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Discretionary Disfunction and *Shivers v. United States*: Consequences of Assuming the Intent of Congress

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DISCRETIONARY DISFUNCTION AND *SHIVERS v. UNITED STATES*: CONSEQUENCES OF ASSUMING THE INTENT OF CONGRESS

by: *Emily B. Garza**

ABSTRACT

The discretionary function exception is a powerful departure from the Federal Tort Claims Act's general waiver of sovereign immunity. This exception applies where government employees commit a tort while acting within the discretion of their position. While there has been a lengthy and varying jurisprudential history surrounding the application of the discretionary function exception, neither the Supreme Court nor Congress has addressed whether violations of constitutional rights fall within the scope of a discretionary act.

*This lack of clarity proved harmful for individuals like Mackie Shivers in *Shivers v. United States* because the discretionary function exception swallowed his claim for relief even though his Eighth Amendment rights were violated. This Note analyzes the error of that approach to constitutional claims and the discretionary function exception through the context of the *Shivers* decision and calls for an amendment to the exception clearly stating that violations of constitutional rights are not discretionary.*

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I. INTRODUCTION

You are 64 years old and an inmate in federal prison. You were incarcerated for a non-violent, cocaine possession charge. You keep your head down, biding your time. One day, the prison officials assign you a new cellmate, a younger prisoner with a history of violence toward cellmates. This violent streak is well known among the inmates and prison officials. You remind the prison officials of this violent pattern, but they brush you off. You are powerless. One night, you are asleep on your bunk. Suddenly you wake up writhing in pain. The pain is sharp and intense. You realize that this pain is radiating from one of your eyes that you can no longer see from. You discover that as the pain in your eye increases, your vision does not. Your cellmate is standing over you with a bloody pair of scissors.

This gruesome act of violence was an unfortunate reality for prisoner Mackie Shivers, the victim of his cellmate’s attack in 2015.¹ After this attack, Shivers sued the United States, alleging that the prison officials were negligent and that they violated his constitutional rights.² This incident raises the question: What will happen if an individual asserts a negligence claim with a constitutional claim against the United States? Sadly, for Mackie Shivers, that answer is far from clear.

Under the Federal Tort Claims Act (“FTCA”), Congress waived sovereign immunity over tort claims based on the acts or omissions of government employees.³ However, this general waiver includes exceptions that can shield the government from liability.⁴ Specifically, the discretionary function exception—arguably the FTCA’s most important exception⁵—shields the United States from liability for harms caused by government employees acting within their discretion.⁶ In other words, when a government employee performs a discretionary act, the United States is not liable for the harms of that act even if that

1. *Shivers v. United States*, 1 F.4th 924, 927 (11th Cir. 2021).

2. *Id.* at 926–27.

3. *See* 28 U.S.C. § 1346(b)(1).

4. *Id.* § 2680.

5. Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1300 (2002) (stating that the discretionary function exception is the “the broadest and most consequential of the FTCA’s specific shields”).

6. 28 U.S.C. § 2680(a).

act was negligent.⁷ However, when an individual asserts a tortious claim that also involves a violation of that individual's constitutional rights, the discretionary function exception becomes difficult to apply. Even the federal circuit courts cannot agree on the correct outcome.⁸ The First and Eighth Circuits held that unconstitutional conduct by government employees does not fall within the discretionary function exception.⁹ The Third Circuit agreed in dicta, stating that the discretionary function exception cannot shield the government from liability when an employee violates the Constitution because "federal officials do not possess discretion to commit such violations."¹⁰ In contrast, the Seventh Circuit found that unconstitutional conduct falls within the discretionary function exception and thus shields the government from liability.¹¹

Although the circuit courts disagree, the Supreme Court has yet to provide guidance. Currently, the success of a claim involving the discretionary function exception and a violation of constitutional rights depends on the circuit in which the claim was made.¹² While a Supreme Court decision will certainly resolve the circuit split, the Court is not the correct governmental body to decide whether the discretionary function exception should exclude claims arising from constitutional rights violations. Because the FTCA centers on Congress's intent to waive sovereign immunity for certain claims, a statutory amendment is necessary to directly address whether actions that transgress the Constitution fall within the scope of the discretionary function exception. Without such an amendment, the courts are left to infer which claims Congress intended to assume liability for.

In *Shivers v. United States*, Mackie Shivers experienced the consequence of assuming congressional intent when he brought his claims to the Eleventh Circuit. Shivers sued the United States under the FTCA, alleging that the federal prison employees were negligent in their cell assignments and that their actions violated his Eighth Amendment right against cruel and unusual punishment.¹³ The Eleventh Circuit joined the Seventh Circuit's approach to the issue by deciding that claims involving constitutional rights violations by government employees fall within the discretionary function excep-

7. See *id.* §§ 2680(a), 1346(b)(1).

8. See *Linder v. United States*, 937 F.3d 1087, 1091 (7th Cir. 2019); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003).

9. See *Limone*, 579 F.3d at 102; *Raz*, 343 F.3d at 948.

10. *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986).

11. See *Linder*, 937 F.3d at 1091; *Kiiskila v. United States*, 466 F.2d 626, 628 (7th Cir. 1972).

12. Compare *Linder*, 937 F.3d at 1091 (finding that the discretionary function exception applies only to tortious conduct), with *Limone*, 579 F.3d at 102 (differing on whether unconstitutional conduct is outside of the scope of the discretionary function exception).

13. *Shivers v. United States*, 1 F.4th 924, 926–27 (11th Cir. 2021).

tion of the FTCA, thereby shielding the United States from liability.¹⁴ This left Shivers with no opportunity for relief against the United States for the injury he sustained.

This Note will argue that the Eleventh Circuit erred in its decision that constitutional rights violations fall within the discretionary function exception for three reasons. First, the Eleventh Circuit erred both in its determination that a constitutional claims exception would be too difficult in practice, and in its reliance on *Bivens* claims, which allow a plaintiff to raise constitutional claims against individual government employees,¹⁵ as the only viable means of relief for a plaintiff in Shivers's position. Second, the Eleventh Circuit erred by failing to apply the second prong of the test laid out in *United States v. Gaubert* for determining whether an act by a government employee is discretionary.¹⁶ This test requires that the court determine: (1) whether the act was discretionary in nature, meaning whether it involves an element of judgment or choice¹⁷ and (2) whether "that judgment is of the kind that the discretionary function exception was designed to shield."¹⁸

Third, the Eleventh Circuit erred by ruling contrary to public policy concerns. In its decision, the Eleventh Circuit failed to recognize the ironic result of implying that Congress intended to give government employees the discretion to violate the Constitution. To resolve this illogical result, I recommend an amendment to the discretionary function exception to clarify that violations of the Constitution are not discretionary. Congress can achieve that outcome by further defining the phrase, "whether or not such discretion be abused" within the FTCA.¹⁹ By clarifying that actions that transgress the Constitution are not discretionary and thus are not shielded by the discretionary function exception, Congress can resolve the illogical result created by the Eleventh Circuit's decision while providing individuals in Shivers's position an opportunity for relief. Further, this solution will maintain one of the primary justifications for the discretionary function exception by not exposing the United States to excessive liability.

