

SOVEREIGN IMMUNITY OR: HOW THE FEDERAL GOVERNMENT LEARNED TO STOP WORRYING AND LOVE THE DISCRETIONARY FUNCTION EXCEPTION

Abstract: The doctrine of sovereign immunity generally bars suits against the federal government. The Federal Tort Claims Act, however, waives sovereign immunity for a broad class of tort claims against the United States. It contains several exceptions, including the discretionary function exception that precludes suit against the federal government if the underlying conduct involved individual judgment or choice. In 2021, in *Shivers v. United States*, the U.S. Court of Appeals for the Eleventh Circuit held that the discretionary function exception to the Federal Tort Claims Act applies even where the plaintiff alleges that the conduct at issue violated the U.S. Constitution. The Eleventh Circuit agreed with the Seventh Circuit and declined to permit a constitutional claims exclusion. In contrast, the First, Eighth, Ninth, and D.C. Circuits have each held that the discretionary function exception does not shield the United States from liability where the conduct at issue allegedly violates the Constitution. This Comment argues that the minority approach is correct because sovereign immunity doctrine indicates that courts should read any exception narrowly in favor of the federal government.

INTRODUCTION

When a person suffers an injury due to another person's negligent or wrongful conduct, tort law allows for the injured person to recover monetary damages from the negligent party.¹ When the wrongdoer is a federal government employee, however, the doctrine of sovereign immunity precludes suit against the United States, absent the federal government's consent.² Until the middle of the twentieth century, no broad statutory scheme waived sovereign immunity.³ In 1946, Congress enacted the Federal Tort Claims Act (FTCA) which gave federal courts jurisdiction over certain tort claims against the Unit-

¹ See *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a tort as a civil wrong that may result in monetary damages awarded to the plaintiff).

² See *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (explaining that the United States cannot be sued without its consent); *Sovereign Immunity*, BLACK'S LAW DICTIONARY, *supra* note 1 (defining sovereign immunity as the prohibition of lawsuits against a government absent its consent).

³ See Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331, 1332 (2000) (describing the absence of a general remedy for tort claims against the United States). For example, prior to a general waiver of sovereign immunity, if a federal employee negligently caused an automobile accident while acting within the scope of their employment, the injured person's only remedy was to go through the burdensome process of seeking compensation via a private bill of Congress. *Id.*

ed States.⁴ The FTCA provides several exceptions to the waiver of sovereign immunity, including the heavily litigated discretionary function exception that insulates the United States from liability where the federal employee exercised choice or judgment in pursuit of a policy objective.⁵ Federal courts disagree about the scope of the discretionary function exception, in particular whether it bars claims where the alleged conduct of the federal employee violated the Constitution.⁶ In 2021, in *Shivers v. United States*, the U.S. Court of Appeals for the Eleventh Circuit held that the discretionary function exception precludes suit against the United States even if the underlying discretionary act was allegedly unconstitutional.⁷

Part I of this Comment explains the history and purpose of the FTCA as well as the factual and procedural history of *Shivers*.⁸ Part II discusses the split among the U.S. Courts of Appeals concerning whether a plaintiff's allegation of a constitutional violation renders the discretionary function exception inapplicable.⁹ Finally, Part III argues that the approach of the U.S. Court of Appeals for the Seventh and Eleventh Circuits is correct because it is consistent with the U.S. Supreme Court's precedent on sovereign immunity and the text of the FTCA.¹⁰

I. SOVEREIGN IMMUNITY, THE FEDERAL TORT CLAIMS ACT, AND *SHIVERS V. UNITED STATES*

In 2021, in *Shivers v. United States*, the U.S. Court of Appeals for the Eleventh Circuit considered whether the FTCA's discretionary function excep-

⁴ Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.); see *infra* notes 19–29 and accompanying text (describing the history of the Federal Tort Claims Act (FTCA) and its application).

⁵ 28 U.S.C. § 2680(a); Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1494–95 (2019) (describing the FTCA's limits and exceptions); see *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991) (applying a two-part test to determine whether conduct is discretionary); see also *infra* note 6 (listing federal circuit court decisions pertaining to the discretionary function exception).

⁶ See, e.g., *Shivers v. United States*, 1 F.4th 924, 930 (11th Cir. 2021) (concluding that unconstitutional discretionary acts are within the discretionary function exception), *petition for cert. filed* (U.S. Nov. 5, 2021) (No. 21-682); *Loumiet v. United States*, 828 F.3d 935, 944 (D.C. Cir. 2016) (holding that the discretionary function exception does not protect allegedly unconstitutional acts); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (holding that unconstitutional conduct is not within the scope of the discretionary function exception); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (deciding that the discretionary function exception does not apply to alleged constitutional violations); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (finding that the constitutionality of an act impacts the discretionary function analysis and that fact investigations are required to determine whether a constitutional violation has occurred).

⁷ *Shivers*, 1 F.4th at 935.

⁸ See *infra* notes 11–46 and accompanying text.

⁹ See *infra* notes 47–80 and accompanying text.

