safety evaluations.

For example, there is a clear conflict in the Fourth and Sixth Circuits regarding the decisions of inspectors from the Mine Safety and Health Administration (MSHA). Both Estate of Bernaldes v. United States and Myers v. United States involved FTCA claims for mine workers killed in accidents alleged to have been due to the negligent inspection of the mines. Both plaintiffs alleged that were it not for the inspectors' negligence, the accidents would not have occurred.

161. Id. at 291 (quoting Caplan v. United States, 877 F.2d 1314, 1316 (6th Cir. 1989)).
162. Id.
164. 81 F.3d 428 (4th Cir. 1996).
165. 17 F.3d 890 (6th Cir. 1994).
166. Estate of Bernaldes v. United States, 81 F.3d 428 (4th Cir. 1996), involved a worker who was killed in a fall at a mine. The Estate claimed the MSHA inspectors negligently failed to discover safety violations including inadequate lighting and the lack of a grate, railing, or safety harness in the coal shed, which caused Mr. Bernaldes' fatal fall.

Myers v. United States, 17 F.3d 890 (6th Cir. 1994), involved an explosion that killed several miners. The survivors alleged several mandatory non-discretionary duties on the part of MSHA inspectors, and their disregard for these duties caused the conditions amenable for the explosion to occur.
In *Bernaldes*, the Fourth Circuit employed the two-prong *Berkovitz/Gaubert* test set forth by the Supreme Court to find that "although the MSHA regulations contain some mandatory language, mining inspectors have the discretion under the regulations to determine if a given mine is in compliance with the regulations."\(^{167}\) The court cited *Gaubert* for the proposition that the "MSHA regulations were not sufficiently specific to be considered 'mandatory.'"\(^{168}\) However, *Gaubert* specifically states "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis."\(^{169}\)

The *Bernaldes* court did not consider the nature of the MSHA inspectors' actions, rather it was assumed, under *Gaubert*, that if the government employee has discretion, any decision would be "grounded in policy when exercising that discretion."\(^{170}\) Thus, the court failed to consider, under the first-prong of the *Berkovitz* test, whether the MSHA inspector, in fact, had discretion. Then, simply because the MSHA inspector made a decision (an arguably unauthorized one), the court reasoned that the decision was presumptively grounded in public policy. Obviously the lower courts' interpretation of *Gaubert* is too broad. In this case, it appears the Fourth Circuit used *Gaubert* as a amnesty from making difficult determinations.

Accordingly the *Bernaldes* court found "that the Sixth Circuit erred in *Myers v. United States* . . . when it held the questions of safety involved objective non-policy based factors."\(^{171}\) However, the *Myers* court correctly read *Gaubert* to find the discretionary function exception did not apply.\(^{172}\) Upon an examination of the nature of the MSHA inspectors' actions, the *Myers* court reasoned the inspectors did have a discretionary choice in making safety determinations, however those decisions were not based upon public policy but on objective considerations of safety.\(^{173}\)

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167. *Bernaldes*, 81 F.3d at 429.
168. *Id.* at 429. (citing *Gaubert*, 499 U.S. at 325; this part of the opinion in *Gaubert* concentrates on extinguishing the distinction between operational and planning levels and their function in discretionary function analysis, not on the definition of "mandatory.").
170. *Bernaldes*, 81 F.3d at 429 (citing *Gaubert*, 499 U.S. at 324).
171. *Bernaldes*, 81 F.3d at 429.
172. *Myers*, 17 F.3d at 890.
173. *Id.* at 896-898.
court correctly examined the MSHA regulations carefully to decide whether the actions of the inspectors were mandatory and non-discretionary.\textsuperscript{174} Based upon the language of the MSHA regulations, the court decided the nature of the inspectors' actions necessitated a choice "sufficient to satisfy the first prong of the Berkovitz/Gaubert analysis."\textsuperscript{175} Then, "[h]aving determined [the] . . . duties . . . require decisions or choices by the MSHA inspectors . . . it remains only to be determined whether these choices or decisions are 'grounded in the social, economic or political goals of the statute and regulations.'"\textsuperscript{176} The court reiterated the Gaubert presumption in favor of finding a policy-based decision, but nevertheless recognized "in many cases, the presumption would be rebutted because many acts performed by agency personnel—though they involve a significant degree of choice—are not grounded in regulatory policy and thus are not protected by the discretionary function exception."\textsuperscript{177} The court reasoned that although a choice was made and it was in furtherance of the MSHA regulation, it was not necessarily based upon the policy considerations that underlie the regulation itself. The court rightly focused on the inquiry of the nature of the particular official's conduct.