Part II of this Note will explore the limited history of the FTCA and the resulting judicial interpretations of the discretionary function exception. Part III will discuss the decisions of the First and Seventh Circuits relating to the discretionary function exception to illustrate the divergence in the judicial interpretations of the exception. Additionally, Part III will discuss the background and applicability of a

14. *See id.* at 932–33.

15. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

16. *See United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

17. *Id.* at 322.

18. *Id.* at 322–23.

19. 28 U.S.C. § 2680(a).

Bivens claim. Next, Part IV will review the background of *Shivers v. United States* and the Eleventh Circuit's ultimate decision. Finally, Part V will analyze the shortcomings of the Eleventh Circuit's *Shivers* decision and will propose a statutory amendment to the FTCA's discretionary function exception to further define the term "abuse" so that constitutional claims clearly fall outside of the scope of the exception's protection.

II. HISTORY OF THE FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION

The FTCA is the result of a Tort Claims Act that was contemplated by Congress for nearly 30 years.²⁰ The FTCA displays the delicate balance between the desire to preserve sovereign immunity and the desire to impose some liability for the tortious acts of government employees.²¹ This Part will explore the motivations for adopting the FTCA, the importance of the discretionary function exception, and the resulting judicial interpretations of that exception.

Prior to the passage of the FTCA, individuals could not assert tort claims against the United States due to sovereign immunity.²² Instead, an individual would have to receive a private bill from Congress granting relief to the injured party.²³ Specifically, each bill required an individual seeking relief to request a member of Congress to introduce their bill and then move that bill through Congressional Committees.²⁴ Before the passage of the FTCA, roughly 2,300 of such bills were brought before Congress.²⁵ These bills each required individual legislation, which depleted the time, resources, and focus of Congress.²⁶ There was a desire to hold the government responsible for the damages of its employees, but there needed to be a simpler way of addressing the tort claims of harmed individuals.²⁷ Ultimately, Congress decided that the bill system was unsustainable, and the 79th Congress passed the long-contemplated FTCA in 1946.²⁸

20. *Dalehite v. United States*, 346 U.S. 15, 24–25 (1953).

21. For a more detailed discussion of sovereign immunity and its history in the United States, see Niles, *supra* note 5, at 1282–96.

22. See *id.*

23. Jonathan R. Bruno, Note, *Immunity for "Discretionary" Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 417–19 (2012).

24. Walter Gellhorn & Louis Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1, 1–2 (1955).

25. Bruno, *supra* note 23, at 417.

26. See *id.* at 418.

27. *Dalehite v. United States*, 346 U.S. 15, 24–25 (1953) (noting that the FTCA arose from "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work").

28. See *id.* at 24; see also *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) (stating that the FTCA was the product of 30 years of congressional consideration).

The FTCA consists of a general waiver of sovereign immunity by Congress for the torts committed by the employees and agents of the United States.²⁹ The FTCA states that individuals may bring a state tort action against the United States for money damages when the United States, if a private individual, would have been held liable for the same act.³⁰ However, this general waiver is not without exceptions which narrow the United States's potential liability.³¹ For example, the general waiver does not apply when a negligence claim arises out of postal matters,³² combatant activities by the military during war,³³ establishments of quarantine by the United States,³⁴ or fiscal operations of the Treasury.³⁵ In other words, when a government act falls within an exception of the FTCA, sovereign immunity is retained, and the government is shielded from liability.

While the FTCA has many exceptions to its general waiver of liability, the discretionary function exception is one of the most used exceptions.³⁶ Under the discretionary function exception, the United States is shielded from liability 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."³⁷ This exception is seemingly quite broad, and some scholars have argued that the scope of the discretionary function exception has never been entirely clear.³⁸

A. *Early Judicial Interpretations of the Discretionary Function Exception*

Due to a limited legislative history, the reach of the discretionary function exception has been difficult to define. Although the FTCA was contemplated for many years, the 79th Congress, which passed the FTCA, did not hold any hearings on the Act.³⁹ Because there were no hearings on the Act, the history of the discretionary function exception is best seen through the bills of the 77th Congress, which

29. See 28 U.S.C. § 1346(b)(1); see also *Dalehite*, 346 U.S. at 17 (explaining that the Act "waived sovereign immunity from suit for certain specified torts of federal employees").

30. 28 U.S.C. § 1346(b)(1).

31. See *id.* § 2680.

32. *Id.* § 2680(b).

33. *Id.* § 2680(j).

34. *Id.* § 2680(f).

35. *Id.* § 2680(i).

36. KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 18 (2019).

37. 28 U.S.C. § 2680(a).

38. See Bruno, *supra* note 23, at 432 (arguing that the intended scope of the discretionary function exception is uncertain because scarce legislative history fails to define the breadth of the term "discretionary acts").

39. *Dalehite v. United States*, 346 U.S. 15, 26 (1953).

first considered the exception; however, the history is still sparse.⁴⁰ This absence of clarification has necessitated judicial interpretations of the exception to fill in the gaps that the plain language of the statute has left behind, and the Supreme Court has noted that its decisions on the discretionary function exception have not “followed a straight line[.]”⁴¹ However, even with slight variations, the Supreme Court’s interpretations of the discretionary function exception prior to 1992 have one central focus: a distinction between discretionary acts at the planning level and those at the operational level.⁴²

The Supreme Court had the first opportunity to interpret the discretionary function exception in *Dalehite v. United States*.⁴³ The situation in *Dalehite* arose after a historic and devastating explosion in Texas City, Texas, in 1947, which killed 576 people and injured more than 3,000 others.⁴⁴ The explosion occurred due to the improper storage of ammonium nitrate fertilizer on a cargo ship.⁴⁵ In a consolidated action, those injured by the explosion alleged that the government was negligent in its handling, manufacturing, and storing of the fertilizer.⁴⁶ Although it was known within the industry that ammonium nitrate was commonly used as an ingredient for explosives,⁴⁷ the Supreme Court held that the United States was shielded by the discretionary function exception.⁴⁸

In reaching its decision, the Supreme Court analyzed the known history of the FTCA. The Court noted that Congress designed the discretionary function exception “to assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions.”⁴⁹ That is, Congress wanted assurance that government employees could perform their job duties without having to fear that the employees’ actions would result in financial liability. Consequently, the Court concluded that Congress wanted to waive sovereign immunity for the tortious conduct of its employees at the

40. *See id.*

41. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984).

42. *See Niles, supra* note 5, at 1320 (citing Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 880 (1991)).

43. *See Dalehite*, 346 U.S. at 26–36.

