Illegal Acts and the Discretionary Function Exception of the Federal Tort Claims Act
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I. INTRODUCTION

Between 1953 and 1973 the Central Intelligence Agency opened without warrants approximately 215,000 letters passing through New York City to and from the Soviet Union. Code-named HTLINGUAL or SRPOINTER, the surveillance project initially involved only the exterior examination of envelopes, but eventually was expanded to include opening letters and photographing their contents for subsequent analysis and distribution at CIA headquarters. Copies of more than 57,000 letters were given to the FBI. A substantial number of the letters were opened pursuant to “watch lists” compiled from names submitted by various divisions of the CIA and the FBI. The other letters were opened at random.

In response to public disclosure of the CIA project, several suits have been filed against the United States under the Federal


2. COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 102-03 (1975) [hereinafter cited as CIA COMMISSION REPORT]; 1976 SELECT COMMITTEE REPORT, supra note 1, at 567-69.

3. CIA COMMISSION REPORT, supra note 2, at 105-06; 1976 SELECT COMMITTEE REPORT, supra note 1, at 569-72.

4. 1976 SELECT COMMITTEE REPORT, supra note 1, at 567.

5. One estimate is that the watch list accounted for 25% of the openings. Id. at 573. In the last year of operation, 5,000 of the 8,700 openings were based on the watch list. CIA COMMISSION REPORT, supra note 2, at 111. On the average the list included 300 names, of which about 100 were supplied by the FBI. Id. at 106-06. The watch list “originated with a relatively few names which might reasonably be expected to lead to genuine foreign intelligence or counterintelligence information, but soon expanded well beyond the initial guidelines into the area of essentially domestic intelligence.” 1976 SELECT COMMITTEE REPORT, supra note 1, at 574. At times the watch list included domestic peace organizations, political activists, scientific organizations, authors such as Edward Albee and John Steinbeck, and others. Id. When the project was finally terminated, the watch list contained about 600 names. CIA COMMISSION REPORT, supra note 2, at 112; 1976 SELECT COMMITTEE REPORT, supra note 1, at 573.

Tort Claims Act (FTCA) seeking damages for unauthorized intrusions on privacy and constitutional rights. Reaction by the courts has varied: three suits have been dismissed, motions to dismiss have been denied in two actions, and one judge has awarded damages to several plaintiffs. A fundamental issue in these cases is the applicability of the discretionary function exception of the FTCA to the CIA activities. Resolution of this important issue depends on the extent to which the exception protects acts of a discretionary nature which violate the law or the Constitution.

II. BACKGROUND

Prior to passage of the Federal Tort Claims Act, the federal government could not be sued in tort because of its sovereign immunity. This sovereign immunity is believed to be a carryover from the common law notion that “the King can do no wrong.” Immunity for the federal government was first recognized by the United States Supreme Court in dicta without explanation in 1821, and has been interpreted to mean that the United States may not be sued without the consent of the Legislature. Congress waived the government’s immunity from contract actions in the nineteenth century, and in the early twentieth century gave limited consent to be sued in admiralty and patent actions. Tort immunity was retained until 1946, when in response to the

large number of private relief bills being pressed upon the Congress, the FTCA was enacted to grant the district courts jurisdiction to hear complaints arising from negligent or wrongful acts of government workers acting within the scope of their employment.

Within the legislation, Congress retained governmental immunity in certain important respects. The most important of these is the discretionary function exception, section 2680(a) of the Act, which specifically exempts the government from liability for:

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

Thus, the government may not be sued for injuries resulting from the administration with due care of any statute or regulation or from the exercise of discretionary functions, even though that discretion "be abused."

The phrase "discretionary function," however, is nowhere defined in the Act, and the statutory language does not specify the extent to which illegal acts of a discretionary nature are to be protected by immunity. The report of the House Committee on the Judiciary accompanying the Act and the Supreme Court decision in Dalehite v. United States help illustrate the coverage of the discretionary function exception, but they do not deal directly with its relation to illegal activities. The applicability of the exception to illegal acts was an incidental issue in Hatahley v. United States, but the decision's precedential value may be questioned.

21. Id. § 2680(a) (1970).
A. Congressional Intent

The report of the House Committee on the Judiciary\(^{25}\) indicates some of the kinds of activities section 2680(a) was intended to protect, but it is not extremely helpful in determining the extent to which discretionary immunity protects illegal acts. In explaining the scope of this "highly important exception," the committee reported that section 2680(a) was intended to preclude the possibility of suit for damages against the government "growing out of an authorized activity . . . where . . . the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid."\(^{26}\) The exception was to immunize the government from suits based on abuses of discretionary authority by regulatory agencies such as the Federal Trade Commission, the Securities and Exchange Commission, or the Treasury, "whether or not negligence is alleged to have been involved."\(^{27}\) Since all the activities discussed by the committee are legal, an argument could be made that by negative implication illegal activities are outside the exception.\(^{28}\) On the other hand, the policy manifest in the first portion of section 2680(a)—that the legality and constitutionality of statutes and regulations not be tested through tort action\(^{29}\)—may also apply to discretionary activities as well.\(^{30}\) The committee reported that the Act was "not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion."\(^{31}\) This language may indicate that even illegal discretionary acts are protected by section 2680(a) as "an abuse of discretion."