¹⁰ See *infra* notes 81–92 **Error! Bookmark not defined.** and accompanying text.

tion applies where a plaintiff alleges a constitutional violation.¹¹ Part A of this Section provides an overview of the doctrine of sovereign immunity and the FTCA.¹² Part B discusses the factual and procedural history of *Shivers*.¹³

A. Sovereign Immunity and the Federal Tort Claims Act

The doctrine of sovereign immunity, which stems from British common law, protects federal and state governments from suit.¹⁴ Historically, the doctrine immunized the monarch from judicial process.¹⁵ In the United States, sovereign immunity precludes persons from suing the government without the government's consent.¹⁶ Suits against the United States require clear authorization from Congress, subject to the particular prescriptions and restrictions of the waiver.¹⁷ In 1996, in *Lane v. Pena*, the U.S. Supreme Court held that any waiver of sovereign immunity must be unequivocal, will not be implied, and will be construed stringently in favor of the government.¹⁸

The FTCA waives sovereign immunity and authorizes persons to sue the United States for money damages where a government employee, acting within the scope of their employment, caused an injury due to a "negligent or a wrongful act or omission" in "circumstances where the United States, if a private person, would be liable" according to the laws of the jurisdiction where the conduct occurred.¹⁹ Prior to its passage in 1946, the doctrine of sovereign immunity barred persons from suing the federal government for the torts of its

¹¹ 1 F.4th at 930; see Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (granting federal district courts exclusive jurisdiction over claims against the United States for the torts of federal employees); *id.* § 2680(a) (exempting liability 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").

¹² See *infra* notes 14–36 and accompanying text.

¹³ See *infra* notes 37–46 and accompanying text.

¹⁴ Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001). At least one scholar argues that the entire doctrine is incongruous with the U.S. Constitution and should be abolished. *Id.* at 1201–02; see *Sovereign Immunity*, BLACK'S LAW DICTIONARY, *supra* note 1 (defining sovereign immunity as the prohibition of lawsuits against a government absent its consent). The idea is that sovereign immunity conflicts with American principles of equality under the law. Chemerinsky, *supra*, at 1202. The contention is that the doctrine, derived from English common law, does not appear in the U.S. Constitution and violates constitutional principles such as government accountability and due process of law. *Id.* at 1205, 1210.

¹⁵ *Id.* at 1201. The legal community occasionally invokes the maxim "the king can do no wrong" to describe this principle. *Id.* at 1202.

¹⁶ See *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (stating that the inability of a plaintiff to sue the United States without its consent is "axiomatic").

¹⁷ See *Lane v. Pena*, 518 U.S. 187, 192 (1996) (examining prior case law to demonstrate that any waiver of sovereign immunity must be unambiguous); *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (stating that courts do not have jurisdiction over a claim against the United States unless authorized by Congress).

¹⁸ 518 U.S. at 192; see 28 U.S.C. § 1346(b)(1) (the FTCA).

¹⁹ § 1346(b)(1).

employees.²⁰ Even so, when federal employees were sued in their personal capacity for tortious conduct, the federal government routinely indemnified them or provided them with counsel.²¹ Otherwise, persons pursuing a judgment from the United States had to rely on Congress to award compensation through private bills.²² Congress took up hundreds of private bills every year.²³ Concerns about the fairness and efficacy of that process led Congress to pass the FTCA, thereby granting federal courts jurisdiction for claims against the United States that meet the requirements of the Act.²⁴

The FTCA carves out certain classes of tort claims for which the United States retains sovereign immunity.²⁵ Relevant to this Comment, the discretionary function exception absolves the federal government of liability for its employees' acts or omissions where the employee had discretion to pursue the particular course of action that led to the harm.²⁶ A discretionary act is one where the employee uses their own judgment to pursue a course of action, in contrast to conduct that a particular statute or regulation requires.²⁷ Conduct

²⁰ See *Brownback v. King*, 141 S. Ct. 740, 745 (2021) (explaining the compensation mechanism for tort claims against the United States prior to the FTCA).

²¹ See *id.* at 745–46 (analyzing the history of claims against the United States based on the tortious conduct of federal employees).

²² *Id.* at 746.

²³ *Id.* The private bill system was an inefficient method for dealing with tort claims against the United States because there were simply too many claims for Congress to adequately consider the merits. See Paul Figley, *Ethical Intersections & The Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347–48, 350–51 (2011) (discussing the history of the private bill system). Members of Congress were ill-equipped and lacked the time to consider the factual and legal underpinnings of every tort claim against the United States. *Id.* at 350–51.

²⁴ See *Brownback*, 141 S. Ct. at 746 (describing the history and purpose of the FTCA).

²⁵ See 28 U.S.C. § 2680 (providing certain exceptions to the FTCA); *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (explaining that liability of the federal government under the FTCA is subject to certain exceptions).

²⁶ See § 2680(a) (establishing the FTCA's discretionary function exception). Although the federal government is immune from suit, a person may nonetheless file a claim against the individual government employee. See *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619–20 (1912) (holding that sovereign immunity does not preclude suits against federal employees in their individual capacity). If a plaintiff obtains a judgment in an FTCA suit against the federal government, regardless of whether it is in their favor, they are precluded from then suing the individual employee. See 28 U.S.C. § 2676 (barring suits against individual federal employees where the claimant has already sued the federal government on the same facts). Plaintiffs may also sue federal employees in their individual capacity for alleged constitutional violations under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). The U.S. Supreme Court created *Bivens* claims to allow suits against individual federal employees for alleged violations of the U.S. Constitution. *Id.*