44. *Id.* at 22–23; *see also* Heather Leighton & Craig Hlavaty, *See Historic, Rare Footage of the Aftermath of the Deadly 1947 Explosion in Texas City*, HOUS. CHRON., <https://www.chron.com/neighborhood/bayarea/article/Historic-footage-deadly-1947-Texas-City-explosion-12482007.php> (Sept. 28, 2018, 12:14 PM) [<https://perma.cc/HSR7-HY3M>] (discussing how the 1947 Texas City explosion killed an estimated 576 people and injured more than 3,000 others).

45. *Dalehite*, 346 U.S. at 22–23.

46. *Id.* at 23.

47. *Id.*

48. *See id.* at 24, 35.

49. *Id.* at 26–27.

operational level, but it did not wish to waive immunity for acts of a government nature or function at the planning level.⁵⁰

In deciding the case, the Court reasoned that the storing of the fertilizer was a policy decision made at the planning level of government activity, and therefore the United States was shielded from liability under the discretionary function exception.⁵¹ The Court explained that it is not necessary to determine where the act of discretion begins and ends; instead, the act must involve a policy decision.⁵² The Court found that "determinations made by executives or administrators in establishing plans, specifications or schedules of operations" involved policy decisions.⁵³ In other words, the discretionary function exception shields the government from liability at the planning level because planning involves a policy judgment.

However, the Court explained that when subordinates carry out plans made by executives, those acts are still discretionary and shielded from liability.⁵⁴ This interpretation appeared to conflict with the Court's holding because a subordinate who follows orders given by executives at the planning level does not act on their own, separate policy judgment. Apart from the Court's confusing interpretation, the *Dalehite* test created a distinction between planning activities, which involved a policy judgment, and operational activities, which involved the initiation of programs and activities.⁵⁵ While government acts at the planning level were protected by the exception, operational activities were not.⁵⁶ However, this distinction proved to be troublesome due to the difficulty in determining whether acts were planning or operational.⁵⁷

The Court further clarified the scope of the discretionary function exception in *Indian Towing Co. v. United States*.⁵⁸ In this case, the owner of a tugboat that ran aground alleged that the United States was negligent in its operation of a lighthouse maintained by the United States Coast Guard.⁵⁹ The Court found that, although the Coast Guard exercised its discretion by deciding to operate the lighthouse, it was obligated to implement due care in maintaining the lighthouse just as a private actor would be required to do.⁶⁰ Therefore, the discretionary function exception did not apply.⁶¹

50. *Id.* at 27–28.

51. *Id.* at 36–38.

52. *Id.* at 35–36.

53. *Id.*

54. *Id.* at 36.

55. *Id.* at 35–36.

56. *See id.* at 42 (explaining that planning decisions, rather than operational decisions, do not subject the government to liability).

57. *See Niles, supra* note 5, at 1318.

58. *See Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955).

59. *Id.* at 62.

60. *Id.* at 69.

61. *See id.*

Unlike the decision in *Dalehite*, which focused on a distinction between the planning and operational level of government activities, the decision in *Indian Towing* focused on whether a private actor in the government's position would be liable for the tortious conduct.⁶² However, it has been argued that the *Indian Towing* decision further solidified the *Dalehite* test because the government's maintenance of the lighthouse was "operational" in nature and therefore did not fall within the discretionary function exception.⁶³

In 1984, the Supreme Court once again discussed the discretionary function exception and the planning/operational test in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*.⁶⁴ In *Varig Airlines*, an owner of a commercial jet sued the Federal Aviation Administration ("FAA") after a fire broke out in one of the jet's bathrooms for negligently certifying the safety standards of the jet.⁶⁵ The Court found that the discretionary function exception applied in this case because the FAA used its discretion to implement a "spot check" system for compliance with safety standards, and therefore, that discretionary act was of the nature and quality intended to be protected by the exception.⁶⁶

The decision in *Varig Airlines* extended the discretionary function exception's reach for both the planning and operational levels of government activity, thereby slightly diverging from the distinction first introduced in *Dalehite*.⁶⁷ The *Varig Airlines* Court explained that the proper inquiry for the application of the discretionary function exception is whether the act of the government employee was of "the nature and quality that Congress intended to shield from tort liability."⁶⁸ This shifted the focus back to Congress's intention to prevent judicial second-guessing of discretionary acts by government employees and agencies.⁶⁹ The Court clarified that the quality of the act was dispositive rather than the position of the employee performing the act.⁷⁰ This clarification, while not overruling *Dalehite*,⁷¹ lessened the division between acts of higher-level employees from those of lower-level

62. *Id.* at 68–69.

63. See Barry R. Goldman, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837, 843 (1992).

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

65. *Id.* at 799–800.

66. *Id.* at 819–20.

67. See *id.* at 813–14; see also *Dalehite v. United States*, 346 U.S. 15, 35–37 (1953) (holding that the discretionary function exception "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations").

68. *Varig Airlines*, 467 U.S. at 813.

69. *Id.* at 820.

70. See *id.*

71. *Id.* at 811–12 (rejecting an argument that claimed *Dalehite* no longer represented a valid interpretation of the discretionary function exception).

employees by including all discretionary acts of government employees regardless of their rank.

Finally, in *Berkovitz v. United States*, the Supreme Court added another clarification to the discretionary function exception.⁷² In *Berkovitz*, a family sued the Food and Drug Administration (“FDA”) for negligently approving an oral polio vaccine after an infant took the vaccine and contracted polio.⁷³ However, in this case, the discretionary function exception failed to shield the FDA from liability because the Court held that following a specified course of action did not involve an element of judgment or choice.⁷⁴

The decision in *Berkovitz* is a rare instance in which the Court restricted the reach of the discretionary function exception. The *Berkovitz* decision makes it clear that when there is a specified course of action mandated by a statute, regulation, or policy, the discretionary function exception will not apply and will not shield the government from liability.⁷⁵ That is because there is not an element of judgment or choice to the employee’s decision; the employee must follow the specified course of action.⁷⁶ In contrast, the discretionary function exception applies “only to conduct that involves the permissible exercise of policy judgment.”⁷⁷

Although there were alterations in its application, the early test for the discretionary function exception was marked by confusing distinctions between operational and planning activities, making the test difficult to apply. It became apparent that the Court would have to revisit the discretionary function exception with the hopes of developing a more simplified test.

B. *Controlling Judicial Interpretation of the Discretionary Function Exception: United States v. Gaubert*

In *United States v. Gaubert*, the Supreme Court received its most recent opportunity to clarify the reach of the discretionary function exception and to simplify the tests laid out in the earlier line of cases.⁷⁸ In *Gaubert*, the United States was sued for negligently carrying out supervisory activities over a thrift institution.⁷⁹ Specifically, Gaubert, who managed the thrift institution, alleged negligence in the federal officer’s selection of new officers and the regulator’s involvement in the day-to-day activities of the institution.⁸⁰ Ultimately, the

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

73. *Id.* at 533.

74. *Id.* at 542–43.

75. *Id.* at 536.

76. *Id.*

77. *Id.* at 539.