Thus, while some language of the committee report implies that discretionary immunity protects illegal acts of a discretionary nature, other language seems to indicate that it does not. Because the language of the committee report allows for two interpretations of the relation of the discretionary function exception to illegal acts, it does not resolve the issue.

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26. Id. at 5.
27. Id. at 5-6.
B. Dalehite v. United States

The first significant judicial interpretation of the discretionary function exception came in Dalehite v. United States in 1953. Although the decision does not deal directly with illegal acts of a discretionary nature, it provides useful guidelines for applying section 2680(a). In Dalehite, a quantity of flammable fertilizer was stored on some ships near Texas City, Texas, in accordance with government plans to ship the nitrogen-based fertilizer to occupied countries after World War II. The fertilizer ignited and the ensuing blazes and explosions claimed many lives and caused extensive property damage. Ruling on the applicability of section 2680(a) of the FTCA in a suit following the disaster, the Supreme Court held that the loading and storage procedures and activities arose out of the performance of discretionary functions. The allegedly negligent acts—pertaining to bagging temperature, packaging, labeling, and the chemical coating of the fertilizer—were found to have been "performed under the direction of a plan developed at a high level under the direct delegation of plan-making authority from the apex of the Executive Department." After explaining that these acts were within the exception because discretion includes "determinations made by executives or administrators in establishing plans, specifications or schedules of operations," the Court concluded: "Where there is room for policy judgment and decision there is discretion."

The Court's observation that the decisions regarding storage procedures were "responsibly made at a planning rather than operational level" has led to the adoption of a planning level-operational level test by many lower courts. Under the test, decisions made at a planning level are protected by section 2680(a), while those made in implementation of existing plans are operational level decisions not within the exception. The test has been criticized for its undue reliance on the rank of the decisionmaker rather than on the nature of the decision. Several variants have

33. Id. at 17-23.
34. Id. at 37-42.
35. Id. at 39-40.
36. Id. at 35-36 (emphasis added).
37. Id. at 42.
39. See, e.g., Downs v. United States, 522 F.2d 990, 996-97 (6th Cir. 1975); L. Jayson, Handling Federal Tort Claims § 249.07, at 12-134 to -140 (1978); Comment,
been suggested by commentators, and one court has ruled that the rank of the official is not determinative and that the essential issue is whether the decision involves the formulation of government policy.

In some cases involving illegal government activities, the issue of discretionary immunity may be disposed of through the planning level-operational level test or one of its variations, without any need to consider the applicability of section 2680(a) to illegal acts. Such is the case when the illegal act takes place at an operational level, where immunity would not exist in any event. But the fact that a decision was made at a planning level and involved discretion in the formulation of government policy does not necessarily mean that immunity is appropriate. Where a planning level decision is made to engage in acts violating the law or Constitution, policy may dictate that the discretionary function exception not apply.

C. Hatahley v. United States

The applicability of the discretionary function exception to illegal acts was an incidental issue in Hatahley v. United States, where horses and burros belonging to some Navajo Indian families had been rounded up by federal officials and sold or destroyed, supposedly in accordance with a Utah abandoned horse statute. There was evidence that the statute was applied dis-
cinatorily against the Indians to force them to leave land for which white livestock owners had been granted permits. In sustaining a district court judgment holding the government liable for damages, the Supreme Court found that the Utah abandoned horse statute had not been properly invoked and that the federal agents had not complied with applicable federal regulations.

In its defense, the government argued that if the roundup was illegal and unauthorized, it would be outside the scope of the agents' employment and the United States would not be liable. Alternatively, if the roundup was authorized, official immunity should protect the federal agents from liability for their mistake of law, and in turn the discretionary function exception should protect the government to the same extent. The Court rejected the first part of the argument, observing that the acts complained of fell in that narrow area "in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment." As to the second portion of the argument, the Court stated, "We are here not concerned with any problem of a 'discretionary function' under the Act. These acts were wrongful trespasses not involving discretion on the part of the agents . . . ."

Although the Court did not elaborate its reasons for finding that the roundup did not involve discretion on the part of the agents, two explanations are possible. One is that the decision made by the range manager to gather the horses in an improper way was made at an operational rather than at a planning level. Regulations specifically provided the manner in which federal agents could invoke state statutes to deal with unlawful grazing. Since the failure to provide the adequate written notice required by regulation was an error made in the implementation of established procedures, it was arguably made at an operational level and therefore not protected by the discretionary function exception. A second explanation, suggested by recent cases, is that for

44. 351 U.S. at 175-76.
45. Id. at 177-80.
46. Brief for the United States at 45-57; see Petitioner's Reply Brief at 8-11.
47. 351 U.S. at 181.
48. Id. (citation omitted).
49. See Harris & Schnepper, supra note 41, at 174 (failure to follow guidelines as operational activity); see also Downs v. United States, 522 F.2d 996, 997-98 (6th Cir. 1975) (FBI agent who did not comply with FBI hijacking guidelines was not setting policy, discretionary immunity not applicable); 56 B.U.L. Rev. 815, 821-22 (1976). The first part of § 2680(a), precluding claims based on the execution of a statute or regulation with due care, did not apply in Hatahley since "'[d]ue care' implies at least some minimal concern
policy reasons an administrator should not be regarded as having discretion to disobey mandatory regulatory commands.\(^{50}\) Such a decision should be considered as outside the agent’s discretion, even if made at a planning level. In that sense, then, section 2680(a) would not apply because the action of the federal agents in *Hatahley* would be viewed as involving disobedience—not discretion.

