

11-1-2007

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Recommended Citation

Andrelv Hyer, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. Rev. 1091 (2007).

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The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis

I. INTRODUCTION

In 1946 Congress enacted the Federal Tort Claims Act (FTCA), which provides that the federal government can be held liable in tort “in the same manner and to the same extent as a private individual under like circumstances.”¹ In enacting the FTCA, Congress also provided thirteen exceptions to this baseline rule.² The most litigated,³ and one of the broadest⁴ of these statutory exceptions, is the discretionary function exception.⁵ The Supreme Court created the current test for the applicability of the discretionary function exception in 1991 in *United States v. Gaubert*.⁶ The *Gaubert* Court’s test created a “strong presumption” that the discretionary function exception applies where the governmental official has discretion to act and the action is “susceptible to policy analysis.”⁷ Although the *Gaubert* presumption has remained the law for seventeen years, it has been consistently decried by commentators as applying the discretionary function exception too broadly and in effect swallowing the purpose of the FTCA.⁸ Accordingly, various commentators have proffered a number of proposals on how to refine and narrow the

1. 28 U.S.C. § 2674 (2000).

2. *See id.* § 2680.

3. James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (“The most gaping and frequently litigated of the FTCA’s exceptions is the ‘discretionary function exception.’”).

4. Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1300 (2002) (“[W]ith the possible exception of an express limitation on claims arising out of intentional torts, the broadest and most consequential of the FTCA’s specific shields is the so-called ‘discretionary function exception.’”).

5. 28 U.S.C. § 2680(a).

6. 499 U.S. 315 (1991).

7. *Id.* at 324–25. The *Gaubert* Court’s analysis and the presumption it created are discussed further in Part III, *infra*.

8. *See infra* Part III.B.

application of the exception.⁹ Similarly, several recent Ninth Circuit decisions reveal judicial attempts to chip away at the *Gaubert* “presumption” and thus narrow the exception’s applicability.¹⁰

This Comment will discuss and compare the Ninth Circuit’s recent approach to the discretionary function exception with both a stricter application of the Supreme Court’s test in *Gaubert* and alternatives advocated by commentators. In so doing, this analysis will illustrate that in addition to applying the discretionary function exception too broadly, the Court’s current approach under *Gaubert* also creates an undesirable incentive for governmental agencies to establish ineffective regulations in order to avoid FTCA liability. Further, this Comment shows that neither the Ninth Circuit’s approach nor proposed scholarly alternatives present solutions that are both workable for courts and able to remove the incentive for agencies to regulate ineffectively.

Identifying the problems created by both the Court’s current approach and other alternative approaches, this Comment proposes a novel analytical approach based upon recognition of the incentives the discretionary function exception creates for agencies in drafting policies. In applying this proposed “incentive recognition” approach, a court would undergo a two-step analysis. First, the court would determine whether the discretionary decision was made through a legislative or administrative process. If so, the exception applies; if not, the court would move to the second step to determine whether: (1) the official taking the action was affirmatively delegated the authority to use discretion in considering specific policy factors; (2) before taking the action, the official had received training such that she was aware of the policy factors she was to consider; and (3) at the time of the action, the official had access to information to make such a policy-based decision. If the government can show that these three criteria are met under the second step, there is a rebuttable presumption that the discretionary function exception applies. This proposed “incentive recognition” approach would narrow the scope of the discretionary function exception and avoid encouraging agency policymakers to enact inefficient policies and regulations to avoid liability exposure. The result is a discretionary function analysis

9. See *infra* Part IV.

10. See *Soldano v. United States*, 453 F.3d 1140 (9th Cir. 2006); *Oberson v. U.S. Dep’t of Agric.*, 441 F.3d 703 (9th Cir. 2006).

that is more attuned to Congress's purpose in enacting the discretionary function exception and the FTCA as a whole.

Part II provides an overview of the context surrounding the passage of the FTCA, Congress's intent in enacting the discretionary function exception, and the Supreme Court decisions dealing with the exception prior to *Gaubert*. Part III provides a general overview of the *Gaubert* decision and reactions to *Gaubert* by scholarly commentators. Part IV discusses various alternative approaches to the Court's current discretionary function analysis, including the approach adopted in several recent Ninth Circuit cases. Part IV also discusses the issues and potential problems raised by each of these alternative approaches. Part V introduces this Comment's proposed "incentive recognition" approach and illustrates how it is similar to and different from other alternative approaches and how it deals with issues that other approaches do not fully address. Specifically, Part V will show that the incentive recognition approach provides a workable standard without creating undesirable policy incentives. Part VI provides a brief conclusion.