The determination of whether the conduct in a particular case sufficiently rebuts this presumption, "the inquiry must focus on an objective evaluation of the discretion conferred rather than a review of the actor's subjective method of choosing a course of action."\textsuperscript{178} Not all discretion is based on policy considerations. Like the Fourth Circuit in Bernaldes, courts are using the Gaubert presumption too broadly and inferring policy considerations where none exist. The Myers court also agreed with Justice Scalia's concurring opinion in Gaubert.

[T]he status of the actor is not totally irrelevant . . . the higher the actor stands in a particular agency, the stronger the presumption that he is afforded discretion to devise public policy. Conversely, the lower the status of the actor, the less likely it is that

\textsuperscript{174} Id. at 895.  
\textsuperscript{175} Id. at 896.  
\textsuperscript{176} Id. (quoting Gaubert, 499 U.S. at 323).  
\textsuperscript{177} Id. (citing Gaubert, 499 U.S. at 325-26 n.7 for the proposition of rebuttal of the presumption in favor of policy-based decisions).  
\textsuperscript{178} Id. (citing Gaubert, 499 U.S. at 325-326).
he is authorized to set policy and the more likely he is to be merely implementing the policy choices of others. 179

The Myers court went on to find the MSHA inspectors were not authorized to set policy, they merely made objective choices regarding neutral principles of safety. 180 The argument that the inspectors exercised policy judgment "relie[d] too heavily on the presumption in Gaubert and fail[ed] to demonstrate . . . any consideration of 'political, social, or economic policy.'" 181 Therefore, the Sixth Circuit did not apply the discretionary function exception due to the lack of policy concerns in the challenged actions. 182

The Fifth Circuit has also recognized the Gaubert presumption to be rebuttable, however in Baldassaro v. United States, the court laid down an almost insurmountable standard. 183 In Baldassaro, a seaman was injured aboard a governmental vessel when part of a detachable sea rail separated from his bunk, causing him to fall to the deck. 184 He filed suit against the United States pursuant to the War Shipping Administration Act (WSAA) 185 and the Suits in Admiralty Act (SAA). 186 "Although the SAA does not contain an express discretionary function exception to its waiver of sovereign immunity," 187 the discretionary function exception of the FTCA is "implicit in private suits brought against the United States government under the Suits in Admiralty Act." 188

The court began its analysis with the Berkovitz/Gaubert two-prong test. It correctly inquired as to the nature of the decision to use detachable sea rails rather than the permanent sea rails recommended by the Maritime Administration (MARAD). 189 There

179. Id. at 896 n.6 (citing Gaubert, 499 U.S. at 334-38 (Scalia, J., concurring)).
180. Id. at 896-97.
181. Id. at 897.
182. Id. Although the court did not apply the discretionary function exception, it dismissed the action nonetheless because there was no analogous Tennessee law that provided a basis for finding that a private individual under like circumstances would owe a duty of care to the miners or their survivors, and the FTCA did not create a private cause of action for the government’s breach of the regulatory scheme. Id. at 904-05.
183. Baldassaro v. United States, 64 F.3d 206 (5th Cir. 1995).
184. Id. at 207.
187. Baldassara, 64 F.3d at 208.
188. Id. (citing Wiggins v. United States Through Dep’t of Army, 799 F.2d 962, 966 (5th Cir. 1986)).
189. Id. at 209.
was no evidence presented that the MARAD standards required sea rails to be attached permanently and thus the court found "the design for the bunks on board the vessel was a discretionary act for purposes" of the first prong of the Berkovitz/Gaubert test.\textsuperscript{190}