*Hatahley*’s rejection, therefore, of discretionary immunity may have been based either on a planning level-operational level descriptive analysis or on a policy judgment that illegal acts should not come within the ambit of section 2680(a). Because it is not clear on which ground the discretionary function exception was found inapplicable, the case should not be considered as a controlling precedent.

In this absence of definitive precedent, the lower courts have generally taken one of two positions regarding illegal acts and discretionary immunity. The positions are: (1) that illegal acts represent abuses of discretion which come within the immunity provided by section 2680(a), or (2) that illegal acts are completely outside the exception because the government cannot have any discretion to violate the law. A third position, which has not been explicitly adopted by any court to date, is that clearly illegal acts are outside the exception, but those falling in a gray area of uncertain legality should be protected by either an absolute or a qualified immunity.

### III. ILLEGAL ACTS AND THE DISCRETIONARY FUNCTION EXCEPTION

#### A. Illegal Acts as an Abuse of Discretion Protected by Section 2680(a)

In *Kiiskila v. Nichols (Kiiskila I)*,\(^{51}\) the Seventh Circuit held that an Army commander had violated the first amendment rights of a civilian employee by excluding her from the Army base where she worked. Prior to the exclusion order a quantity of anti-war literature had been found in the trunk of the woman’s car while she was entering the base; she had previously mentioned an antiwar demonstration to a soldier on the base during a casual for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners.” 351 U.S. at 181.


\(^{51}\) 433 F.2d 745 (7th Cir. 1970).
conversation; and she had recently distributed leaflets near a naval station. In view of this behavior, the officer concluded that the woman would probably attempt to distribute literature on the post in violation of a base regulation prohibiting demonstrations, sit-ins, and similar activities. The court of appeals held that the worker had not violated the regulation and that in the absence of any "overwhelming countervailing state" interests peculiar to her job, the exclusion from the base and concomitant loss of her job were violative of the first amendment.

On remand, the district court issued an order enjoining the commander from barring the civilian worker from the base. The former employee then amended her complaint to seek $150,000 damages from the United States. The district court's dismissal of the damage claim was affirmed by the court of appeals in *Kiiskila v. United States (Kiiskila II)* on the basis of the discretionary function exception. The court observed that the commander possessed "wide, though constitutionally limited authority to exclude . . . persons inimical to security, discipline and morale." Although the officer may have "through negligence or wrongful exercise . . . abused his discretion by enforcing the regulation [regarding demonstrations and similar activities] against activity 'too far removed in terms of both distance and time' . . . to pass constitutional muster," the government remained immune because of the discretionary function exception. On these facts it was held that even a "constitutionally repugnant" exclusion order was merely an abuse of discretion protected by the discretionary function exception.

While not citing *Kiiskila II*, a district court in *Siebel v. United States* reached basically the same conclusion in dismissing an action based on the CIA mail project. Admitting that "the mail intercept activity complained of here might very well have been unlawful if conducted by private persons," the court reasoned that:

52. *Id.* at 746.
53. *Id.* at 746-47.
54. *Id.* at 748-51.
55. *Kiiskila v. United States*, 466 F.2d 626, 627 (7th Cir. 1972).
56. *Id.*
57. *Id.* at 628.
58. *Id.*
59. *Id.* at 627-28. Significantly, the court did not rule that one injured by unconstitutional excesses of discretionary authority is without remedy; it held only that pecuniary relief was unavailable. *Kiiskila I* indicates that injunctive relief is clearly allowable. 433 F.2d at 751.
this in itself does not subject the United States to civil liability. The FTCA exempt the United States from liability for discretionary acts performed by its employees, whether or not the discretion involved be abused. The discretionary acts complained of here might have involved an abuse of discretion. Nevertheless, the United States has not waived its sovereign immunity with respect to these acts.61

Similarly, both Hardy v. United States62 and Murphy v. CIA63 indicated that the CIA intrusions complained of fell within the discretionary function exception, and the actions were dismissed.