II. CONTEXTUAL BACKGROUND: CONGRESSIONAL INTENT AND SUPREME COURT TREATMENT PRIOR TO 1991

A. *The FTCA*

The FTCA was enacted by Congress in 1946.¹¹ Without such Congressional consent to be held liable in tort, the doctrine of sovereign immunity prevents a party from bringing a tort action against the federal government.¹² Prior to the FTCA, the only means

11. See Niles, *supra* note 4, at 1301.

12. The doctrine of sovereign immunity in American law is often considered the American equivalent of the English common law doctrine that "the king could do no wrong." See *United States v. Clarke*, 33 U.S. 436, 444 (1834); see also G. Michael Harz, Comment, *The Liability of the United States Government Under the Federal Tort Claims Act*, 66 DENV. U. L. REV. 601, 602 (1989). Despite this general view, some commentators contend that considering the structural differences between American government and English monarchy, British sovereign immunity was improperly transplanted into American law and that Supreme Court jurisprudence immediately prior to the FTCA recognized this and applied the doctrine less rigidly. *Id.* at 604 ("Several years prior to the adoption of the FTCA, the Supreme Court indicated that it was backing away from strict construction in favor of a more liberal interpretation of governmental immunity waivers."); Niles, *supra* note 4, at 1297 ("The passage of the [FTCA] has been described as the culmination of a broader trend toward the relaxation of traditional concepts of sovereign immunity in the United States . . ."); see also

for parties to seek redress for injury caused by the government was “through the cumbersome mechanism of private bills” issued by Congress.¹³ Considering that the issuing of private bills would have been governed more by happenstance and political considerations¹⁴ than by the actual merits of a case, the government’s submission to tort liability under the FTCA marked a landmark change.

The baseline rule in 28 U.S.C. § 2674 provides that the federal government shall be liable in tort “in the same manner and to the same extent as a private individual under like circumstances.”¹⁵ One commentator suggests that the purpose of the FTCA was to relieve Congress of the burdensome private bill procedure, rather than “to open the federal government to new theories of tort liability.”¹⁶ Thus, Congress included thirteen exceptions to this baseline rule. The discretionary function exception is “[t]he most gaping and frequently litigated of the FTCA’s exceptions.”¹⁷

B. The Discretionary Function Exception

The discretionary function exception shields the federal government from liability for “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a

Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 2–3 (2002) (“The history of sovereign immunity in the United States is a history of mistakes . . . [T]his entrenched system of immunities owes its existence to multiple errors made by judges, scholars, and legislators in attempting to understand our early history.”). Professor Niles further contends that an understanding of “the [doctrine of sovereign immunity’s] clear incongruence with [American] governmental structure” assists in understanding the FTCA’s proper role. Niles, *supra* note 4, at 1280–96. Regardless of this theoretical “incongruence,” it is clear that at the time the FTCA was enacted, the overwhelmingly prevailing view was that the government could only be sued in tort if it submitted to jurisdiction. *Id.* at 1289–90; *see also* Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 876 (1991) (noting congressional acts passed in the decades prior to the FTCA that “open[ed] the courthouse doors to victims of maritime torts” by consenting to jurisdiction).

13. Krent, *supra* note 12, at 875–76.

14. *See id.*

15. 28 U.S.C. § 2674 (2000).

16. Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 715 [hereinafter *Reflections*] (“The legislator voting for the [FTCA in] 1946 approved a cautious transfer of government tort responsibility from Congress to the federal courts. The goal was much more to aid Congress than to open the government to new theories of tort liability.”). *See discussion infra* notes 103–06 and accompanying text.

17. Levine, *supra* note 3, at 1541.

discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”¹⁸ By passing this provision, it is apparent that Congress intended for governmental actions based upon certain types of decisions to avoid tort liability.¹⁹ Several Supreme Court cases addressing the discretionary function exception have looked to the FTCA’s legislative history and have determined that in enacting the exception “Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”²⁰

18. 28 U.S.C. § 2680(a). Section 2680(a) provides that the FTCA does not apply to [a]ny 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.