²⁷ See *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (finding that a discretionary act must involve individual choice or judgment). In *Berkovitz*, a two-month-old infant contracted polio after taking an oral dose of a polio vaccine. *Id.* at 533. The Division of Biologic Standards, operating under the National Institutes of Health, issued a license to the vaccine manufacturer without obtaining test data beforehand, in violation of specific regulatory and statutory directives. See *id.* at 542–43 (explaining that the agency violated 21 C.F.R. § 601.2 and 42 U.S.C. § 262, requiring the receipt of test data before the agency issues a license). The Court reasoned that because the employee's act contra-

mandated by a particular statute or regulation is not discretionary because the employee must adhere to the prescribed course of conduct.²⁸ The rationale is that courts should avoid using tort actions as a vehicle for questioning administrative and legislative choices based on political, social, and economic policy considerations.²⁹

In 1988, in *Berkovitz v. United States*, the Supreme Court considered whether the FTCA's discretionary function exception applied where an infant took an oral polio vaccine that was allegedly improperly approved.³⁰ Reasoning that the regulators' approval contravened a specific policy, the Supreme Court held that the discretionary function exception did not bar suit.³¹ The *Berkovitz* Court established a two-step framework for determining whether the discretionary function exception applies.³² Courts must first consider whether the conduct at issue involved choice or judgment on the part of the employee and then determine whether the judgment made was the type that the exception was meant to protect.³³ For the exception to apply, the employee's choice must be based in public policy considerations, meaning that they contemplated the social, economic, and/or safety effects of their decision.³⁴

Three years later, in 1991, in *United States v. Gaubert*, the Supreme Court affirmed the approach that it established in *Berkovitz*.³⁵ Importantly, courts

vened a specific federal legal mandate, the discretionary function exception did not bar the plaintiff's case. *Id.* at 543.

²⁸ *Id.* at 544.

²⁹ See *id.* at 536–37 (quoting *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) to support the proposition that courts should not use tort actions to second-guess administrative decisions rooted in public policy).

³⁰ *Id.* at 533.

³¹ *Id.* at 542–43. The agency failed to examine the vaccine to ensure regulatory compliance, contrary to its legal obligations. *Id.* at 544. The Court reasoned that the FTCA's discretionary function exception did not apply because the agency violated a compulsory mandate. *Id.*

³² See *id.* at 536–37 (deciding that the exception applies where the employee (1) exercised discretion and (2) was motivated by policy concerns); see also *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991) (applying the *Berkovitz* test).

³³ See *Gaubert*, 499 U.S. at 322–23 (describing the *Berkovitz* test as the proper method for determining whether the discretionary function exception applies); *Berkovitz*, 486 U.S. at 536–37 (establishing the two-part test for determining whether conduct is discretionary and thereby subject to the discretionary function exception).

³⁴ See *Gaubert*, 499 U.S. at 322–23 (holding that the FTCA's discretionary function exception protects government actions grounded in policy considerations); *Berkovitz*, 486 U.S. at 537 (noting that discretion exists wherever the law permits the employee to exercise their individual choice or judgment).

³⁵ See *Gaubert*, 499 U.S. at 322–23 (reiterating that courts must examine whether (1) the challenged conduct was discretionary and (2) whether the action or decision was rooted in public policy to determine whether the discretionary function exception applies). In *Gaubert*, the chairman of a thrift institution claimed that the Federal Home Loan Bank Board was negligent in its supervision of the institution and that the Board's negligence caused the value of the thrift institution's shares to decline. *Id.* at 318–19, 320. The Court decided that the discretionary function exception applied and thereby shielded the government from suit because the regulators were free to choose their method of supervi-

may presume that discretionary acts are driven by public policy, even if the employee did not actually consider the policy implications of their conduct.³⁶

B. The Factual and Procedural History of Shivers v. United States

On September 3, 2015, Marvin Dodson attacked Mackie Shivers Jr.³⁷ The two men were inmates at United States Penitentiary Coleman II, where they shared a cell.³⁸ While Shivers was asleep, Dodson stabbed him in the eye with a pair of scissors, permanently blinding Shivers in his right eye.³⁹ In April 2016, Shivers filed a pro se complaint against the United States under the FTCA and against five prison employees under *Bivens*.⁴⁰ Shivers alleged that the prison officials negligently decided to make Dodson his cellmate and that their decision violated his Eighth Amendment rights because the prison officials knew of Dodson's violent tendencies and hostility towards prior cellmates.⁴¹

The district court dismissed Shivers' *Bivens* claim without prejudice for failing to exhaust his administrative remedies.⁴² The court then dismissed the

sion. *Id.* at 328–29, 332. The Court determined that the Board's day-to-day oversight of the bank was discretionary and thus subject to the discretionary function exception because the conduct at issue involved the regulators' individual judgment. *Id.* at 325.

³⁶ See *id.* at 324 (deciding that a regulation permitting employee discretion creates an inference that the employee considered public policy). If the discretionary act is within the bounds of the applicable regulation, it is presumed to be grounded in public policy. *Id.* Accordingly, if the first prong is met then the plaintiff bears the burden of showing that the act did *not* involve public policy considerations. *Id.*; see *Compart's Boar Store, Inc. v. United States*, 829 F.3d 600, 605 (8th Cir. 2016) (noting that an employee exercising discretion permitted by a regulatory scheme is presumed to weigh the same public policy considerations that motivated the creation of the scheme).