78. See *United States v. Gaubert*, 499 U.S. 315, 322 (1991).

79. *Id.* at 318.

80. *Id.* at 319–20.

Court found that the government's acts were discretionary because the acts were based on public policy considerations.⁸¹

In reaching the decision, Justice White in the majority opinion condensed many of the rules arising from the previous decisions with one clear exception: the Court plainly rejected the earlier distinction between planning and operational activities.⁸² Specifically, the Court emphasized that discretionary acts involve judgment or choice and "there is nothing in that description that refers exclusively to policymaking or planning functions."⁸³ Further, the Court rejected the Fifth Circuit's endorsement of the "nonexistent dichotomy" between acts of discretion and operational activities.⁸⁴ In other words, both operational and planning activities could be shielded by the exception so long as they involve an element of judgment or choice and there is not a specified course of action to the contrary.⁸⁵ Therefore, the government's day-to-day management of the thrift institution is not automatically excluded from the discretionary function exception because management is an "operational" activity.⁸⁶

Instead of the planning/operational test that was prominent in the earlier line of cases, the Court created a two-prong test to determine whether an act by a government employee is discretionary.⁸⁷ This test has a strong emphasis on public policy because the purpose of the discretionary function exception is to prevent judicial second-guessing of administrative decisions.⁸⁸ The Court stated that the first inquiry is whether the acts in question were discretionary or "whether they were instead controlled by mandatory statutes or regulations."⁸⁹ The first prong of the *Gaubert* test firmly reinforces the *Berkovitz* decision, which stated that when a regulation requires a specific course of action, the employee has no choice but to follow the regulation, and therefore the act is not discretionary because it does not involve an element of judgment or choice.⁹⁰ In applying the first prong of the test, the Court found that the government agencies in this case were not bound to a particular course of action when supervising financial institutions, and that it was clear that the agencies had the discretion to supervise the institution through informal means.⁹¹

81. *Id.* at 332 (holding that the acts were discretionary because they were performed to protect an insurance fund).

82. *See id.* at 325.

83. *Id.*

84. *Id.* at 326.

85. *Id.* at 325 (stating that "[d]iscretionary conduct is not confined to the policy or planning level").

86. *Id.*

87. *Id.* at 322–23.

88. *Id.* at 323.

89. *Id.* at 328.

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

91. *Gaubert*, 499 U.S. at 329–31.

Next, the Court stated the test's second inquiry—whether the action in question involved “the kind of policy judgment that the discretionary function exception was designed to shield.”⁹² This two-prong test shows the change in the Court's analysis since rejecting the planning/operational test. By removing the hurdles of the previous test, the Court can focus on whether the act was based on considerations of public policy. As applied to *Gaubert*, the Court found that the agencies' actions were based on a policy consideration because the regulators made management changes to protect an insurance fund.⁹³

Since the case was decided, *Gaubert* has received differing critiques. Some scholars assert that the *Gaubert* decision misconstrued Congress's intent by expanding the scope of the discretionary function exception and drastically limiting the United States's exposure to liability.⁹⁴ However, other scholars appreciate *Gaubert* for retiring the planning/operational test, but they also recognize that *Gaubert* is not a perfect solution because further clarification on the test's scope is necessary.⁹⁵ While the suitability of the *Gaubert* test may be up for debate, what is not debatable is that the government's success rate has risen to 76% when the discretionary function exception is asserted as a defense to a tort claim.⁹⁶

The Supreme Court has had to revisit the discretionary function exception many times since the adoption of the FTCA in 1946. The decisions discussed above exemplify the continued difficulty in defining the scope of the FTCA. Further, these decisions also illustrate the inherent shortcomings in relying on judicial interpretations of congressional intent. However, while these decisions add to our understanding of the exception as generally applied to negligence claims, there has not been a case involving an activity that is both tortious and unconstitutional. Consequently, the Supreme Court has yet to address the applicability of the discretionary function exception for claims of that nature, leaving the circuit courts to reach their own decisions.

III. PRIOR LAW

Before discussing and analyzing the Eleventh Circuit's decision in *Shivers v. United States*, it is pertinent to first discuss the prior law that the *Shivers* court relies on. First, this Part will discuss the diverging approaches of the Seventh Circuit in *Linder v. United States* and the

92. *Id.* at 332.

93. *Id.*

94. See Niles, *supra* note 5, at 1328–29 (noting that the *Gaubert* test made clear that almost any discretionary act will fall within the protection so long as it is susceptible to a policy analysis).

95. See Goldman, *supra* note 63, at 849–50.

96. Bruno, *supra* note 23, at 412 (noting the government's success rate in asserting the discretionary function exception rose to 76% since 1991).

First Circuit in *Limone v. United States*. Lastly, this Part will briefly explain the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, and the resulting "Bivens claim" which plaintiffs can assert against government employees individually.

A. Linder v. United States

In *Linder v. United States*, Linder, a deputy marshal, was indicted for witness tampering and using excessive force.⁹⁷ Due to this indictment, Linder was placed on leave.⁹⁸ Linder claimed that once he was placed on leave, a U.S. marshal instructed other deputies not to speak with him or his lawyers, which made it difficult for Linder to receive information from potential witnesses and form his defense.⁹⁹ Although the indictment against him was dropped, Linder brought suit against the United States due to his treatment by the other marshals.¹⁰⁰ Linder asserted two tort theories against the United States, one for malicious prosecution and another for intentional infliction of emotional distress.¹⁰¹ Additionally, Linder argued that the barrier to obtaining witnesses violated the Confrontation Clause of the Sixth Amendment.¹⁰² However, the government moved to dismiss these claims and argued that they were barred by the discretionary function exception.¹⁰³ In opposition, Linder argued that no one has the discretion to violate the Constitution.¹⁰⁴

In rejecting Linder's argument, the Seventh Circuit first held that there was not a violation of his constitutional rights.¹⁰⁵ The court noted that the compulsory process of attaining witnesses is a trial right that is not guaranteed by the Constitution before trial.¹⁰⁶ Therefore, because the indictment was dropped, Linder's Sixth Amendment rights were not violated.¹⁰⁷

Although the court noted an evidentiary weakness in Linder's constitutional claim, the court also took great issue with the focus of Linder's argument. The court stated that the Constitution has nothing to do with the FTCA as FTCA claims are based on state tort law and analyze whether the government, if a private person, would be held liable.¹⁰⁸ Consequently, the discretionary function exception cannot

97. *Linder v. United States*, 937 F.3d 1087, 1088 (7th Cir. 2019).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1090.

103. *Id.* at 1088.

104. *Id.* at 1090.

105. *Id.* at 1090–91.

106. *Id.* at 1090.