These cases would indicate, on their facts, that illegal acts of a discretionary nature are abuses of discretion within the protection of section 2680(a). Carried to its extreme, this interpretation would immunize any governmental decision which was shown to be of a discretionary nature by virtue of a planning level-operational level type of analysis. The legality of a decision would be taken into consideration only to the extent it affected the application of this test. The government would be liable only for those torts caused by operational level decisions; recourse for injuries from illegal discretionary acts would be limited to injunctive relief and private relief bills submitted to Congress.64

B. Illegal Acts as Outside the Discretionary Function Exception

While Kiiskila II and Siebel hold that acts exceeding an official’s authority are an abuse of discretion protected by section 2680(a), another series of cases places such acts outside the discretionary function exception. These cases hold that an official’s authority is limited by applicable regulations, statutes, and constitutional provisions. Any decision in violation thereof is outside an official’s authority or discretion—not merely an abuse of discretion—and therefore not protected by section 2680(a).

A case in which the due process clause of the Constitution and pertinent postal regulations were arguably violated is Myers & Myers, Inc. v. United States Postal Service,65 where a corporation brought a suit against the Postal Service for negligently re-

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61. Id. slip op. at 4.
63. No. 76-12, slip op. at 2 (N.D. Iowa May 28, 1976) (dictum).
65. 527 F.2d 1252 (2d Cir. 1975).
fusing to renew six contracts for the transportation of mail between post offices.\textsuperscript{66} Facts were alleged to show that the action was part of a sanction taken against the company for purported irregularities in operating procedures.\textsuperscript{67} The lower court dismissed the action, holding that the decision not to renew the contracts was a discretionary act under section 2680(a) of the FTCA.\textsuperscript{68} The appellate court agreed that the refusal to renew the contracts was within the discretionary function exception,\textsuperscript{69} but ruled that the denial of prior notice and a hearing was not.\textsuperscript{70}

The court observed that the Postal Service's refusal to renew the contracts under the circumstances may have amounted to a long term de facto debarment of the transportation company,\textsuperscript{71} and that in such a case due process and applicable postal regulations would require notice and an opportunity to be heard.\textsuperscript{72} The court also found that the government's failure to grant a hearing or notice could constitute a wrongful act within the meaning of the FTCA, and that discretionary immunity would not apply to it.\textsuperscript{73}

[H]ere the appellants' argument is that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment from government contracting. It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.\textsuperscript{74}

Thus, while section 2680(a) protected the government's final decision regarding the contract renewal, it did not protect irregularities in the decisionmaking procedure that violated postal regulations and due process requirements.

A similar analysis was used in \textit{DeBonis v. United States},\textsuperscript{75} a pre-\textit{Dalehlite} decision in which a district court dealt in dicta with the applicability of discretionary immunity to fourth amendment violations. The opinion observed that section 2680(a) protection would not apply to the illegal seizure of a vehicle without a warrant. "Under the circumstances [the agents] did not have any

\begin{thebibliography}{99}
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\bibitem{66} Id. at 1253-54.
\bibitem{67} Id. at 1254-55, 1258.
\bibitem{68} Id. at 1253-54.
\bibitem{69} Id. at 1256-57.
\bibitem{70} Id. at 1261.
\bibitem{71} Id. at 1255, 1258.
\bibitem{72} Id. at 1258-60.
\bibitem{73} Id. at 1260-61.
\bibitem{74} Id. at 1261.
\bibitem{75} 103 F. Supp. 123 (W.D. Pa. 1952).
\end{thebibliography}
discretion in this operation,—it was their obligation and duty to comply with the mandate of the fourth amendment and procure a search warrant before entering upon the premises of a private citizen."76 The case was dismissed on other grounds.77

A similar approach was followed in Griffin v. United States,78 a case dealing with injuries resulting from the release of polio vaccine that did not meet regulatory standards. After rejecting the government's argument that the decision to approve the particular lot of vaccine involved sufficient policy considerations to bring it within section 2680(a), the court stated:

Even were we to concede that discretion was otherwise conferred upon DBS [the Division of Biologic Standards] by the regulation, no discretion was conferred to disregard the mandatory regulatory command. In discounting test results that were required to be considered significant, DBS acted outside the scope of the authority conferred by the regulation. The violation of a nondiscretionary command takes what otherwise might be characterized as a "discretionary function" outside the scope of the statutory exception.79

The CIA mail-opening cases present a situation in which the first and fourth amendments as well as certain criminal statutes were allegedly violated. Three decisions, Avery v. United States,80 Cruikshank v. United States,81 and Birnbaum v. United States,82 have held that the discretionary function exception does not protect the decision to open mail without warrants.

Citing Myers and Hatahley, the district court in Avery v. United States denied a motion to dismiss, finding the decision to open mail, although "made at a high enough policy level so as to ordinarily come within the ambit of § 2680(a)," to be outside the exception.

[T]here is a difference between abuse of discretion and lack of discretion. An official who abuses his discretion, by acting arbitrarily or discriminatorily, for example, will be protected by § 2680(a). But an official with no discretion in a particular area has no discretion to abuse; he can only act in excess of his authority.83

76. Id. at 125-26.
77. Id. at 126-28.
78. 500 F.2d 1059 (3d Cir. 1974).
79. Id. at 1068-69.
83. 434 F. Supp. at 944.
A motion to dismiss was similarly denied in Cruikshank v. United States. The district court reasoned:

[If this country has learned nothing else in the past decade, it has learned that no man, nor any man acting on behalf of our government, is above the law. The Government should not have the “discretion” to commit illegal acts whenever it pleases. In this area, there should be no policy option.]