³⁷ Additional Brief of Appellant Mackie L. Shivers Jr. at 2, *Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021), No. 17-12493-DD [hereinafter Appellant Brief]. There was a significant age difference between the cellmates; Shivers was sixty-four, Dodson was twenty-six. *Id.* Shivers alleges that Dodson was acting erratically in the days leading up to the attack and that he made prison officials aware of the apparent threat to his safety. *Id.*

³⁸ *Id.*

³⁹ *Shivers*, 1 F.4th at 927. Shivers and Dodson were both in prison for non-violent drug offenses and had been cellmates for eight months prior to the attack. *Id.*

⁴⁰ *Id.*; Appellant Brief, *supra* note 37, at 7. The Seventh Circuit noted that the Supreme Court created *Bivens* claims against individual federal employees in part because the FTCA does not apply to alleged constitutional violations. *Linder v. United States*, 937 F.3d 1087, 1090 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 159 (2020); see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing a cause of action against federal employees for alleged constitutional violations).

⁴¹ *Shivers*, 1 F.4th at 927.

⁴² *Id.* The Prison Litigation Reform Act (PLRA) requires federal inmates to exhaust all available administrative remedies before bringing a court action. *Id.* at 935–36; see 42 U.S.C. § 1997e(a) (requiring prisoners to exhaust all available administrative remedies before bringing suit in federal court). Shivers claimed that he had properly submitted the four required forms, but Bureau of Prison records only showed submission of the first three. *Shivers*, 1 F.4th at 927. Another inmate, Gordon Reid, assisted Shivers with filling out the forms required to pursue his administrative remedies. *Id.* at 927. The government introduced records from the federal Bureau of Prison's document retrieval system showing that it did not receive the fourth and final form. *Id.* at 936.

FTCA claim because it determined that the discretionary function exception barred the suit.⁴³ Shivers appealed the decision, arguing that the FTCA's discretionary function exception did not bar his claim because the conduct at issue was not merely tortious, but unconstitutional.⁴⁴ The Eleventh Circuit affirmed, reasoning that inmate housing decisions are left to the discretion of prison officials and that there is no "constitutional-claims exclusion" to the FTCA's discretionary function exception.⁴⁵ The court reasoned that the FTCA creates a cause of action for tortious conduct arising under state law and provides no remedy for injuries under the U.S. Constitution.⁴⁶

II. THE CIRCUIT SPLIT REGARDING ALLEGED CONSTITUTIONAL VIOLATIONS AND THE FTCA'S DISCRETIONARY FUNCTION EXCEPTION

In 1972, in *Kiiskila v. United States*, the U.S. Court of Appeals for the Seventh Circuit held that the discretionary act of a federal employee, albeit unconstitutional, exempted the United States from liability under the FTCA.⁴⁷ Since then, the U.S. Court of Appeals for the First, Eighth, Ninth, Eleventh, and D.C. Circuits have all considered whether the discretionary function exception precludes suit against the United States where the underlying conduct was unconstitutional.⁴⁸ Section A of this Part examines the majority of federal appeals courts' approach.⁴⁹ Section B discusses the Seventh Circuit's approach.⁵⁰ Section C discusses the Eleventh Circuit's decision in *Shivers v. United States*, which adopted the Seventh Circuit's reasoning.⁵¹

⁴³ *Id.* at 935; see 28 U.S.C. § 2680(a) (the FTCA's discretionary function exception).

⁴⁴ Appellant Brief, *supra* note 37, at 9; see U.S. CONST. amend. VIII (prohibiting the government from imposing "cruel and unusual punishments"). The court explained that for Shivers to state a valid FTCA claim he would need to assert a negligence claim under state law. *Shivers*, 1 F.4th at 934. To state an Eighth Amendment claim, he would need to show that prison officials behaved with "deliberate indifference" regarding a "known substantial risk of serious harm" towards him. *Id.* at 934 n.7.

⁴⁵ *Id.* at 928–30.

⁴⁶ *Id.* at 928; see 28 U.S.C. § 1346(b)(1) (the FTCA).

⁴⁷ See 466 F.2d 626, 627–28 (7th Cir. 1972) (holding that because the government employee exercised discretion, the discretionary function exception barred plaintiff's claim against the United States notwithstanding a finding that the act violated the U.S. Constitution).

⁴⁸ See *Loumiet v. United States*, 828 F.3d 935, 944 (D.C. Cir. 2016) (holding that the discretionary function exception does not protect allegedly unconstitutional acts); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (same); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (same); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (same). *But see Shivers*, 1 F.4th at 930 (11th Cir. 2021) (concluding that unconstitutional discretionary acts are within the scope of the discretionary function exception and thus bars suit).

⁴⁹ See *infra* notes 52–63 and accompanying text.

⁵⁰ See *infra* notes 64–73 and accompanying text.

⁵¹ See *infra* notes 74–80 and accompanying text.