107. *See id.*

108. *Id.*

involve constitutional claims because the Constitution applies to public actors, not private individuals.¹⁰⁹ Ultimately, the *Linder* court decided in favor of the United States and found that the discretionary function exception still applies, even when a constitutional claim is raised.¹¹⁰

B. *Limone v. United States*

In contrast to the Seventh Circuit's decision in *Linder*, the First Circuit's decision in *Limone v. United States* held that the discretionary function exception does not apply when there is a valid constitutional claim.¹¹¹ In *Limone*, former prisoners brought an FTCA action against the United States after their murder convictions were overturned because it was revealed that the FBI had suppressed reliable information that contradicted the witness testimony that led to their prosecution.¹¹² The prisoners asserted negligence claims against the United States (along with claims of malicious prosecution and intentional infliction of emotional distress) while also arguing that the FBI violated their constitutional due process rights.¹¹³

In defense, the United States raised the discretionary function exception, arguing that the acts of withholding exculpatory information and assisting a witness to frame the former prisoners were discretionary.¹¹⁴ Specifically, the government argued that decisions related to "whether and how informants should be employed" are generally discretionary.¹¹⁵ Further, the government asserted that the FBI's decision to withhold the exculpatory evidence was based on policy to protect the security of its sources.¹¹⁶ However, the First Circuit rejected those arguments.¹¹⁷

First, the First Circuit recounted the *Gaubert* test and the "specified course of conduct" test from *Berkovitz*.¹¹⁸ In considering these tests, the First Circuit noted that an act is not discretionary when there are actions proscribed by federal statutes or regulations.¹¹⁹ In expanding upon that rule, the First Circuit plainly stated that the discretionary

109. *Id.*

110. *See id.* at 1091–92.

111. *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (holding that the action of the FBI was unconstitutional and therefore "not within the sweep of the discretionary function exception").

112. *Id.* at 83.

113. *Id.* at 87.

114. I note here that *Bolduc* is a First Circuit case that applied *Gaubert*. The First Circuit cited the *Bolduc* decision in *Limone* (which applied *Gaubert*) and the elements attributed to *Bolduc* are the elements of the *Gaubert* test. Because *Gaubert* is the proper test, therefore, I refer to it as the *Gaubert* test here. *Id.* at 101.

115. *Id.*

116. *Id.*

117. *Id.* at 87.

118. *Id.* at 101.

119. *Id.*

function exception does not shield conduct that “transgresses the Constitution.”¹²⁰ That is, much like how actions that are proscribed by federal statutes or regulations are not discretionary due to the lack of judgment or choice, actions that are contrary to the Constitution are also not discretionary.¹²¹ Consequently, because the lower court had previously determined that the FBI’s conduct violated both the Constitution and Department of Justice Guidelines, the conduct was not discretionary and thus not shielded by the discretionary function exception.¹²²

Finally, the *Limone* court warned that “virtually any action can be characterized as discretionary” if viewed in general, as opposed to within the context that the conduct was committed.¹²³ Although the FBI may generally have discretion over the use of informants, in the specific context of *Limone*, the FBI’s actions were not discretionary as they clearly violated due process.¹²⁴

C. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*

While not directly related to the FTCA and the discretionary function exception, a *Bivens* claim is said to have been created by the Supreme Court so that individuals can bring claims against government employees that the discretionary function exception could bar.¹²⁵ The Court developed the *Bivens* framework with the hopes of deterring the unconstitutional conduct of government employees by exposing them to individual liability.¹²⁶

In *Bivens*, the Court held that a cause of action for monetary damages exists when a government employee violates an individual’s Fourth Amendment rights.¹²⁷ This claim differs from claims under the FTCA because a *Bivens* cause of action is against the government employees in their individual capacities; the defendant is not the United States government.¹²⁸ Although a *Bivens* claim was originally established concerning a violation of an individual’s Fourth Amendment rights, the cause of action is now available for violations of other con-

120. *Id.*

121. *See id.*

122. *Id.*

123. *Id.*

124. *Id.* at 101–02.

125. *See Linder v. United States*, 937 F.3d 1087, 1090 (7th Cir. 2019); *see also Shivers v. United States*, 1 F.4th 924, 933 (11th Cir. 2021) (stating that “[p]risoners can and should bring constitutional claims against individual prison officials under *Bivens* for their unconstitutional conduct”).

126. Michael B. Hedrick, Note, *New Life for a Good Idea: Revitalizing Efforts to Replace the Bivens Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Tort Suits*, 71 GEO. WASH. L. REV. 1055, 1057 (2003).

127. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

128. *See id.*

stitutional rights by a government employee.¹²⁹ For example, the Court permitted an inmate to raise a *Bivens* claim after his Eighth Amendment rights were violated.¹³⁰ However, the Court has recently disfavored the creation of new causes of action under *Bivens*.¹³¹

IV. THE CASE—*SHIVERS v. UNITED STATES*

After discussing the context surrounding the FTCA and the discretionary function exception, this Part will now turn to the case at the heart of this Note, *Shivers v. United States*. This Part will discuss the facts surrounding the case, the Eleventh Circuit’s argument and ultimate decision, and Judge Wilson’s concurring and dissenting opinion.

Petitioner Mackie Shivers was a 64-year-old inmate in federal prison.¹³² He had been incarcerated due to a cocaine possession conviction.¹³³ Shivers’s newly assigned cellmate, 24-year-old Marvin Dodson, was also convicted of a cocaine-related crime.¹³⁴ Dodson was mentally unstable and had exhibited violent tendencies toward his earlier cellmates.¹³⁵ Prison official assigned Dodson to Shivers’s cell, and the two men cohabitated without any issues for eight months.¹³⁶ However, one night while Shivers was sleeping, Dodson stabbed him in the eye with a pair of scissors.¹³⁷ This attack rendered Shivers permanently blind in the injured eye.¹³⁸

Following the attack, Shivers pursued the administrative remedies required to assert an FTCA claim and a *Bivens* claim.¹³⁹ After he believed that he had exhausted these remedies, Shivers brought those claims against the United States and five individual prison employees.¹⁴⁰ Shivers alleged that the prison employees were negligent in assigning Dodson to Shivers’s cell because the employees knew of Dodson’s “violent tendencies” and his “history of assaulting his cellmates.”¹⁴¹ In addition to the negligence claim, Shivers also as-

129. Hedrick, *supra* note 126, at 1057.

130. See *Carlson v. Green*, 446 U.S. 14, 18–20 (1980); see also Matthew W. Tikonoff, *A Final Frontier in Prisoner Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 995 (2007) (finding the Supreme Court extended a *Bivens* claim in *Carlson v. Green* to the Eighth Amendment).