Relying on Avery, Myers, and Hatahley in its decision granting judgment to the plaintiffs, the court in Birnbaum v. United States concluded:

The decision to conduct an intelligence operation by methods which violate the Constitution of the United States and which also probably violate several federal statutes is not discretionary in the same sense that the decision to fly a supersonic plane over land or to produce a potentially explosive fertilizer might be. There is no evidence that Congress intended this exception to do more than free the operations of government from excessive concern over the untoward, and often unexpected, results of legitimate activity conducted in the public interest.

There is no discretion under our system to conceive, plan and execute an illegal program.

Under the analysis of these cases, the discretionary function exception does not apply unless a decision both meets the planning level-operational level test or a variant and does not violate any regulation, statute, or constitutional provision. Discretionary immunity, then, would automatically be waived whenever a government decision violated the law.

C. Immunity for Acts in the Gray Area of Uncertain Legality

Because the demarcation of constitutional, statutory, and regulatory limits on discretionary authority is not always clear, and factual issues on which jurisdiction or authority depends are often not easily resolved, the two categorical approaches discussed above are not always satisfactory. While not all policy decisions to commit illegal acts should be protected as is the case with the Kiiskila II approach, neither should all such decisions result in loss of immunity as dictated by the Myers approach. Where decisions fall within a gray area of legal uncertainty, the government should still be allowed some protection from liabil-

84. 431 F. Supp. at 1359.
85. 436 F. Supp. at 973-74.
ity. Two basic approaches are available to provide this protection. A purely objective approach would exclude clear violations of the Constitution and the law from the ambit of section 2680 (a), but include within the immunity discretionary acts that are arguably legal. A second approach would provide only qualified immunity for such discretionary acts, dependent on the officer’s good faith belief or motives.

1. An arguable legality test

In applying the arguable legality test to illegal acts of a discretionary nature, a court would consider only the objective reasonableness of the official’s determination that an act was or could be considered legal. The officer’s subjective motivations and beliefs would not be relevant to application of the discretionary function exception under this test. The discretion protected by section 2680(a) would simply be defined to include the power of an administrator to reasonably interpret the law limiting his authority.

The arguable legality test has a partial analogy in the common law immunities and defenses available to public officials when sued individually. Public officers are generally granted personal immunity from suit for decisions made within the scope of their authority. The immunity protects errors of fact as well as of law. However,

all officers, including judges, are liable if they act wholly outside of their jurisdiction or official authority, even where the act is a discretionary one . . . . [But a] further refinement [distinguishes] acts which are merely “in excess” of the jurisdiction or authority—meaning that they are within the scope of the general subject-matter over which the officer has power, although he is without jurisdiction in the particular case. As to such acts there is immunity . . . . [T]he determination of facts which do or do not give him jurisdiction or authority . . . is obviously a judicial or discretionary function.

89. W. Prosser, supra note 87, § 132, at 991 (footnotes omitted).
Another commentator has reasoned,

[I]f the officer acts clearly outside the authority conferred on him by statute, regulation or process, he is liable for the injurious consequences of his conduct . . . . But the notion today is recognized that an officer generally has the duty and the power to determine . . . even mistakenly that he has jurisdiction—unless the facts and the law are so clear as not to present an issue challenging "judicial inquiry."90

While the interests protected by the personal immunity of officials are not identical to those protected by governmental immunity,91 they are sufficiently similar92 that it could be argued the federal government should not have to pay each time an employee misinterprets his authority where the law is unclear.93

The result in Kiiskila II conforms with an "arguable legality" test as applied to section 2680(a). There the commander's order barring the civilian employee from the Army base because of her antiwar activities withstood attack at the district and appellate court levels.94 Only when the appeal was heard en banc was the lower court reversed and the order of exclusion found to be unconstitutional.95 In the subsequent damage action, the fact that the order was not obviously in violation of the Constitution may have been a factor in the finding that the order was protected by the discretionary function exception. If the commander's act had been more blatantly unconstitutional, perhaps the district and appellate courts would not have been so willing to apply section 2680(a).

The arguable legality test can also be applied to the facts in Myers where there were indications that the Postal Service's refusal to renew the contracts with the transportation company was part of a sanction taken against it for purported, but later disproven, irregularities in business procedures. If the facts alleged

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90. 2 F. HARPER & F. JAMES, supra note 87, § 29.10, at 1643 (emphasis added). See Barr v. Mateo, 360 U.S. 564, 575 (1959); Spalding v. Vilas, 161 U.S. 483, 498 (1896); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1343-45 (2d Cir. 1972); Jaffe, supra note 87, at 218; Remedies Against the United States, supra note 64, at 834-35.
92. See Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting); Jaffe, supra note 87, at 224; James, supra note 11, at 651-52; Reynolds, supra note 39, at 121-23.
95. Id.
by the company were true, it seems fairly clear that the nonrenewals were part of a de facto debarment, and in such a case regulations plainly required prior notice and a hearing. Failure to provide notice and a hearing was clearly a violation of applicable regulations, and imposition of liability was thus consistent with the arguable legality test.