A. The Majority View of the U.S. Courts of Appeals

In deciding whether an alleged constitutional violation falls within the scope of the discretionary function exception, the majority of circuit courts hold that such an act is outside the exception and thus the federal government may be held liable.⁵²

In 2000, in *Nurse v. United States*, the Ninth Circuit considered a case where the plaintiff alleged that U.S. Customs Service agents illegally stopped and searched her while she travelled from Vancouver, Canada to Los Angeles, California.⁵³ She alleged that the government had crafted and instituted training policies for its agents that violated the U.S. Constitution and resulted in her unlawful arrest.⁵⁴ Applying the two-step test that the Supreme Court adopted in *Berkovitz v. United States*, the Ninth Circuit first found that the supervision and training of officers, as well as the creation and implementation of procedures, constituted discretionary acts.⁵⁵ Notably, where a federal employee is permitted to use discretion, courts presume that the decision is imbued with policy analysis, regardless of whether the act was in fact motivated by policy.⁵⁶ The court explained that although the officials' acts normally fell within the discretionary function exception, the allegation of a constitutional violation mandated further proceedings to determine whether the officials exceeded the scope of their discretion.⁵⁷ By deciding that the discretionary function exception did not protect the United States from claims involving alleged constitutional vio-

⁵² See, e.g., *Loumiet*, 828 F.3d at 944 (concluding that the discretionary function exception does not cover acts that violate the Constitution); *Limone*, 579 F.3d at 102 (same); *Raz*, 343 F.3d at 948 (same); *Nurse*, 226 F.3d at 1002 (same).

⁵³ *Nurse*, 226 F.3d at 999. Plaintiff was stopped at the airport in Vancouver, and again at the airport in Los Angeles. *Id.* They alleged that both seizures were without probable cause and based on race. *Id.*

⁵⁴ *Id.* at 1002. The court permitted the plaintiff's claims against the United States based on the conduct of the arresting officers to proceed reasoning that the law enforcement proviso authorized them. *Id.*; see 28 U.S.C. § 2680(h) (the FTCA's law enforcement proviso). The proviso authorizes suit against the United States based on some intentional torts committed by federal law enforcement or investigative officers. § 2680(h). Congress adopted the proviso in 1974 following public constitutional violations by law enforcement officers. See *Nguyen v. United States*, 556 F.3d 1244, 1254–55 (11th Cir. 2009) (describing widely-publicized warrantless raids on the houses of innocent people based on faulty information as the reason Congress adopted the proviso). The proviso renders the federal government liable even where the underlying conduct was discretionary. § 2680(h); *Nguyen*, 556 F.3d at 1256–57. The court did not consider the law enforcement proviso in *Shivers*. See generally 1 F.4th 924 (11th Cir. 2021) (never mentioning the proviso).

⁵⁵ See *Nurse*, 226 F.3d at 1001–02 (noting that the FTCA's discretionary function exception generally shields the United States from liability for such acts); *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (establishing the two-part test for deciding whether conduct is discretionary under the FTCA's discretionary function exception).

⁵⁶ See *Nurse*, 226 F.3d at 1001 (stating that courts presume discretionary acts are based on policy considerations).

⁵⁷ *Id.* at 1002. The court decided that the question of whether the defendants violated the U.S. Constitution could not be answered at the motion to dismiss stage. *Id.*

lations, the Ninth Circuit endorsed the proposition that the U.S. Constitution is a limit on the otherwise permissible choices of federal officials.⁵⁸

Similarly, in 2016, in *Loumiet v. United States*, the D.C. Circuit decided that the FTCA's discretionary function exception does not immunize the United States from suit where a federal actor allegedly violates the constitution.⁵⁹ The plaintiff argued that the Office of Comptroller and Currency's prosecution of him constituted retaliation and violated his First and Fifth Amendment rights.⁶⁰ The court recognized that a prosecutorial decision is the classic example of a discretionary function even where there is scant evidence in favor of the proceeding.⁶¹ The court also recognized that liability under the FTCA necessarily flows from an alleged violation of state law.⁶² Nevertheless, the court held that the plausible allegation of a constitutional violation related to the discretionary conduct at issue in a plaintiff's FTCA claim allows that plaintiff to vitiate the discretionary function exception and proceed against the United States for tortious acts under state law.⁶³

⁵⁸ See *id.* at 1002 n.2 (holding only that the discretionary function exception does not apply where the underlying conduct is allegedly unconstitutional). In 2003, in *Raz v. United States*, the Eighth Circuit relied on similar reasoning to the court in *Nurse*. See *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (reasoning that federal employees lack discretion to violate the Constitution). The plaintiff in *Raz*, a former Israeli citizen, claimed that the FBI surveilled and harassed him for fifteen years because of his opinions about Middle Eastern politics. *Id.* at 947. The court held that the FTCA's discretionary function exception did not prohibit suit because the plaintiff alleged that the surveillance violated his First and Fourth Amendment rights. *Id.* at 948. The court reasoned that the discretionary function exception does not apply where a plaintiff alleges unconstitutional acts because federal employees do not have discretion to violate the Constitution. See *id.* (reasoning that federal employees lack discretion to commit constitutional violations).

⁵⁹ 828 F.3d 935, 944 (D.C. Cir. 2016).

⁶⁰ *Id.* at 938. A bank hired Loumiet and other attorneys to represent it during an investigation of securities fraud by the Office of Comptroller and Currency (OCC). *Id.* at 939. Eventually, the OCC closed the bank and initiated a proceeding against Loumiet that resulted in a three-week trial where the OCC dropped all charges. *Id.* at 938. An appeals court later found that the charges were not "substantially justified." *Id.* at 938–39. Loumiet then filed suit against the United States under the FTCA and initiated a *Bivens* claim against the individual government actors for retaliatory prosecution. *Id.* at 939–40; see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing a cause of action against federal employees for alleged constitutional violations).

⁶¹ *Loumiet*, 828 F.3d at 940. Prosecutorial decisions involve determining policy goals in light of scarce agency resources, making it the type of decision that Congress aimed to shield from liability under the discretionary function exception. *Id.* at 942; see *Berkovitz v. United States*, 486 U.S. 531, 537 (1988) (stating that the discretionary function exception protects government actions grounded in public policy).