For the second prong, the court stated the appropriate inquiry to be "whether the act in question is 'susceptible to policy analysis'" but followed with the Gaubert presumption.\textsuperscript{191} Mr. Baldassaro argued that "policy considerations such as expense, appearance, safety, comfort, practicability and function are not social, economic, or political considerations of a governmental nature."\textsuperscript{192} The decision between detachable and permanent sea rails contained no policy consideration that Congress meant to protect by the discretionary function exception. Like the Sixth Circuit case in \textit{Myers}, the decision here was based on objective factors of safety, comfort, appearance, and expense. The Fifth Circuit rejected that proposition in favor of an insurmountable Gaubert presumption. The court stated the overbroad proposition "that almost any exercise of governmental discretion could be overly parsed so as to focus on minute details of sub-decisions to he point that any relationship to policy would appear too attenuated."\textsuperscript{193}

So if a plaintiff is to overcome the presumption they must look to the specific decision that caused the harm, and it is the underlying consideration of \textit{that} challenged decision that should be analyzed. The Fifth Circuit was satisfied that as long as a policy-based discretionary judgement was made at some point in time, the discretionary function exception would blanket all subsequent decisions. Like the Third Circuit in \textit{Fisher Bros. Sales, Inc.},\textsuperscript{194} the court focused its analysis on the wrong discretionary judgment. Here, the challenge was against the decision to use detachable hand rails, not on the broad decision to accept that particular vessel for the Ready Reserve Force component of the National Defense Reserve Fleet.\textsuperscript{195}

Mr. Baldassaro raised another important issue in making his claim. He claimed the decisions made by the manufacturer were

\begin{itemize}
  \item \textsuperscript{190} Id.
  \item \textsuperscript{191} Id. at 211 (quoting Gaubert, 499 U.S. at 325).
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} 46 F.3d 279 (3d Cir. 1995).
  \item \textsuperscript{195} Id. at 210.
\end{itemize}
not of a governmental nature. This claim related to another problem with the current application of the discretionary function exception—it applies to many decisions that are not governmental decisions.

The Court in Dalehite, when reviewing the legislative history of the FTCA, found that

while Congress desired to waive the Government’s immunity form actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature for function.

The House Report of the Congress that adopted the discretionary function exception stated it to be

a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of authorized activity, such as flood control or irrigation project, where no negligence on the part of any government agent is shown, and the only ground for the suit is the contention that the same conduct by a private individual would be tortious.

As the Dalehite Court correctly interpreted “[o]ne only need read s 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.” Thus, the discretionary function exception was intended to shield the Government form liability for acts conducted in furtherance of its uniquely governmental functions. When the United States, or its agents, is not acting in a core governmental role, it should not be able to assert the discretionary function exception. A better approach to the discretionary function exception would involve a three-prong inquiry: 1) does the challenged action involve a

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196. Id. at 211.
197. See Indian Towing Co., 350 U.S. at 66-68; Varig Airlines, 467 U.S. at 815, n.12; Berkovitz, 486 U.S. at 531.
200. Dalehite, 346 U.S. at 32 (emphasis added).
uniquely governmental function, (2) does the challenged action involve discretion, and (3) is the challenged action grounded in the policy considerations Congress intended to immunize from judicial second-guessing.\footnote{201}

The Court has expressly rejected this approach regarding a unique government function.\footnote{202} However, in each of these instances the Court rejected the argument when the Government attempted to use the idea of a "unique" or "core governmental function" as an offensive blanket avoidance of liability. In each case, the United States attempted to escape liability by claiming their actions were uniquely governmental. The Court responded to this aggressive argument by resounding "all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government."\footnote{203} In spite of these arguments, the threshold determination of whether the challenged action is uniquely governmental is necessary for the effective application of the discretionary function exception. Not all Government activity is uniquely governmental.