19. See *infra* text accompanying notes 21–22.

20. *Berkovitz v. United States*, 486 U.S. 531, 537–39 n.4 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813–14 (1984) (reviewing legislative history of discretionary function exception); *Dalehite v. United States*, 346 U.S. 15, 27–34 (1953) (“The legislative history indicates that while Congress desired to waive the Government’s immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.”).

In referencing the legislative history of the discretionary function exception, *Dalehite*, *Varig* and *Berkovitz* all refer to a paragraph of comments made by Assistant Attorney General Francis Shea in a hearing before the House Judiciary Committee on January 29, 1942, which was then reprinted with modifications in the Senate and House Reports on the subject. *Reflections*, *supra* note 16, at 705–07. The pertinent parts of these statements provide:

[The discretionary function exception] is a highly important exception, intended to preclude any possibility that the [FTCA] might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for 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. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The [FTCA] is 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. Nor is it desirable or intended that the constitutionality of legislation, or

Commentators have likewise noted that the exception was intended to serve a separation of powers function.²¹ Yet in enacting the exception, Congress did not define discretionary function and commentators suggest that Congress provided little concrete guidance as to its intended scope.²² House Reports indicate that Congress intended that regulatory actions taken by the Federal Trade Commission, Securities Exchange Commission, and Treasury Department should fall within the exception,²³ and that the exception should exclude “such common-law torts as an automobile collision caused by the negligence of an employee of . . . [a] Federal agency.”²⁴ Beyond the two extremes of broad ranging regulatory actions and automobile accidents, the task fell upon the courts to determine the precise line where the discretionary function

the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies. Thus, [the discretionary function exception is] not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions.

H.R. REP. NO. 79-1287, at 5-6 (1946), quoted in *Dalehite*, 346 U.S. at 29 n.21.

For an overview of legislation leading up to the enactment of the FTCA and the legislative history discussing the discretionary function exception, see *Reflections*, *supra* note 16, at 695-715.

21. Krent, *supra* note 12, at 894-906; Donald Yoo, *With the Federal Tort Claims Act, the Federal Government Has Waived Its Sovereign Immunity on a Limited Basis*, L.A. LAW., Feb. 2007, at 24, 29 (“The justification behind the rather broad scope of the discretionary function exception is that to allow courts to adjudicate matters of administrative discretion would force judges to second-guess decisions of executive officers, violating the principle of separation of powers and interfering with government processes.”).

22. Krent, *supra* note 12, at 877 (“Congress plainly intended that some agency negligence would be exempted, but the scope of the exception was left undefined.”). Although the Court looked to the legislative history for guidance in both *Dalehite* and *Varig*, commentators have questioned the helpfulness of the legislative history in determining the scope of the discretionary function exception’s coverage. See *id.* (“The legislative history also does not clarify the scope of the exception.”); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 367 (1995) [hereinafter *Protecting Discretion*] (“The legislative history, spread over several sessions of Congress, gives little . . . guidance.”). But see Niles, *supra* note 4, at 1303 (“The legislative history of the Act . . . provides valuable guidance as to what Congress intended to shield with the discretionary function exception.”).

23. H.R. REP. NO. 79-1287, at 5-6 (1946), quoted in *Dalehite*, 346 U.S. at 29 n.21; see also Krent, *supra* note 12, at 877; Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 449 (1997).

24. H.R. REP. NO. 79-1287, at 6 (1946), quoted in *Dalehite*, 346 U.S. at 29 n. 21.

exception's coverage ends. Thus, although the exception is statutory in nature, its scope and application have been, in large part, a judicial determination.²⁵

C. Judicial Interpretations of the Discretionary Function Exception

I. Dalehite v. United States

The Supreme Court's first treatment of the discretionary function exception came in 1953 with *Dalehite v. United States*.²⁶ *Dalehite* involved injuries incurred when two ships in Texas City harbor containing fertilizer with an ammonium nitrate base caught fire and caused extensive injuries.²⁷ Because the federal government was overseeing the manufacture and shipment of the fertilizer,²⁸ it was sued under the FTCA for negligence. Dalehite claimed that the government was negligent in (1) "drafting and adopting the fertilizer export plan as a whole," (2) manufacturing the fertilizer, and (3) loading the ship.²⁹ The Court held that that the discretionary function exception barred all of these claims.³⁰