⁶² *Loumiet*, 828 F.3d at 945–46; see 28 U.S.C. § 1346(b)(1) (establishing liability for the United States according to the law of the state where the alleged conduct occurred).

⁶³ *Loumiet*, 828 F.3d at 946. The court remanded the case to the district court for a factual finding of the plausibility of Loumiet's allegations of unconstitutional conduct, in which case the discretionary function exception would not apply. *Id.* Similarly, in 2009, in *Limone v. United States*, the First Circuit held that the discretionary function exception does not shield government actors who violate the U.S. Constitution in the course of a discretionary act. See 579 F.3d 79, 102 (1st Cir. 2009) (finding unconstitutional conduct outside the scope of the discretionary function exception). In *Limone*, the

B. The Seventh Circuit's Approach

In 1972, in *Kiiskila v. United States*, the Seventh Circuit held that a federal employee's exercise of discretion, even if "constitutionally repugnant," precluded liability of the United States under the FTCA.⁶⁴ The court decided that the officer in charge of a military base had the discretion to prevent people from entering the base and did not violate any prescription when he barred the plaintiff from entering.⁶⁵ Under this conception, the discretionary function exception prevents a waiver of sovereign immunity even where the discretion at issue is improperly or negligently abused.⁶⁶ Because the officer utilized discretion in applying the regulation permitting him to exclude parties from the base, the court held that the government was not liable.⁶⁷

Similarly, in 2019, in *Linder v. United States*, the Seventh Circuit determined that whether conduct is unconstitutional is irrelevant under the FTCA.⁶⁸ Accord-

plaintiffs sued the United States alleging that FBI agents had supplied a witness for a criminal case against them and that the agents knew of information that undercut the testimony. *Id.* at 83. The agents informed the state prosecutor that the witness's story "checked out" despite having information to the contrary. *Id.* at 85–86. According to the court, allegations of unconstitutional conduct cannot serve as the substance of a plaintiff's FTCA claim but instead serve only to negate the use of the discretionary function exception as an avoidance of liability. *See id.* at 102 n.13 (noting that the cause of action established by the FTCA does not stem from constitutional offenses). Considering the two-step *Berkovitz* framework, the court explained that the discretionary function exception does not protect conduct contrary to prescribed regulation or federal statute. *Id.* at 101. Because the district court had already concluded that the underlying conduct offended the Constitution, the circuit court only needed to decide whether the unconstitutional conduct fell within the discretionary function exception. *Id.* The circuit court concluded that unconstitutional conduct is not discretionary and thus the discretionary function exception did not bar suit. *Id.* at 102.

⁶⁴ 466 F.2d 626, 627–28 (7th Cir. 1972). There, an army colonel excluded the plaintiff from a base where she held a civilian job at a credit union. *Id.* at 626–27. The colonel responded that she had violated a military regulation prohibiting political demonstrations on the base. *Id.* at 627. The Seventh Circuit held that he used his discretion as a commanding officer to permanently exclude her from the base. *Id.* at 627–28 & 627 n.2. It noted that the exclusion violated the First Amendment but nevertheless ruled that the FTCA's discretionary function exception barred suit against the United States because the colonel exercised independent judgment. *Id.* at 627–28.

⁶⁵ *Id.* at 628.

⁶⁶ *See id.* (noting that 28 U.S.C. § 2680(a) permits abuse of discretion and does not waive sovereign immunity); *see* § 2680(a) (carving out an exception to the FTCA for discretionary conduct even where the government actor abuses their discretion).

⁶⁷ *Kiiskila*, 466 F.2d at 628.

⁶⁸ 937 F.3d 1087, 1090 (7th Cir. 2019), *cert. denied*, 141 S. Ct 159 (2020). In *Linder*, the U.S. Marshal Service placed a deputy on leave while it investigated him for allegedly punching the father of a fugitive in the face. *Id.* at 1088. Marshal McPherson, Linder's supervisor, instructed other deputies not to speak with Linder or his attorneys without the U.S. Marshal's permission. *Id.* The district court found that McPherson violated Linder's Fifth and Sixth Amendment rights. *United States v. Linder*, No. 12 CR 22, 2013 WL 812382, at *52 (N.D. Ill. Mar. 5, 2013); *see* U.S. CONST. amend. V (preventing the government from improperly interfering with a criminal defendant's defense); U.S. CONST. amend. VI (guaranteeing the right of a criminal defendant to confront witnesses without concern for government reprisal against the witnesses). The Seventh Circuit held that the Marshal in charge exercised discretion in deciding how the deputies could communicate with the plaintiff and

ing to the court, the FTCA creates liability where there are allegations of state law torts, but does not create a cause of action for constitutional violations.⁶⁹ The court further observed that the FTCA grants jurisdiction in circumstances where the federal government would be liable for the conduct only where a private person would be liable.⁷⁰ Because the U.S. Constitution does not generally constrain the conduct of private parties, the court reasoned that a tort claim resting on an alleged constitutional violation has no place under the FTCA.⁷¹ It ultimately found that the federal actor used discretion and that their judgment was grounded in public policy.⁷² Therefore the discretionary function exception applied to the conduct without regard to plaintiff's constitutional theory.⁷³