The CIA cases can also be rationalized with the arguable legality test, with the conflicting results being attributable to a difference of opinion as to how “arguably legal” the mail-opening operation was at the time. It could be that Birnbaum, Cruikshank, and Avery reflect a belief that the CIA activities were clearly illegal and thus outside section 2680(a), and that Siebel, Murphy, and Hardy represent a belief that the project was merely of questionable legality at the time, but still worthy of immunization. Language from Siebel that “the mail intercept activity complained of here might very well have been unlawful if conducted by private persons” may provide some support for this interpretation. Although applicable criminal statutes and constitutional provisions seem to indicate that the project was illegal, there is still room for a difference of opinion over whether it was clearly illegal at the time.

2. A qualified good faith defense or immunity

A qualified good faith immunity or defense comparable to that granted certain officials in section 1983 and Bivens civil rights actions could also be made applicable to the government

96. See note 71 and accompanying text supra.
99. In Birnbaum, the government maintained that a sound argument could be made that at the time the mail openings occurred they were legal. It refrained from doing so in the interest of deterring future violations. Memorandum of United States in Support of its Renewed Motion to Dismiss and in Opposition to Plaintiff’s Motion for Summary Judgment on the Issue of Liability of the United States at 3.

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

in areas of unclear legality. In *Scheuer v. Rhodes*, the Supreme Court held that in section 1983 actions for deprivations of constitutional rights under color of state authority, officials are granted qualified immunity in varying degrees dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

In the subsequently decided cases of *Wood v. Strickland* and *O'Connor v. Donaldson* the Court may have slightly modified the standard, holding that the relevant question is whether a state official knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the affected, or if he took the action with malicious intention to cause a deprivation of clearly established constitutional rights or other injury to the.

An analogous qualified good faith immunity as applied to governmental tort liability would turn on two elements: (1) the existence of a good faith belief in the legality of the decision made, and (2) the reasonableness of that belief. Thus, applica-

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102. The court noted in *Cruikshank* that "[w]hether or not the government should be liable for illegal acts carried out by employees acting in good faith is not an issue before the court at this time." 431 F. Supp. at 1357 n.5. Perhaps if a good faith defense had been advanced, the outcome would have been more favorable to the government. However, there are indications that the actions in fact were not taken in good faith. See CIA Commission Report, supra note 2, at 107; 1976 Select Committee Report, supra note 1, at 608-11.

104. Id. at 247-48.
107. See Procunier v. Navarette, 98 S. Ct. 855, 864-66 (1978) (Stevens, J., dissenting); Economou v. United States Dep't of Agriculture, 535 F.2d 688, 693 (2d Cir. 1976); K. Davis, supra note 87, § 26.00, at 574-76.
109. See Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2d Cir. 1972);
tion of the good faith test would be similar to that of the arguable legality test, with an additional subjective consideration of actual belief or motive.

IV. Policy

In deciding which of the three principal approaches should be used in cases involving illegal acts of a discretionary nature, four basic policy reasons behind section 2680(a) must be considered. First, the discretionary function exception is said to promote the separation of powers by preventing undue judicial interference with executive decisions. Second, preventing imposition of liability is viewed as promoting zealous performance of duties and responsibilities by government officials. Third, courts are said to be ill equipped to "second-guess" discretionary policy decisions made by the executive branch. Finally, it has been suggested that discretionary immunity helps avoid the "enormous and unpredictable liability which could result from judicial re-examination of major executive and legislative decisions."110

A. Guarding the Separation of Powers

Providing immunity for discretionary acts helps promote the independence of the judicial and executive branches of government. Where an official has been given authority to weigh competing policy considerations and make quasi-judicial or quasi-legislative decisions, Congress has indicated "its desire that final decision-making power and responsibility rest in that official."111 Decisions by such officials should be subject to the test of the ballot box, directly or indirectly, and not to the courts' reasonable man test.112 If decisions are subject to review through tort cases, officials will "start acting with one eye to possible court questioning, resulting in the loss of much of their independence, regardless of the fact that they cannot be held personally liable."113 To avoid


111. Remedies Against the United States, supra note 64, at 892; see Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1975).


such a result, the judiciary is reluctant "to review the propriety of actions which under our form of government are committed to the co-ordinate branches of that government," and even in the absence of section 2680(a), it is likely that a discretionary function exception would be judicially created. Judicial review by appeal from administrative determinations may sometimes affect decisions otherwise protected by the exception, but with its attendant procedural safeguards, such review does not involve the same cost or degree of judicial interference as do tort actions.

The Kiiskila II approach, that illegal discretionary acts are considered an abuse of discretion protected by section 2680(a), would further this objective by disallowing review through tort claims of any executive policy decision. Protection to this extent, however, may be overly broad. Where policy has been established by statute or the Constitution, arguably no "room for policy judgment and decision" is left for officials to violate that law. Since officials are not granted policymaking power or discretion to commit illegal acts, allowing suit for illegal acts of a discretionary nature through the Myers approach does not infringe on the decisionmaking power legally entrusted to public servants, and does not unduly impair separation of powers.