The Court began its analysis with an extensive review of the legislative history, determining that Congress did not intend to prevent liability for "common-law torts" such as a government employee's negligence in operating a vehicle³¹ on the one hand but intended to prevent tort suits brought to test the legality of legislative or administrative actions such as federal fund expenditure.³² The Court then held that "the cabinet-level decision to institute the fertilizer export program was a discretionary act"

25. See Niles, *supra* note 4, at 1303 ("The primary problem for courts asked to apply the [discretionary function exception] has been coming up with a definition of 'discretionary . . .'").

26. 346 U.S. 15 (1953).

27. *Id.* at 22-23. As a result of the fire, "[b]oth ships exploded and much of the city was leveled and many people killed." *Id.* at 23. Henry Dalehite's case was a test case for hundreds of other claims. *Id.* at 17.

28. *Id.* at 17-22. The fertilizer was to be sent to aid countries devastated by World War II. *Id.* at 19.

29. *Id.* at 23-24.

30. *Id.* at 24.

31. *Id.* at 28.

32. *Id.* at 27 (citing *Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary, 77th Cong. 29 (1942)* (statement of Francis M. Shea, Assistant Attorney General, United States of America)).

protected under the exception.³³ Similarly, the Court held that the exception barred the other two claims regarding the manufacture and shipping of the fertilizer, reasoning that these activities were done according to a “basic ‘Plan’” that had been created through a proper exercise of the relevant governmental officer’s discretion.³⁴

Essentially, the *Dalehite* Court decided that the discretionary function exception applies to (1) any planning-level action with which “there is room for policy judgment” and (2) any operational-level action taken pursuant to a planning-level directive. Although the *Dalehite* Court clearly set out that these types of actions *are* within the scope of the discretionary function exception, the Court did not determine what types of actions *are not* covered by the exception. Specifically, the court stated that “[i]t is unnecessary to define, apart from this case, precisely where discretion ends.”³⁵

2. Indian Towing Co. v. United States

In its 1955 decision *Indian Towing Co. v. United States*,³⁶ the Court reaffirmed *Dalehite*’s planning/operational distinction rather than adopting an analysis that would consider whether the action at issue was part of a “uniquely governmental function.”³⁷ The Court rejected the government’s proposed “uniquely governmental function analysis” because it “would . . . push . . . courts into the ‘non-governmental’-‘governmental’ quagmire that has long plagued the law of municipal corporations.”³⁸ In sum, *Indian Towing* rejected as unworkable a discretionary function analysis based on determining whether the action at issue involves a “uniquely

33. *Id.* at 37.

34. *Id.* at 37–39. The Court found there was no liability for negligently creating the plan because “[t]he decisions . . . were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government’s fertilizer program.” *Id.* at 42.

35. *Id.* at 35.

36. 350 U.S. 61 (1955).

37. *Id.* at 64.

38. *Id.* at 64–65. The Court states that “[a] comparative study of the cases [dealing with the non-governmental/governmental distinction in municipal law] in the forty-eight States will disclose an irreconcilable conflict.” *Id.* at 65. At issue in *Indian Towing* was whether the exception barred a claim that the government negligently failed to maintain a lighthouse. *Id.* at 62–63. Although maintaining the lighthouse was an operational level activity, the government contended that the claim was nonetheless barred because the activity was a “uniquely governmental function.” *Id.* at 64.

governmental function” or not.³⁹ In so doing, *Indian Towing* affirmed *Dalehite*’s analysis distinguishing between planning and operational level actions. Despite less-than-perfect adherence by lower courts,⁴⁰ the *Dalehite* planning/operational distinction, affirmed by *Indian Towing*, remained the Supreme Court’s test for some thirty years until 1984.

3. United States v. Varig

In its 1984 decision, *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*,⁴¹ the Supreme Court again considered what types of actions are properly characterized “discretionary functions,” and in so doing shifted the focus away from *Dalehite*’s planning/operational analysis. *Varig* involved claims against the Federal Aviation Administration (FAA)⁴² under the FTCA for negligently inspecting and granting “airworthiness certificates” on two airplanes that were not manufactured according to FAA regulations.⁴³

At issue was the “spot-check” inspection procedure the FAA had implemented to grant airworthiness certificates for aircraft.⁴⁴ This procedure directed FAA inspectors to use discretion in conducting a less detailed inspection on aircraft manufactured by “[e]xperienced manufacturers having previously demonstrated the acceptability of

39. *Id.* at 65–66.