C. The Eleventh Circuit's Decision in *Shivers v. United States*

In 2021, in *Shivers v. United States*, the Eleventh Circuit decided that allegations of constitutional violations do not invoke the FTCA's waiver of sovereign immunity as long as the underlying conduct was discretionary, thereby barring suit against the United States.⁷⁴ The court held that the two-step inquiry established in *Berkovitz v. United States* is the beginning and end of the analysis.⁷⁵ It explained that where the conduct at issue involved legitimate discretion and was grounded in public policy, it is irrelevant whether the discretion was exercised in violation of the plaintiff's constitutional rights.⁷⁶ The court further explained that discretion is absent where federal law specifically prescribes a course of action for the federal employee because the employee has no choice but to follow the prescription.⁷⁷ The Eighth Amendment does not

therefore concluded that the discretionary function exception barred Linder's suit against the United States. *Linder*, 937 F.3d at 1090.

⁶⁹ *Id.* at 1090.

⁷⁰ *Id.*; see 28 U.S.C. § 1346(b)(1) (the FTCA).

⁷¹ See *Linder*, 937 F.3d at 1090 (stating that the FTCA applies to torts under state law, not to constitutional violations).

⁷² *Id.* at 1089–90. The court explained that the U.S. Marshal could choose how personnel interacted with Linder, and that his choice was rooted in a policy of limiting organizational strife. *Id.* at 1090.

⁷³ See *id.* at 1091 (stating that the discretionary function exception does not prevent liability for some discretionary acts while allowing it for others) (emphasis added).

⁷⁴ 1 F.4th 924, 935 (11th Cir. 2021), *petition for cert. filed* (U.S. Nov. 5, 2021) (No. 21-682).

⁷⁵ See *id.* at 930 (noting that the language of the discretionary function exception is unambiguous and unqualified); see also *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991) (affirming that *Berkovitz* established the proper framework for determining whether government conduct fits within the discretionary function exception); *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (stating that discretionary conduct involves an element of choice and that protected discretion must be grounded in public policy considerations).

⁷⁶ *Shivers*, 1 F.4th at 931.

⁷⁷ See *id.* (stating that the discretionary function exception applies unless the conduct is contrary to the specific prescription of a federal statute, regulation, or policy); see also *Berkovitz*, 486 U.S. at 536 (stating that a federal employee does not use discretion when they contravene a federal directive).

contain specific prescriptions regarding the housing placement of inmates.⁷⁸ Therefore, the discretionary function exception protects prison officials' decisions on prisoner housing assignments.⁷⁹ The court acknowledged the circuit split on this issue and sided with the Seventh Circuit.⁸⁰

III. THE MINORITY APPROACH IS CORRECT BECAUSE IT ALIGNS WITH THE FTCA'S TEXT

The text of the FTCA as well as U.S. Supreme Court precedent support the Seventh and Eleventh Circuits' interpretation that no constitutional claim exclusion to the discretionary function exception exists.⁸¹ The doctrine of sovereign immunity precludes suits against the United States without the explicit consent of the federal government.⁸² In enacting the FTCA, Congress waived sovereign immunity for certain causes of action, while carving out some exemptions.⁸³

The proper reading of the discretionary function exception is to limit the judicial inquiry to whether the conduct at issue was discretionary, not whether

In *Shivers*, the court followed Eleventh Circuit precedent that inmate-housing placement decisions are discretionary. 1 F.4th at 929; see *Cohen v. United States*, 151 F.3d 1338, 1345 (11th Cir. 1998) (concluding that prisoner placement and classification decisions are discretionary).

⁷⁸ See U.S. CONST. amend. VIII (preventing the government from imposing "cruel and unusual punishments"); *Shivers*, 1 F.4th at 931 (stating that the Eighth Amendment does not direct prison officials regarding housing placements). The court also noted a plaintiff would need to satisfy a different standard if it recognized a constitutional claims exclusion. *Shivers*, 1 F.4th at 934. To show a violation of the Eighth Amendment, *Shivers* would need to prove that prison employees acted subjectively with a "deliberate indifference to a known substantial risk of serious harm" towards him. *Id.* at 934 n.7.

⁷⁹ *Shivers*, 1 F.4th at 933 n.5.

⁸⁰ *Id.*; see *Linder v. United States*, 937 F.3d 1087, 1090 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 159 (2020) (holding that the FTCA's discretionary function exception precludes suit against the United States even where the conduct at issue was unconstitutional).

⁸¹ See 28 U.S.C. § 1346(b)(1) (the FTCA); *id.* § 2680(a) (the FTCA's discretionary function exception); *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (stating that the federal government has not consented to be sued for constitutional torts under the FTCA); *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991) (stating that the discretionary function exception serves to prevent second-guessing by the judiciary of policy-driven decisions); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (finding that conduct is not discretionary where it is contrary to *specifically prescribed* conduct) (emphasis added); *Shivers*, 1 F.4th at 931, 933 (deciding that the discretionary function exception shields the government from liability even where the discretionary conduct is allegedly unconstitutional and further, that the Eighth Amendment does not specifically prescribe a method of inmate housing); *Linder*, 937 F.3d at 1090 (stating that the constitutionality of the conduct at issue is irrelevant for analysis of the discretionary function exception).