For example, in \textit{Jurzec v. American Motors Corp.}, the plaintiff sued the government after her husband died as a result of the rollover of a surplus jeep he had purchased from the Postal Service.\footnote{204} She asserted that the discretionary function exception did not apply because she was suing the Postal Service in the Service's capacity as a seller of jeeps, "a traditionally non-governmental role," rather than in its capacity as a regulator.\footnote{205} The court rejected the distinction between governmental and non-governmental operations based on the Supreme Court precedent.\footnote{206}

In \textit{Jurzec}, the Government did not attempt to use the discretionary function defense as an aggressive shield. Rather, Mrs. Jurzec asserted that because the Government did not act in a uniquely governmental role, it could not have made determinations based on social, economic, or political considerations when it sold her husband a defective jeep. It is only logical that such a

\footnote{201. The second and third prongs are the \textit{Berkovitz/Gaubert} test. These prongs should be analyzed with due regard for the position of the employee who made the discretionary decision, adhering to Justice Scalia's concurrence in \textit{Gaubert}.}

\footnote{202. \textit{See Indian Towing Co.}, 350 U.S. at 66-68; \textit{Varig Airlines}, 467 U.S. at 815, n.12; \textit{Berkovitz}, 486 U.S. at 531.}

\footnote{203. \textit{Indian Towing Co.}, 350 U.S. at 67.}

\footnote{204. \textit{Jurzec v. American Motors Corp.}, 856 F.2d 1116 (8th Cir. 1988).}

\footnote{205. \textit{Id.} at 1118.}

\footnote{206. \textit{Id.} at 1118.}
determination is made of the nature of the particular conduct involved in order to further Congress’ intent to protect against judicial second-guessing of policy determinations. There must be a underlying policy determination. If the Government is not acting in its role as a regulator, it will not be making policy determinations, consequently the judiciary would have nothing upon which to make a second guess.

In *Rothrock v. United States*\(^{207}\), the Seventh Circuit found the discretionary function exception applied where the Government was acting in its unique governmental role as regulator of the highways.\(^{208}\) Here, a motorist sued the United States seeking to recover for personal injuries he sustained in an accident allegedly caused by the absence of a guardrail on a bridge that was resurfaced with federal funds.\(^{209}\) Rothrock claims that under the FTCA, that the United States was liable because it failed to “ensure, as a condition of its funding decision, that the bridge was constructed in accordance with the safety standards it references for such decisions, including those adopted by the American Association of State Highway Traffic Officials.”\(^{210}\)

The court began its discussion with the *Berkovitz/Gaubert* test. The court found the applicable statute, the Federal Aid Highway Act,\(^{211}\) directs the Secretary of Transportation to formulate guidelines for the approval of projects “in the best overall public interest.”\(^{212}\) The statute lists a number of factors the Secretary is to consider when approving projects\(^{213}\) and the court found “the sheer number of factors involved suggests that Congress intended these decisions to be made as an exercise of judgment and choice.”\(^{214}\) Projects were to be approved based upon a totality of circumstances approach, involving both objective and subjective evaluations. The court reasoned “the statutes and regulations

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207. 62 F.3d 196 (7th Cir. 1995).
208. Id.
209. Id. at 197.
210. Id.
212. Rothrock, 62 F.3d at 199 (quoting 23 U.S.C. § 109(h)).
213. The court listed 5 factors in 23 U.S.C. §109(h): (1) air, noise, and water pollution; (2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services; (3) adverse employment effects, and tax and property value losses; (4) injurious displacement of people, businesses and farms; and (5) disruption of desirable community and regional growth.
214. Id.
themselves satisfy the first requirement for the discretionary function exception."²¹⁵

In its discussion of the second prong, the court began with the Gaubert presumption. However, it analyzed the government's decision on allocating federal funds. The court stated "[e]ven without Gaubert's presumption, this decision is explicitly subject to policy analysis under the statute and regulations."²¹⁶ The court went on to state the United States had a primary responsibility for maintenance of the road, and its decision on how to allocate funds in furtherance of that goal clearly involves the type of social, economic and political considerations the discretionary function exception is designed to shield.²¹⁷ By way of example, the allocation of federal funds is a core governmental function that the discretionary function should protect.