40. Krent, *supra* note 12, at 880 (noting that “lower courts applied the planning versus operations level distinction, with varying emphases” and that the “approach received much criticism from commentators”).

41. 467 U.S. 797 (1984).

42. Some of the actions at issue in *Varig* were actually taken by the Civil Aeronautics Agency (CAA), the predecessor to the FAA. Likewise, some of the regulations at issue in *Varig* were actually CAA regulations. *See id.* at 800, 817–18. For the sake of simplicity, however, this Comment explains all these actions and regulations as if they were by the FAA.

43. *Id.* at 799–803. *Varig* was the consolidation of two separate actions. The first involved a fire that started in one of the aft lavatories of a Boeing 707, causing “124 of the 135 persons on board [to die] from asphyxiation or the effects of toxic gases produced by the fire.” *Id.* at 800. The claimants contended that the fire started in the lavatory’s trash receptacle—which was allegedly not made of fire proof material in violation of regulation. *Id.* at 800–01. The second action involved a fire caused by a “gasoline-burning cabin heater” in an air taxi, which killed all four persons aboard. *Id.* at 802. Again, the claimants’ argument was that the “installation [of the heater] did not comply with applicable FAA regulations” and thus “the Government was negligent in certifying [the] installation.” *Id.* at 803.

44. *Id.* at 817 (quoting CAA MANUAL OF PROCEDURE § .330).

their quality control and inspection competence.”⁴⁵ The Court held that the discretionary function exception applied to both (1) “the FAA’s *decision to implement* the ‘spot-check’ system of compliance review” and (2) “the *application* of that ‘spot-check’ system to the particular aircraft involved in these cases.”⁴⁶

In doing so, the Court turned away from the *Dalehite* Court’s focus on the planning/operational distinction, noting that “it is the *nature of the conduct*, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.”⁴⁷ The Court observed that Congress’s intent in enacting the exception was to “prevent judicial ‘second-guessing’” of policy decisions made by other branches of the government.⁴⁸ Based on this policy, the Court concluded that the FAA’s decision to implement the “spot-check” program fell within the scope of the exception because to hold otherwise “would require the courts to ‘second-guess’ the [policy] judgments of an agency exercising its regulatory function.”⁴⁹ The Court further held that the FAA employees’ application of the “spot-check” program in these cases was “in accordance with agency directives,” and thus “protected by the discretionary function exception as well.”⁵⁰

Like *Dalehite*, *Varig* provides little guidance as to when the discretionary function exception should *not* apply. Specifically, the Court found it “unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception.”⁵¹ However, by narrowing in on the “nature of the conduct,”⁵² rather than the planning/operational level distinction

45. *Id.* (quoting CAA MANUAL OF PROCEDURE § .330).

46. *Id.* at 819 (emphasis added).

47. *Id.* at 813 (emphasis added). In proclaiming this focus on the “nature of the conduct,” the Court says nothing to the fact that this may conflict with the planning/operational level distinction applied in *Dalehite*. Rather, the *Varig* Court supports this proposition with language from *Dalehite*, stating that “the exception covers ‘[n]ot only agencies of government . . . but all employees exercising discretion.’” *Id.* (quoting *United States v. Dalehite*, 346 U.S. 15, 33 (1953)); see also William P. Kratzke, *The Supreme Court’s Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 13 (1993) (noting that the *Varig* Court “never noted the level at which inspection decisions were made, whether planning or operational”).

48. *Varig*, 467 U.S. at 814.

49. *Id.* at 820.

50. *Id.*

51. *Id.* at 813.

52. *Id.*

articulated in *Dalehite*, the *Varig* Court clarified the focus of the analysis. Moreover, *Varig* clearly approved of the exception's application to an area not explicitly covered in *Dalehite*'s holding—discretionary action taken at the operational level pursuant to a planning-level directive.⁵³ In other words, *Varig* expressly affirmed that when discretion is delegated to lower-level employees via policymaking-level action (such as writing FAA regulations), the actions of the lower-level employees become discretionary functions.⁵⁴ Beyond this, however, the *Varig* Court left little guidance for courts handling future discretionary function exception cases.