131. See *Egbert v. Boule*, 142 S. Ct. 1793, 1797 (2022).

132. *Shivers v. United States*, 1 F.4th 924, 927 (11th Cir. 2021).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* Both the government and Shivers agreed that Shivers successfully completed three steps of the administrative process, but the parties disagreed as to whether Shivers completed the final step, as the government claimed to have never received the final form. *Id.*

141. *Id.*

serted that his Eighth Amendment right to be free of cruel and unusual punishment had been violated.¹⁴² The government moved to dismiss the FTCA claim, arguing that the claim was barred by the discretionary function exception.¹⁴³ Additionally, the government asserted that the *Bivens* claim failed due to Shivers's failure to exhaust all administrative remedies.¹⁴⁴ The district court granted the dismissal of both claims, and Shivers then appealed.¹⁴⁵

On appeal, Shivers argued that his Eighth Amendment claim was not merely a separate substantive claim but rather stood as a bar to using the discretionary function exception of the FTCA.¹⁴⁶ The crux of his argument was that government employees simply “do not have [the] discretion to violate the Constitution”—meaning that when the action of a government employee is both tortious and unconstitutional, the discretionary function exception cannot apply.¹⁴⁷

Before addressing the merits of Shivers's argument, the Eleventh Circuit first decided whether the discretionary function exception applied.¹⁴⁸ To do this, the court considered *Gaubert's* two-prong test¹⁴⁹ and its prior decision in *Cohen v. United States*.¹⁵⁰ In *Cohen*, the Eleventh Circuit found that “[d]eciding how to classify prisoners and choosing the institution in which to place them are part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation's prisons.”¹⁵¹ Consequently, the court held that prisoner housing decisions satisfy the *Gaubert* test, and the discretionary function exception applied.¹⁵² In *Shivers*, the Eleventh Circuit followed its *Cohen* precedent and held that “inmate-classification and housing-placement decisions fall squarely within the discretionary function exception.”¹⁵³ However, the Eleventh Circuit did not expressly analyze whether the prison officials' decision was of the kind that the discretionary function exception was designed to shield.¹⁵⁴

Having decided that putting Dodson in Shivers's cell was a discretionary act, the Eleventh Circuit then held that the Constitution imposed no limit on such acts.¹⁵⁵ The court reasoned that the statutory language of the discretionary function is clear, and Congress did not

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 928.

146. *Id.* at 929.

147. *Id.*

148. *Id.*

149. See *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

150. *Cohen v. United States*, 151 F.3d 1338, 1340 (11th Cir. 1998).

151. *Id.* at 1344.

152. *Id.*

153. *Shivers*, 1 F.4th at 929.

154. See *id.*

155. *Id.*

intend to include a “constitutional-claims exclusion.”¹⁵⁶ Most importantly, the court noted that Congress chose not to limit the degree of the abuse discretion that could fall within the discretionary function exception.¹⁵⁷ Additionally, the court reasoned that Congress had the opportunity to exclude grossly negligent conduct from the discretionary function exception; however, Congress chose not to.¹⁵⁸ The court focused on the language “any claim” used within the FTCA to reach this conclusion.¹⁵⁹ Because the language “any claim” is broad, the court reasoned that even unconstitutional conduct falls within the exception enumerated in the FTCA.¹⁶⁰

Further, the Eleventh Circuit strongly disagreed with Shivers’s argument for a “constitutional claims exclusion” because the FTCA has no relation to constitutional claims.¹⁶¹ The court reasoned that “Congress did not create the FTCA to address constitutional violations at all but, rather, to address violations of *state tort law* committed by federal employees.”¹⁶² Consequently, even if a government employee violated the Constitution, the government can still raise the discretionary function exception.¹⁶³ The court opted for a narrow inquiry focusing only on whether the underlying action was discretionary according to the *Gaubert* test.¹⁶⁴

In reaching its decision, the Eleventh Circuit heavily relied on the Seventh Circuit’s decision in *Linder v. United States*.¹⁶⁵ The Eleventh Circuit found that the Seventh Circuit had rejected a similar constitutional claims argument because the FTCA does not apply to constitutional violations.¹⁶⁶ Further, the Eleventh Circuit agreed with the Seventh Circuit’s argument in *Linder* that the Supreme Court created a *Bivens* action to allow plaintiffs to sue individual employees for unconstitutional conduct otherwise not actionable under the FTCA.¹⁶⁷

While the Eleventh Circuit judges all agreed with the lower court’s dismissal of Shivers’s *Bivens* claim for not exhausting all of his administrative remedies, they disagreed about the FTCA claim.¹⁶⁸ Judge Charles Wilson dissented from the majority’s decision on the FTCA claim as he did not agree that the discretionary function exception shields the United States when a government employee violates the

156. *Id.* at 929–30.

157. *Id.* at 930.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* (internal quotations omitted).

162. *Id.*

163. *See id.*

164. *Id.*

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

166. *Shivers*, 1 F.4th at 932; *Linder*, 937 F.3d at 1090.

167. *Shivers*, 1 F.4th at 933.

168. *Id.* at 936 (Wilson, J., concurring in part and dissenting in part).

Constitution.¹⁶⁹ Judge Wilson argued that “[b]y violating the Constitution, a government employee necessarily steps outside his permissible discretion[.]”¹⁷⁰ Further, Judge Wilson acknowledged that “virtually every other circuit” that addressed the issue presented in *Shivers* found that “the discretionary function exception cannot provide blanket immunity for tortious conduct that also violates the Constitution.”¹⁷¹

V. ANALYSIS OF *SHIVERS*

This Part will discuss three primary flaws in the Eleventh Circuit’s decision. First, this Note will argue that the *Shivers* court erred in both its determination that a constitutional claims exception would be too difficult to apply in practice and in its reliance on *Bivens* to provide individuals an opportunity for relief for claims of this nature. Second, this Note will argue that the Eleventh Circuit misapplied the *Gaubert* test by failing to address the second prong. Third, this Note will make a public policy argument that Congress did not intend to allow individuals to violate the Constitution. Finally, this Note will propose a statutory amendment to the FTCA to further define the term “abuse” as it is used in the FTCA discretionary function exception to clarify that violations of constitutional rights cannot fall within the discretionary function exception.

A. *Constitutional Claims in Practice and Over-Reliance on Bivens Claims*

One reason that the Eleventh Circuit rejected *Shivers*’s argument was the court’s fear that a constitutional claims exception would be too difficult in practice.¹⁷² The difficulty was said to arise from potential juror confusion resulting from multiple jury instructions.¹⁷³ The majority argued that the district court would have to instruct the jury about both the state-law negligence claim and the constitutional claim, with the caveat that the negligence claim is dependent upon the bringing of a successful constitutional claim.¹⁷⁴ The idea being that a successful constitutional claim would prevent the application of the discretionary function exception, preserving the court’s jurisdiction over the matter and allowing the jury to decide the negligence claim.

169. *Id.*

170. *Id.*

171. *Id.* at 938.

172. *See id.* at 934.

173. *Id.*

174. *Id.* (stating that the district court would have to explain that “even if the plaintiff proves the prison employees were negligent under state law, the discretionary function defense bars that state-law claim against the United States unless the plaintiff also proves his federal constitutional claim that the same prison employees were deliberately indifferent to a substantial risk of serious harm and thereby violated his clearly established Eighth Amendment rights”).

However, as Judge Wilson sensibly noted, it is not uncommon for merit issues and jurisdiction issues to proceed to trial together.¹⁷⁵ Therefore, it would be feasible to have a constitutional claims exception because district courts are equipped to issue complex jury instructions.