In the Eighth Circuit, although the court rejected the unique governmental function distinction in Jurzec, two subsequent decisions use language that is consistent with making such a threshold determination of whether a particular act or decision involved a unique governmental function. In Appley Bros. v. United States, farmers and grain elevators, who sold or stored grain at federally licensed grain warehouses, alleged negligent failure to follow specific agency regulations in inspecting the warehouses.²¹⁸ The plaintiffs argued that although the decision of the United States Department of Agriculture (USDA) to suspend a warehouse's license would be a discretionary function, the fact that agency policy required the inspectors to verify compliance with the regulations was not a decision grounded in social, economic, and political policy.²¹⁹ "Indeed, the failure was not one of policy choice; rather, it was 'a failure to effectuate policy choices already made.'"²²⁰ The policy choice by the USDA was a core governmental function, but the inspector's choice to overlook the violations of that policy was not an action of an employee exercising a unique governmental function. The inspector's duties were objective obligations, the negligent performance of which would cause the government to be

²¹⁵. Id.
²¹⁶. Id. at 200.
²¹⁷. Id.
²¹⁸. Appley Bros. v. United States, 7 F.3d 720 (8th Cir. 1993).
²¹⁹. Id. at 727.
²²⁰. Id. (quoting Camozzi v. Roland/Miller & Hope Consulting Group, 866 F.2d 287, 290 (9th Cir. 1989)). See Dube v. Pittsburgh Corning, 870 F.2d 790, 799 (1st Cir. 1989); Prescott v. United States, 959 F.2d 793, 799 (9th Cir. 1992); Collins v. United States, 783 F.2d 1225, 1229 (5th Cir. 1986).
liable as a private citizen in like circumstances under the FTCA.\textsuperscript{221}

In \textit{Tonelli v. United States}, postal patrons sued under the FTCA alleging that postal workers stole their mail from their post office box.\textsuperscript{222} When the patrons noticed mail "of an adult nature" had been opened and resealed, they reported the problem to a postal employee who, in turn, reported the problem to the postmaster.\textsuperscript{223} The postmaster, after an unmistakable delay, initiated a post office "sting" in which "the postal inspectors observed a postal employee . . . removing first class mail from the Tonelli's post office box, opening some of the mail and removing some of the pictures."\textsuperscript{224} The complaint alleged negligent hiring, negligent supervision, and retention of that particular postal worker.

The court, using the Berkovitz/Gaubert test, analyzed the claims discretely.\textsuperscript{225} With respect to the issues of negligent supervision and retention, the court stated "[i]ssues . . . generally involve the permissible exercise of policy judgment and fall within the discretionary function exception . . . [h]owever this action involves allegations that the post office failed to act when it had notice of illegal behavior."\textsuperscript{226} Thus, the "failure to act after notice . . . [would] not represent a choice based on plausible policy considerations."\textsuperscript{227} With respect to the alleged negligent hiring, "[t]he post office's choice between several potential employees involves the weighing of individual backgrounds, office diversity, experience, and employer intuition."\textsuperscript{228}

For the court to analyze a claim like the claim raised in \textit{Tonelli}, would require "judicial second-guessing" of the Government's decision to hire a particular employee.\textsuperscript{229} However, an analysis of a claim for failure to act upon receiving notice of illegal acts of an employee, like the one in \textit{Tonelli}, removes the Government from its core governmental function. This removal should allow the Government to be sued as a private individual under like circumstances. The government's actions within a unique

\begin{footnotes}
\item[221.] See \textit{Indian Towing Co.}, 350 U.S. 66-68.
\item[222.] \textit{Tonelli v. United States}, 60 F.3d 492 (8th Cir. 1995).
\item[223.] \textit{Id.} at 494.
\item[224.] \textit{Id.} The postal worker who pilfered the pictures resigned in lieu of termination about two weeks later.
\item[225.] \textit{Id.} at 496.
\item[226.] \textit{Id.}
\item[227.] \textit{Id.}
\item[228.] \textit{Id.}
\item[229.] \textit{Id.}
\end{footnotes}
governmental function are closely tied to the necessity for a policy-based discretionary decision, but the two should remain distinct factors for invoking the discretionary function exception.