4. *Berkovitz v. United States*

Four years after *Varig*, the Supreme Court decided *Berkovitz v. United States*,⁵⁵ and in so doing articulated a more definite rule regarding the scope of the discretionary function exception.⁵⁶ *Berkovitz* addressed whether several claims relating to the alleged negligence of two government agencies⁵⁷ in regulating polio vaccines should be summarily dismissed as barred by the discretionary function exception.⁵⁸ Plaintiffs claimed that the government (1) violated federal law “in issuing a license to [the manufacturer of the polio vaccine]” and (2) violated regulations “in approving the release of the particular lot of [the vaccine] that contained Kevan

53. Recall that *Dalehite* held the exception covered (1) discretionary decisions made at the planning level and (2) actions of operational-level employees pursuant to mandatory planning-level directives. See *supra* text accompanying notes 33–34. The *Varig* holding, however, addressed facts not at issue in *Dalehite* and thus made clear that the exception's scope includes discretionary action taken at the operational level pursuant to a planning-level directive authorizing the use of the discretion. *Varig*, 467 U.S. at 820 (upholding the operational level implementation of “spot-check” procedures created at the planning level).

54. As discussed *infra* Part IV.B.1, one proposed scholarly approach would exclude such actions from the discretionary function exception.

55. 486 U.S. 531 (1988).

56. *Id.* at 536; cf. *Reflections*, *supra* note 16, at 689 (“*Varig* and *Berkovitz* provide structure to discretionary function law at a time when it is badly needed.”).

57. The claims in *Berkovitz* alleged negligent action by both the Division of Biologic Standards and the Food and Drug Administration. *Berkovitz*, 486 U.S. at 533.

58. *Id.* at 533–34. The government moved for dismissal “for lack of subject-matter jurisdiction on the ground that the agency actions fell within the discretionary function exception.” *Id.* at 533. The district court denied the motion and the court of appeals reversed. *Id.* at 533–34.

Berkovitz's dose."⁵⁹

Apparently the alleged actions involved in both claims occurred at the operational level, although the Court did not focus on this in conducting its analysis. Rather, the Court laid out a two-pronged framework for addressing the scope of the discretionary function exception. Drawing upon *Varig's* reasoning that "it is the nature of the conduct" that matters, the *Berkovitz* Court stated that "a court must *first* consider whether the action is a matter of choice for the acting employee."⁶⁰ With regard to this first prong, the Court explained that the "exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."⁶¹ Thus, under the *Berkovitz* test, the analysis stops if the court finds a "statute, regulation, or policy [that] specifically prescribes" the employee's "course of action."⁶² In the absence of a mandatory course of action, under the *second* prong, "[the] court must determine whether [the employee's] judgment is of the kind that the discretionary function exception was designed to shield."⁶³ In explaining how this second prong of the test should be applied, the *Berkovitz* Court quoted *Varig's* observation that Congress's intent in enacting the exception was "to 'prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy'"⁶⁴ Accordingly, the *Berkovitz* Court concluded that the exception "protects only governmental actions and decisions based on considerations of public policy."⁶⁵ Thus, the fact that the agency actor actually took into account public policy factors is key under the second step in *Berkovitz*.

In addressing whether the exception bars the plaintiffs' claim that the agency violated federal law in issuing the license, the Court reasoned that this claim could be read several different ways. The Court held that if the claim was that the government issued the

59. *Id.* at 539–40.

60. *Id.* at 536 (emphasis added) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984)).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 536–37 (quoting *Varig*, 467 U.S. at 814).