An illustration of this principle may be found in the CIA mail-opening context. There, a legislative and constitutional policy had already been established that mail not be opened and read without a warrant. The decision whether intelligence needs outweighed interests in privacy was for a magistrate to make, not CIA agents in New York City. There was no "room for policy judgment and decision" in this respect, and therefore the mail intercept project should not merit application of discretionary immunity.

The arguable legality and good faith tests would also comport with the separation of powers. Where the exact limits of the law and official authority are not clear, an officer's "attempt to define those limits must be [considered] part of the task committed to his judgment." So long as his interpretation is reasonable, it should be respected and protected by section 2680(a).

114. 2 F. HARPER & F. JAMES, supra note 87, § 29.15, at 1662.
115. James, supra note 11, at 651; see K. DAVIS, supra note 40, § 25.05, at 481.
116. See Remedies Against the United States, supra note 64, at 892-93.
119. Remedies Against the United States, supra note 64, at 834.
B. Fostering Official Zeal

1. The need for immunity

A reason often suggested for granting personal immunity to public officials is the chilling effect that potential liability may have on the ardor of public servants and on the willingness of persons to serve in such positions of responsibility.120 Making the government liable for erroneous decisions of its employees alleviates the problem to some extent, but it may still "unduly inhibit the exercise of power. The officer's fear for his rating and his sense of responsibility to his principal may lead him to decide that a risk of a law suit is the greater evil."121 The time commitments and potential loss of face in trials may thus act as a dampening force on official zeal.122

The precise impact of potential government liability on employees is not known,123 but if every decision were capable of generating a lawsuit, officials would tend to be overly cautious and, in some degree, to work in an atmosphere of fear and tension.124 Effective government policymaking requires maximum freedom to plan, experiment, and negotiate.125 To this end, the discretionary function exception eliminates the threat of tort suits for policy decisions made within the official's authority, and thereby removes any stifling effect of potential government liability on official zeal, initiative, and effectiveness.

In this respect, a Kiiskila II approach would maximize the zeal of public servants by removing the threat of suit for any act of a discretionary nature. But there is no need to promote the zealous performance of illegal activities. The important objective is that an officer be able to exercise fully his legal authority.126 The Myers approach basically accords with this objective. For example, imposing government liability for the CIA mail open-

120. Wood v. Strickland, 420 U.S. at 319-20; Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); Jaffe, supra note 87, at 223-24.
123. James, supra note 11, at 652.
125. Reynolds, supra note 39, at 121; see James, supra note 11, at 652.
126. See Remedies Against the United States, supra note 64, at 834.
ings would primarily deter illegal intelligence operations, but not unduly affect legitimate intelligence gathering. Just as imposing liability for negligent operational level decisions may encourage greater care on the part of government administrators, 127 so allowing suit for clearly illegal discretionary acts may discourage violations of the law. 128

Of course, officers should not be "charged with predicting the future course of constitutional law." 129 Where the law is unclear there may be a danger that instead of merely avoiding illegal actions, officers will tend to do nothing at all. The arguable legality and good faith tests may prevent this result by granting officials a reasonable amount of discretion in gray areas of legal uncertainty and thus encourage full use of official authority. 130

2. Arguable legality versus good faith immunity

The deterrent effects of the arguable legality and good faith tests are not identical. The good faith standard may have a greater dampening effect on official ardor than an arguable legality test because a public servant may fear being "hard put to it to satisfy a jury of his good faith" 131 if a decision turns out to be erroneous. When liability depends on an official's subjective belief or motives, the danger of harassing suits with insubstantial bases may hinder impartial, decisive action. 132

The choice between the two tests depends on the amount of zeal and freedom it is desired that officials exercise in a particular area of the law. 133 Perhaps the choice should be based on the kind of right infringed upon by the decision. 134 For instance, good faith might be the appropriate standard for applying section 2680(a) where constitutional rights are involved; in nonconstitutional cases, arguable legality might be better. 135 Alternatively, in the

130. See Remedies Against the United States, supra note 64, at 834.
132. See Remedies Against the United States, supra note 64, at 834.
133. Jaffe, supra note 87, at 224-25.
135. This would be analogous to what appears to be the federal rule regarding per-
interest of simplicity, it may be more desirable that the same standard be adopted for all illegal acts. In any event, deciding which test to use is less important than recognizing some kind of immunity for acts of uncertain legality so as to allow maximum flexibility and freedom in government.

C. Avoiding Judicial “Second-Guessing” of Discretionary Acts

It has been suggested that the judiciary is not well suited to make political judgments more appropriately left to Congress and the executive branch. The fault concept largely relied on in judicial decisionmaking presupposes the existence of an objective standard which may not exist in an area of competing legislative facts and theories. “The normal rules of liability cannot be applied easily to the unusual and gigantic tasks that few but the Government perform—tasks such as waging wars and building flood control projects.” Using the Dalehite fact situation as an example, one commentator has concluded:

The considerations are too complex. There are big questions of comparative cost, of alternative technique, and of what risks must be undergone in the public interest. An attempt to transmute in the alembic of negligence these competing considerations into a judgment of “reasonableness” emphasizes that the negligence concept has not been designed to handle such issues.