In addition to the perceived difficulties surrounding jury instructions, the *Shivers* court was further dissuaded from considering a constitutional claims exception because the court believed that a *Bivens* action would provide individuals with an opportunity for relief.¹⁷⁶ That is, the *Shivers* court was not inclined to create a “new” exception when *Bivens* was already available to provide a remedy. However, as Mackie Shivers demonstrates, a *Bivens* claim does not always provide that relief.¹⁷⁷ In fact, *Bivens* failed Mackie Shivers. Inmates in federal prison must exhaust their administrative remedies before they can bring suit in district court.¹⁷⁸ These administrative remedies can be difficult to navigate for incarcerated individuals, who often have limited access to resources and assistance.¹⁷⁹ Mackie Shivers particularly exemplifies this concern because he had to seek help from another inmate when filing his administrative remedies with the Bureau of Prisons.¹⁸⁰ Further, there was disagreement between the parties concerning whether Shivers filed his BP-11 Form, which is the final step in the administrative process.¹⁸¹

While *Bivens* is, at times, an adequate remedy for constitutional torts, it is not a perfect fit.¹⁸² Many prisoners who file their complaints pro se are unaware of the requirement to exhaust administrative remedies, or the consequences of failing to satisfy that requirement.¹⁸³ While there is a Model Pro Se Prisoner complaint online to help prisoners navigate the process of exhausting their administrative remedies, this model language is not adopted in every jurisdiction, which furthers the difficulties in understanding the procedural hurdle.¹⁸⁴ Due to the knowledge gaps of pro se prisoners regarding administrative remedies, their claims that are procedurally flawed, but possibly

175. *Id.* at 940 (Wilson, J., concurring in part and dissenting in part). The jury would have to decide the jurisdictional issue—whether the discretionary function exception immunizes the United States from suit—and the merit issue—whether the defendants were liable under state law. *Id.*

176. *See id.* at 939.

177. *See id.* at 936 (dismissing the *Bivens* claim without prejudice).

178. Tikonoff, *supra* note 130, at 990.

179. *See* Elana M. Stern, Comment, *Completely Exhausted: Evaluating the Impact of Woodford v. Ngo on Prisoner Litigation in Federal Courts*, 166 U. PA. L. REV. 1511, 1534–36 (2018) (discussing the difficulties of pro se prisoners in exhausting their administrative remedies due to knowledge gaps).

180. *Shivers*, 1 F.4th at 927.

181. *Id.* at 927–28.

182. *See* Hedrick, *supra* note 126, at 1058–64.

183. Stern, *supra* note 179, at 1534.

184. *Id.*

meritorious, are dismissed, leaving the harmed prisoner with no opportunity for relief.¹⁸⁵ Instead, a more appropriate remedy would be for unconstitutional conduct to fall outside the reach of the discretionary function exception. It surely would have been a more appropriate remedy for Mackie Shivers, who was left with permanent vision loss and no remedy.¹⁸⁶

In sum, the Eleventh Circuit's decision was motivated by misplaced fear and misplaced trust in how a constitutional claims exception would work in practice. Instead, the Eleventh Circuit trusted that the established *Bivens* claim would provide individuals whose constitutional rights had been violated an opportunity for relief. However, a *Bivens* action does not fully provide an opportunity for relief in the way the Supreme Court originally intended.¹⁸⁷ Instead, a more appropriate solution is an amendment to the FTCA to clarify that unconstitutional conduct is excluded from the discretionary function exception.

B. *The Gaubert Test: The Missing Second Prong*

While the Eleventh Circuit was correct to apply the *Gaubert* test, the court did not apply the test in full force.¹⁸⁸ Specifically, the Eleventh Circuit neglected to apply the second prong: whether the judgment or choice is of the kind that the discretionary function exception was designed to shield.¹⁸⁹ Due to this misapplication of the test, the Eleventh Circuit failed to reach the correct conclusion—unconstitutional conduct performed by government employees falls outside of the protection of the discretionary function exception.

There is no dispute that the Eleventh Circuit adequately applied the first prong of the *Gaubert* test, which considers whether the act committed by the government employee was discretionary in nature.¹⁹⁰ Inmate classification and housing placement decisions are surely acts that require an employee to implement discretion.¹⁹¹ Further, the Eleventh Circuit relied on its previous decision in *Cohen v. United States*¹⁹² to reach this decision. However, due to the reliance on *Cohen*, the Eleventh Circuit's application of the *Gaubert* test fell short.

Instead of addressing the second prong explicitly, the Eleventh Circuit imported its application of the *Gaubert* test in *Cohen* to deter-

185. *Id.* at 1535–36.

186. *Shivers*, 1 F.4th at 927, 936.

187. *See* Hedrick, *supra* note 126, at 1057–58 (discussing the shortcomings of the *Bivens* remedy).

188. *See Shivers*, 1 F.4th at 929.

189. *See* *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991).

190. *See Shivers*, 1 F.4th at 929; *see also Gaubert*, 499 U.S. at 322 (stating that “[t]he exception covers only acts that are discretionary in nature, acts that ‘involv[e] an element of judgment or choice’”).

191. *Shivers*, 1 F.4th at 929.

192. *See Cohen v. United States*, 151 F.3d 1338, 1345 (11th Cir. 1998).

mine that “inmate-classification and housing-placement decisions fall squarely within the discretionary function exception.”¹⁹³ However, the issue addressed in *Cohen* is not the issue addressed here. That is, *Cohen* did not address constitutional claims; instead, *Cohen* only addressed the discretionary function exception in relation to a negligence claim.¹⁹⁴ Therefore, the Eleventh Circuit should have considered *Gaubert*’s second prong in the context of Shivers’s tort claim and constitutional claim. Had the *Gaubert* test been properly applied, the outcome in *Shivers* would likely change.

The Eleventh Circuit should have applied *Gaubert*’s second prong like the First Circuit applied the test in *Limone*, which found that unconstitutional conduct falls outside the scope of the discretionary function exception.¹⁹⁵ The First Circuit expanded on the rule outlined in *Berkovitz*—that an act falls outside the discretionary function exception when it is contrary to a specified course of action¹⁹⁶—by stating that actions that transgress the Constitution also fall outside the discretionary function exception.¹⁹⁷ This interpretation goes to *Gaubert*’s second prong because it plainly shows that actions that violate the Constitution are not of the kinds of actions that the discretionary function exception was designed to shield.¹⁹⁸ It is very unlikely that the discretionary function exception was designed to protect actions that infringe upon the constitutionally guaranteed rights of individuals. Further, if actions contrary to specified courses of action are excluded from the discretionary function exception, then surely violations of the Constitution should be excluded as well.

Judge Wilson touched on this very argument in his dissent in *Shivers*.¹⁹⁹ Judge Wilson noted that when a government employee violates the Constitution, that employee is “impermissibly[] acting outside of the scope of their discretion, rather than merely abusing the discretion they have.”²⁰⁰ Although there may not be a specified course of action for inmate housing, there is a specified course of action when it comes to the Constitution—do not violate the Constitution.