The Ninth Circuit contains a plethora of discretionary function litigation. A cursory review of the more recent cases helps to define the term "unique governmental function." The introductory paragraph of this paper concerned Childers v. United States, the case involving a tragic hiking accident which resulted in the death of an 11-year old boy. The court found a discretionary function in the Government's decision regarding the maintenance and treatment of trails in Yellowstone National Park. Like the allocation of funds for road and highway maintenance, the allocation of federal funds for trail maintenance is a unique governmental function.

A closely analogous case shows that a uniquely governmental function is one that involves a matter of regulatory choice or judgment. In Faber v. United States, a diver sued the United States for its failure to warn of the existence of diving hazards in a national park. The court held "the use of the discretionary function exception must be limited to those unusual situations where the government was required to engage in broad, policy-making activities or to consider unique social, economic, and political circumstances in the course of making judgments." The court recognized that not every decision by the Government is a uniquely governmental decision. In this case, there was not a unique governmental function because the challenged conduct was the same as that of a private citizen who fails to take proper action to ensure the safety of visitors on its property and is thereby liable for negligence.

Faber can be reconciled with Childers. In Childers, the National Park Service had to make broad decisions regarding aesthetic values and environmental coherence, while in Faber, the employees of the United States Forest Service failed to follow specifically prescribed federal policy to warn of the danger of diving. The underlying policy decision of the development of a sign plan to

230. Childers, 40 F.3d at 973. See the earlier discussion in the introductory paragraph of this paper.
231. Id. at 974.
232. Faber v. United States, 56 F.3d 1122, 1124 (9th Cir. 1995).
233. Id. at 1123.
234. Id. at 1125 (emphasis added).
235. Id.
warn was a unique governmental function, but when the employees failed to follow specific guidelines in *Faber*, the first prong of the *Berkovitz/Gaubert* test was not met and thus the discretionary function exception did not apply to bar the diver's claim.  

Another example of a unique governmental function is the conduct of military investigators. Three different cases found a discretionary function existed while agents of the military performed investigations of alleged foul play, the negligent destruction of civilian aircraft on a military base, and the negligent maintenance of a river.

In *Sabow v. United States*, the unique governmental function was the investigation by the Naval Investigative Service (NIS) and the Office of the Judge Advocate General (JAG) regarding the death of a Marine Corps officer from a gunshot wound while under investigation for alleged misuse of military aircraft. The decisions by the NIS and the JAG are both grounded in unique considerations with social, economic, and political components. Thus, to escape the discretionary function exception bar, the Sabows needed to point to specific failures in following directives and show an investigator's decision was merely based on objective factors. Since they could not, the unique governmental function of military investigation met the two-pronged *Berkovitz/Gaubert* test and the suit was barred by the discretionary function exception.

In *Black Hills Aviation, Inc. v. United States*, the unique governmental function was the Army's decision regarding the scope of its investigation. The United States Army White Sands Missile Range is a highly controlled and secured military installation. The Army and the Department of Defense conducted a series of

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236. *Id.* at 1127. *See Valdez v. United States*, 56 F.3d 1177 (9th Cir. 1995) (Hiker brought negligence claim for injuries he sustained when he fell down the face of a waterfall in a national park, court held the discretionary function exception did bar the hiker's claim because the determinations made by the NPS involved the same unique government functions as in *Childers*.). *Blackburn v. United States*, 100 F.3d 1426 (9th Cir. 1996) (Diver sought to recover for injuries he suffered when he dove off a bridge due to the failure to warn and the negligent design and maintenance of the bridge itself but was barred by the discretionary function exception.).

237. *Sabow v. United States*, 93 F.3d 1445 (9th Cir. 1996)

238. *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968 (10th Cir. 1994).


241. *Id.* at 1453-54.