However, with regard to illegal acts of a discretionary nature, such complex policy judgments are generally not required by any of the three possible approaches. Under Kiiskila II, once a decision is determined to be of a discretionary nature, no further judicial inquiry is necessary, and the case may be dismissed. The Myers approach requires only a determination of the legality of the act—something courts are equipped to do. If the law violated was meant to protect against the harm that occurred and the illegal act caused the harm, then liability may be imposed without the weighing and selection of competing policies. Similarly,
resolution of the issues involved in application of the arguable
legality and good faith tests—the existence of a good faith belief
in the action, and/or the reasonableness of that belief—is well
within judicial capabilities. Thus, the ability of courts to second-
guess executive decisions should not affect the selection of a stan-
dard for applying the discretionary function exception to illegal
acts.

D. Preventing Excessive Damages

Government decisions necessarily affect large numbers of
people and organizations; some of these decisions "conceivably
could cause huge losses to millions of people."141 While section
2680(a) was not enacted specifically to preclude potentially enor-
mous liability resulting from discretionary activities, it "can, and
inevitably will, serve that purpose."142 There is an interest in
keeping the government relatively solvent, and large judgments
could hamper vital programs.143 Allowing imposition of liability
in every case where government employees have exceeded the
bounds of their authority might contravene this interest by in-
creasing the potential for excessive recoveries. For example, in
Birnbaum the trial court awarded $1,000 damages to each plain-
tiff.144 Since the aggregate liability for the over 215,000 pieces of
mail opened by the CIA during the twenty-year life of the mail
intercept could reach great amounts,145 it may be the kind of
result that the discretionary function exception was intended to
prevent.

On its face, Kiiskila II, with its broad construction of the
discretionary function exception, would appear to be the best
approach for avoiding excessive damages, and Myers, with its
narrowing of government immunity, would appear to be the
worst. However, the extent to which economic considerations af-
fect the courts’ application of section 2680(a) is not clear. One
writer has suggested that "[a]lthough courts have not always
adverted to this consideration, the results indicate that the possi-
bility of an inordinate amount of liability to an indeterminate
number of people has influenced their decisions."146 Another has

141. Reynolds, supra note 39, at 123.
142. Id. But see 7 Hastings L.J. 330, 332 (1956).
143. Reynolds, supra note 39, at 123.
144. 436 F. Supp. at 989.
145. However, Wilson v. United States, No. 77-975 (E.D.N.Y. Feb. 17, 1978), indi-
cates that Judge Weinstein would generally limit damages to $1,000 per plaintiff rather
than $1,000 per letter opened.
146. 66 Harv. L. Rev. 488, 494 (1953).
proposed that in cases where the potential applicability of discretionary immunity is not certain, consideration should be given to the interest of preventing "massive and widespread claims resulting from a single governmental act." Apparently, although prevention of massive judgments may influence the courts in borderline cases, it is not usually a determinative factor.

Whatever subjective desire Congress may have had to prevent excessive damages by discretionary immunity must be balanced against congressional intent to compensate those injured by the wrongs of governmental employees, and the interest of keeping actions of administrators within the limits of their authority. Where damages from an illegal act are not speculative, the interest of compensating the injured and deterring unlawful decisions should outweigh the interest of restricting the government's potential liability. The discretionary function exception should not be a bar to recovery for injuries from clearly illegal acts. The balance may shift, however, when acts of arguable legality are considered. While the interest in compensating those harmed is just as great as with clearly illegal acts, the resulting deterrence of administrative wrongdoing may not be as effective or desirable. The interests of allowing administrators some discretion to reasonably determine the bounds of their authority and of avoiding potentially massive recoveries weigh heavily in favor of allowing some form of immunity for actions in the gray area of arguable legality.

V. Conclusion

By enacting the discretionary function exception, Congress evidenced an intent that certain decisions entrusted to the nonjudicial branches of government should not be subject to review by the courts. However, the split of judicial opinion in the CIA cases illustrates that the state of the law regarding illegal acts and the discretionary function exception is unclear. While two Supreme Court cases—Dalehite v. United States and Hatahley v. United States—shed light on the exception, neither case provides a definitive precedent for resolving the issue. Lower courts have generally taken two positions, either (1) that illegal acts are an abuse

149. Notes 129-35 and accompanying text supra.
of discretion protected by section 2680(a), or (2) that illegal acts are completely outside of the scope of the exception.

The most desirable result would seem to be a middle position: that clearly illegal acts are outside the scope of the exception, but those meeting either an arguable legality or good faith test are protected by discretionary immunity. This position adequately promotes the separation of powers, encourages zealous performance of official functions, can be easily applied by the judiciary, and strikes a balance between the government's interest in avoiding potentially excessive liability and the victim's interest in receiving just compensation.

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