In conclusion, the Eleventh Circuit failed to properly apply the *Gaubert* test by relying on a prior application of the test in a case that did not address constitutional issues. Had the test been properly applied, the Eleventh Circuit should have reached a similar conclusion as the First Circuit in *Limone*, which held that actions that transgress the Constitution fall outside the scope of the discretionary function

193. *Shivers*, 1 F.4th at 929.

194. See *Cohen*, 151 F.3d at 1339–40.

195. See *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009).

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

197. *Limone*, 579 F.3d at 101.

198. See *id.*

199. See *Shivers v. United States*, 1 F.4th 924, 937–38 (11th Cir. 2021) (Wilson, J., concurring in part and dissenting in part).

200. *Id.* at 937.

exception. This proper application of Supreme Court precedent would have avoided the illogical implication that Congress intended to give government employees the discretion to violate the Constitution.

C. *Public Policy: No One Has the Discretion to Violate the Constitution*

As discussed above, the result of the *Shivers* decision is absurd. It implies that Congress intended to allow government employees to have the discretion to violate the Constitution. If we are to have any faith in Congress and our Constitution, this result cannot stand. Amending the statute would solve this absurdity while also maintaining one of the primary justifications for the discretionary function exception.

The FTCA represents the consent of Congress to waive sovereign immunity for certain conduct of government employees, and the discretionary function exception is a retraction of that consent.²⁰¹ One of the primary justifications for the discretionary function exception (and sovereign immunity generally) is that it allows the United States to avoid crippling financial liability for the negligent acts of its employees.²⁰² This justification is grounded in utilitarianism.²⁰³ If the government were liable for every minor act of negligence of its employees, then the country as a whole would suffer due to the extensive expenditure of resources on litigation and potential settlements.²⁰⁴ Because the potential liability could devastate the federal budget, immunizing the government is thought to be an adequate justification for preventing some harmed individuals from obtaining a financial remedy.²⁰⁵

This sound justification for the discretionary function exception can be maintained while also excluding unconstitutional conduct from the exception's protection. Due to the robust protection created by the *Gaubert* test, it is unlikely that the government would be opened up to excessive liability.²⁰⁶ As discussed in Section II.C., the creation of the *Gaubert* test has resulted in a high success rate for the government when it raises the discretionary function exception.²⁰⁷ By exposing the government to liability in the occasional circumstances in which an individual asserts a constitutional claim and a negligence claim together, the government will not be open to crippling liability and the absurd result of the *Shivers* decision can be resolved.

201. See 28 U.S.C. § 1346(b)(1); see also *id.* § 2680(a).

202. Goldman, *supra* note 63, at 854.

203. See *id.*

204. See *id.*

205. See *id.*

206. See Niles, *supra* note 5, at 1328–29 (noting that the *Gaubert* test made it clear that almost any discretionary act will fall within the protection so long as it is susceptible to a policy analysis).

207. See Bruno, *supra* note 23, at 412 (noting that the government's success rate in asserting the discretionary function exception rose to 76% since 1991).

D. *Proposed Amendment for the Discretionary Function Exception*

To ensure that no one has the discretion to violate the Constitution, an amendment to the FTCA is needed. Although the *Shivers* court could have reached the correct outcome had it properly applied the *Gaubert* test, a more permanent remedy for the reoccurring problem of constitutional tort claims can be resolved through an amendment to the FTCA.

Historically, judicial interpretations of the discretionary function exception have been insufficient to fill in the gaps of Congress's intent.²⁰⁸ Additionally, due to the creation of a *Bivens* claim, Congress has been disincentivized to amend the FTCA because it is believed that *Bivens* established an adequate remedy.²⁰⁹ However, as discussed above, *Bivens* is not always a perfect fit.²¹⁰ Therefore, the best solution is for Congress to amend the FTCA to make its intent clear.

This Note suggests that Congress should amend the discretionary function exception of the FTCA by further defining the phrase "whether or not such discretion be abused."²¹¹ This definition should make it clear that unconstitutional conduct by government employees is not an abuse of discretion and thus is not protected by the discretionary function exception. That is, the amendment should clarify that acts that transgress the Constitution are not discretionary because no one has the discretion to violate the Constitution.

Additionally, an amendment that clarifies which actions constitute an abuse of discretion will resolve the statutory interpretation concerns seen in *Shivers*. The *Shivers* court found that because the plain language of discretionary function exception does not use qualifying language to limit the scope of the term "abused," conduct that transgresses the Constitution falls within the exception.²¹² This amendment would negate that argument and would ensure that the discretionary function exception does not shield actions that rise to the level of a constitutional violation. In sum, this amendment will resolve the ambiguities of Congress's intent behind its general waiver of liability while affording individuals with a more adequate opportunity for relief.

VI. CONCLUSION

Mackie Shivers faced a grave and permanent loss, and the law was unable to afford him an adequate remedy, or any remedy for that matter. This Note has argued that Shivers's lack of remedy is a result of the complicated judicial history of the discretionary function excep-

208. See *supra* Section II.A.

209. See Hedrick, *supra* note 126, at 1059 (arguing that *Bivens* removed "any political pressure on Congress to create a more satisfactory remedy").

210. See *supra* Section V.A.

211. 28 U.S.C. § 2680(a).

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

tion and the resulting tests that attempted to express the intent of Congress. These judicial interpretations caused confusion among the circuit courts and resulted in two contrasting approaches to constitutional tort claims—one which found unconstitutional conduct to be outside the scope of the discretionary function exception, and one in which it did not.

The outcome in *Shivers* furthered the divide between the circuit courts by holding that the discretionary function exception shields unconstitutional conduct. This Note has argued that the Eleventh Circuit erred in its *Shivers* decision. First, the *Shivers* Court erred both by trusting *Bivens* to provide an adequate remedy and by fearing that a constitutional claims exception would be difficult to apply in practice. Second, the Eleventh Circuit erred by failing to properly apply the second prong of the *Gaubert* test. Third, the *Shivers* court erred by failing to consider the public policy implications of allowing government officials to have the discretion to violate the Constitution.

This misguided outcome further emphasizes the need for a statutory amendment to the FTCA. Judicial interpretations of the discretionary function exception and the presumptive interpretation of congressional intent have proven to result in inadequate remedies. Lawsuits against the United States require the consent of Congress. Therefore, it is only right that Congress should be the governmental body to clarify the impact of constitutional violations on tort claims against the government, especially after the contradictory approaches of the circuit courts. An amendment that makes it clear that transgressions against the Constitution are not shielded by the discretionary function exception will preserve the purpose of sovereign immunity (protecting the United States from mass financial liabilities), while both maintaining the supremacy of the Constitution and providing a path to recovery for individuals like Mackie Shivers who were gravely harmed by government employees.