242. *Black Hills Aviation, Inc.*, 34 F.3d at 970.
ground-to-air missile tests and contracted with Black Hills Aviation, a privately owned civilian aviation company, for aerial fire suppression services in connection with these tests.\textsuperscript{243} During the flight, the Black Hills aircraft crashed on the missile range and both civilian pilots were killed.\textsuperscript{244}

The father of one of the pilots and the owner of the aircraft "requested access to the crash cite and was allowed the following:

(1) an overflight of the crash site . . .; (2) a visit to the crash cite . . . with . . . the Public Affairs Officer at the missile range . . .; (3) a visit to the crash cite . . . to disassemble the landing gear . . .; and (4) a visit to the crash cite area to pick up the wreckage that had been airlifted to a range road."\textsuperscript{245}

Neither the National Transportation Safety Board nor the Army Safety Center in Fort Rucker actually investigated the crash.\textsuperscript{246} The Army did not allow the plaintiff "to perform [his] own investigation of the undisturbed crash cite or participate in the Army's investigation."\textsuperscript{247} The plaintiff personally retained a team of "experts to conduct an analysis of the . . . debris," and they "found some evidence that an external force had affected [the flight before the] crash."\textsuperscript{248} The plaintiff believed the Army mistakenly shot down his son's flight and sued the Government for his son's wrongful death and the negligent destruction of the aircraft.\textsuperscript{249}

The court phrased the issue as "whether the discretion . . . [not to investigate] . . . is the kind that the discretionary function was designed to shield."\textsuperscript{250} The court held "the decisions made by the officers on the White Sands Missile Base concerning the . . . investigation of the crash . . . involved a trade-off between a more complete investigation into the cause of the crash and the resumption of important military missile tests."\textsuperscript{251} Military officers' decisions involved the unique function of government as protector and defender of the nation. As a unique government function, the decisions are then amenable to the \textit{Berkovitz/Gaubert} test to complete the determination of whether those decisions are discretion-
ary functions. Since the decisions were not made in violation of regulation and since they were "obviously decisions grounded in military policy which are not to be second-guessed by the courts," the court barred the claim through the discretionary function exception.252

In Tew v. United States, a man was killed while rafting when his raft capsized after passing an underwater structure.253 His mother brought a wrongful death suit alleging the Department of the Army Corps of Engineers was aware of the structure, but neither it nor the United States Coast Guard had placed any warning signs or markers on the river.254

The court fashioned the issue as "whether these alleged governmental duties fulfill the two requirements of the discretionary function exception."255 By so phrasing the issue, the Tenth Circuit regarded the duties of the Department of the Army Corps of Engineers and the United States Coast Guard as being uniquely governmental. The court went on to find the Corps had absolutely no duty to mark such structures and dismissed the claim.256 The Coast Guard's "power to mark obstructions . . . clearly involves an element of judgment or choice."257 Further, the Coast Guard's decision to leave the structure unmarked was grounded in economic and practicability policy decisions.258 Thus, along with Sabow and Black Hills, Tew shows clearly that considerations involving the function of the military are unique governmental functions.

Another analogous area of discretionary functions within the military is characterized by Crumpton v. Stone,259 where the wife of an Army officer who committed suicide brought an action based on the release of investigatory records relating to the officer.260 The release of the records allegedly caused the officer's wife great embarrassment and emotional distress.261 The court quickly dismissed the action due to the Army's unique role and "the discretion exercised by the Army in evaluating the [Freedom of

252. Id.
253. Tew, 86 F.3d 1003.
254. Id. at 1004.
255. Id. at 1005.
256. Id.
257. Id. at 1006
258. Id.
260. Id.
261. Id. at 1402.
Information Act] request [was] of the nature and quality that Congress intended to shield from tort liability." 262 The court stated such decisions by military officials to be "quintessential discretionary function[s]." 263 By example, therefore, it is apparent that any military agency decision involves a unique governmental function.

One additional problem with the current application of the discretionary function exception is characterized by the Eleventh Circuit in *Powers v. United States*. 264 Under the current operation, courts have refashioned the Berkovitz/Gaubert test to make it even more broadly applicable than it was before. In *Powers*, the plaintiffs were property owners who sued the United States for uninsured flood losses, "alleging that the Government had negligently failed to publicize the availability of federally subsidized flood insurance." 265 Although the court did not discuss it, the subsidizing of flood insurance would clearly be a unique governmental function. The court found the discretionary function exception protected the decision not to publicize the flood insurance. 266 In reaching that conclusion, the court relied on a refashioned model of the Berkovitz/Gaubert test, stated in the converse: "if a government official in performing his statutory duties must act without reliance upon a fixed or readily ascertainable standard, the decision he makes is discretionary and within the discretionary function exception." 267 Although this test tries merely to state the converse of the first prong of the Berkovitz/Gaubert test, it modifies the test to allow more discretionary function exceptions. By stating the test in this way, the court is able to add more equivocal words than are necessary to determine if the challenged action involved a matter of choice. 268