⁸² *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

⁸³ See § 1346(b)(1) (granting district courts jurisdiction over civil claims against the United States for tortious conduct in circumstances where a private person would be liable to the plaintiff under the state law where the conduct occurred); § 2680(a) (exempting the United States from liability where a federal employee performed a discretionary function, regardless if the discretion was abused); see also *United States v. Muniz*, 374 U.S. 150, 163 (1963) (noting that Congress intended the discretionary function exception to prevent liability that would unduly hamper government action); *Calderon v. United States*, 123 F.3d 947, 948 (7th Cir. 1997) (stating that the waiver of immunity by the FTCA is "far from absolute").

the conduct was unconstitutional.⁸⁴ Permitting a constitutional claims exclusion would create a backdoor around sovereign immunity that is anathema to the purpose of the discretionary function exception.⁸⁵ In allowing the exclusion, some courts have stated that federal employees do not have discretion to violate the Constitution.⁸⁶ This misconstrues the inquiry required by the Supreme Court in *Berkovitz v. United States* concerning the discretionary function exception and allows plaintiffs to proceed with otherwise barred suits merely by alleging that conduct was unconstitutional.⁸⁷

The FTCA does not protect the federal government from claims of unconstitutional conduct; rather, sovereign immunity protects the government from claims of unconstitutional conduct.⁸⁸ The FTCA operates as a limited waiver of sovereign immunity for state law tort claims.⁸⁹ In practice, a constitutional claims exclusion would involve an unwarranted expenditure of scarce judicial resources and raise significant concerns regarding separation of powers.⁹⁰

⁸⁴ See *Varig Airlines*, 467 U.S. 797, 813 (1984) (stating that the application of the discretionary function exception depends on the conduct at issue); *Shivers*, 1 F.4th at 930 (reasoning that discretionary conduct triggers the discretionary function exception even if the conduct is allegedly unconstitutional).

⁸⁵ See *Varig Airlines*, 467 U.S. at 808 (describing the discretionary function exception as a balance between imposing tort liability on the federal government and protecting a class of discretionary government activity from suit); Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1309–10 (2002) (discussing the rationale for the discretionary function exception, specifically the impact of potential liability on government behavior and the societal costs of involving the government in litigation). Absent the exception, government actors might eschew policy-based decision-making in favor of a path that does not result in liability. Niles, *supra* at 1309. Further, the discretionary function exception aims to avoid the expenditure of resources that accompanies civil litigation against the government and that the public bears. *Id.* at 1310.

⁸⁶ See, e.g., *Loumiet v. United States*, 828 F.3d 935, 944 (D.C. Cir. 2016) (explaining that the government lacks discretion to violate the Constitution); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (same); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (same).

⁸⁷ See *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (establishing a two-part test for whether the discretionary function exception applies); *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991) (applying the *Berkovitz* test by asking whether the conduct involved choice or judgment and whether it was motivated by public policy considerations). If a federal employee is permitted to use their own judgment, there is a presumption that the conduct involved considerations of public policy. *Gaubert*, 499 U.S. at 324; see *Buckler v. United States*, 919 F.3d 1038, 1045 (8th Cir. 2019) (noting that the decision-making process need only be *susceptible* to considerations of policy, but that the defendant need not actually have considered the policy implications of their conduct); see also *Castro v. United States*, 560 F.3d 381, 394 (5th Cir. 2009) (Smith, J., dissenting) (reasoning that a constitutional claims exclusion would allow a plaintiff to subject the United States to liability for constitutional torts, contrary to the U.S. Supreme Court holding in *Meyer*), *rev’d en banc*, 608 F.3d 266 (5th Cir. 2010).

⁸⁸ See *Meyer*, 510 U.S. at 478 (stating that the United States has not consented to liability for the constitutional torts of its employees).

⁸⁹ *Raplee v. United States*, 842 F.3d 328, 331 (4th Cir. 2016) (noting that liability of the United States depends on state substantive law where the tort occurred); see 28 U.S.C. § 1346 (the FTCA).

⁹⁰ See *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (noting that judicial resources are scarce); *Holland v. Florida*, 560 U.S. 631, 658 (2010) (same); see also Niles, *supra* note 85, at 1312–13 (ex-

Courts are circumscribed in their ability to expand the federal government's waiver of sovereign immunity.⁹¹ Pushing the limits of the FTCA goes beyond the weight of precedent and the proper interpretation of the statute.⁹²

CONCLUSION

In 2021, in *Shivers v. United States*, the U.S. Court of Appeals for the Eleventh Circuit held that there is no constitutional claims exclusion to the FTCA's discretionary function exception. The decision is correct because it properly construed the role of the judiciary in interpreting the exception. To apply the exception, it is preferable that courts limit their investigation to the two-part test established in *Berkovitz v. United States*. In doing so, courts adhere to precedent and avoid an overreaching interpretation of the FTCA's waiver of sovereign immunity.

TRISTEN RODGERS

pressing a concern for judicial questioning of government policy decisions). There are formal concerns of judicial intervention because courts are not accountable to the public, and practical concerns about the capacity of courts to adequately consider the policy justifications and implications of a course of conduct. See Niles, *supra* note 85, at 1312, 1313–14.

⁹¹ See *Lane v. Pena*, 518 U.S. 187, 192 (1996) (finding that precedent necessitates a strict construction of the federal government's waiver of sovereign immunity).

⁹² See *id.*; *Varig Airlines*, 467 U.S. 797, 814 (1984) (finding that Congress sought to avoid courts "second-guessing" policy decisions of federal employees).