**IV. Conclusion**

Although the refurbishing of opinions handed down by the Supreme Court is unavoidable, it only enlarges the application of the discretionary function exception. Congress did not intend the

262. *Id.* (quoting Cope v. Scott, 45 F. 3d 445, 448 (D.C. Cir. 1995)).
263. *Id.* at 1406.
265. *Id.* at 1122.
266. *Id.* at 1123.
267. *Id.* at 1124 (emphasis added) (quoting Alabama Elec. Coop., Inc. v. United States, 769 F.2d 1523, 1529 (11th Cir. 1985)).
268. *Berkovitz*, 486 U.S. at 536 ("whether the action is a matter of choice for the acting employee").
exception to swallow the rule. The discretionary function exception is applied too often and with varying results. If a court is confused by the current test, it will make a decision on an \textit{ad hoc} basis, quoting only the most ambiguous and ambivalent language from \textit{Berkovitz} and \textit{Gaubert}. If a court understands the purpose of the discretionary function exception, it still has years of case law precedent with which to reach the answer it wants based on the particular facts in the case before it at the time.

If the Supreme Court should revisit the discretionary function exception, given the state of confusion and disorientation in the lower federal courts, it should restore Congress' true intent to make the federal government liable for its tortious actions as a private citizen in like circumstances, unless the employee is acting under a unique governmental function, makes a discretionary choice, and uses a policy-based judgment in making that decision. Then, and only then, should the decision be guarded by the discretionary function exception.

The determination of whether a challenged action is a unique governmental function is does not have a bright line answer. However the question is not amorphous. It requires a court to consider whether the social, economic, and political factors underlying the challenged conduct—those that involve the kinds of decisions Congress intended to shield—are in furtherance of a core governmental regulatory purpose. Therefore, when the employee is dedicated to a governmental function, his decisions may be shielded by the discretionary function exception. On the other hand, if that employee is not functioning in furtherance of a core governmental purpose, his decision should not be shielded by the discretionary function exception because Congress did not intend such decisions to be immunized.

V. AN IMPROVED TEST

To begin, a threshold determination must be made as to whether the discretionary choice involves a uniquely governmental function. If not, the discretionary function exception is not applicable. If the choice involves a unique governmental function, a court must consider whether the action is a matter of choice for the acting employee.\textsuperscript{269} If not, if the employee was under a mandatory directive to follow a specific course of action, the dis-

\textsuperscript{269} See \textit{Berkovitz}, 486 U.S. at 536; \textit{Gaubert} 499 U.S. at 327. This is the first prong of the Berkovitz/Gaubert test.
cretionary function exception is not applicable. If the challenged conduct involves an element of judgment, a court must determine whether that decision was based on considerations of public policy. 270 In making the Berkovitz/Gaubert two-prong inquiry, a court should take the level of the decision maker into account based on his/her responsibility for making a relevant policy judgment and that the subject matter of the decision is one that ought to be informed by policy considerations. 271

This test would sufficiently immunize the type of conduct Congress intended to shield when it fashioned the discretionary function exception while narrowing the applicability it as a blanket exception to the waiver of sovereign immunity. Although the Supreme Court has expressly rejected some of the contentions of this new test, upon reconsideration it may realize the overbreadth of the current test and the need to simplify and succinctly characterize the discretionary function exception.

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270. See Berkovitz, 486 U.S. at 536-37; Gaubert, 499 U.S. at 332. This is the second prong of the Berkovitz/Gaubert test.

271. Gaubert, 499 U.S. 315 (Scalia, J., concurring). This is the gist of Justice Scalia's concurrence in Gaubert—that the operational/planning level distinction should not be determinative of a discretionary function, but that the decisionmaker's level of employment is relevant to both prongs of the Berkovitz/Gaubert test.