65. *Id.* at 537.

license “either without determining whether the vaccine complied with regulatory standards or after determining that the vaccine failed to comply, the discretionary function exception does not bar the claim.”⁶⁶ The Court reasoned that, under the first prong of its test, the exception would not apply to such a claim because “[t]he agency ha[d] no discretion to deviate from . . . mandated procedure.”⁶⁷

However, if the claim was that the agency determined that the vaccine “complied with regulatory standards, but that the determination was incorrect,” the Court held that the exception would have applied only if the officials who made the determination “permissibly exercised policy choice” in doing so. The Court remanded on the issue of whether this was a policy-based decision.⁶⁸ Thus, the applicability of the exception turned on whether the determination “involve[d] the application of objective scientific standards” or whether it “incorporate[d] considerable ‘policy judgment.’”⁶⁹

As for the plaintiffs’ second claim that the government violated regulations in approving the particular lot of the vaccine, the Court held that the facts the plaintiffs alleged were sufficient to prove that the discretionary function exception did not apply.⁷⁰ Specifically, the plaintiffs alleged that the government violated mandatory regulations, such that, under the first prong of the test, the discretionary function exception would not apply to bar the claim.⁷¹

The *Berkovitz* Court’s two-pronged test provided a more concrete framework for applying *Varig*’s “nature of the action” analysis. By articulating its two-pronged test, the *Berkovitz* Court, unlike the *Varig* and *Dalehite* Courts, provided a workable test that could be used in a variety of situations to determine when the discretionary function should not apply. Specifically, the discretionary function would not apply if (1) the official’s action violated a mandatory directive or (2) if the action was not “based on considerations of public policy.”⁷² The *Berkovitz* Court’s holding

66. *Id.* at 544.

67. *Id.*

68. *Id.* at 545. The Court specifically stated the issue on remand as whether “agency officials appropriately exercise policy judgment in determining that a vaccine product complies with the relevant safety standards.” *Id.*

69. *Id.*

70. *Id.* at 547.

71. *Id.*

72. *Id.* at 536–37.

“further distanced itself” from the *Dalehite* planning/operational distinction,⁷³ and thus affirmed *Varig*’s focus on the “nature of the action.” Although the framework articulated in *Berkovitz* is workable for courts, it is nonetheless undesirable because, as discussed below, it encourages agency policymakers to regulate inefficiently.

III. *GAUBERT V. UNITED STATES*: THE CURRENT APPROACH AND ITS PROBLEMATIC “PRESUMPTION”

The current Supreme Court test for the discretionary function was articulated in 1991 in *United States v. Gaubert*. This Part first reviews the Court’s decision in *Gaubert*. It then considers commentators’ reactions to *Gaubert*, including an explanation of how the Court’s approach creates bad policy incentives for governmental agencies seeking to avoid liability under the FTCA.

A. Overview: *Gaubert v. United States*

The Supreme Court’s most recent decision dealing with the discretionary function exception, *Gaubert v. United States*,⁷⁴ also provides the most bright-line test for determining when the exception applies. In *Gaubert*, the Court considered whether actions taken by the Federal Home Loan Bank Board (FHLBB), a federal agency, in supervising a savings and loan association, fell within the scope of the discretionary function exception.⁷⁵ The Court held that the exception covered FHLBB’s conduct and that it was not subject to suit.⁷⁶

The *Gaubert* Court affirmed that the *Berkovitz* Court’s two-pronged test set out the proper framework for discretionary function analysis. In doing so, the Court more explicitly rejected *Dalehite*’s distinction between operational and planning-level actions.⁷⁷

73. Kratzke, *supra* note 47, at 14 (“In *Berkovitz v. United States* the Supreme Court further distanced itself from the planning/operation dichotomy of *Dalehite* by again ignoring it.”).

74. 499 U.S. 315 (1991).

75. *Id.* at 318–19.

76. *Id.* at 319.

77. *Id.* at 323. Specifically, the Court reasoned:

Where Congress has delegated the authority . . . to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the

However, the *Gaubert* Court fundamentally changed the second prong of the *Berkovitz* test by setting out the following rule: where “a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.”⁷⁸ The Court further explained this “presumption” by stating that “[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.”⁷⁹

The Court explained that in order for a plaintiff’s “complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.”⁸⁰ The Court further explained that “[t]he focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred . . . , but on the *nature* of the actions taken and on whether they are susceptible to policy analysis.”⁸¹ Under the *Gaubert* Court’s analysis, focusing on the nature of the action, a plaintiff must make a showing that (1) the action in question was in violation of a mandatory statute, regulation, or policy; or (2) that if the actor had a choice in how he acted, the choice was not “susceptible to policy analysis” in order to survive a motion to dismiss under the discretionary function exception.⁸²

While the *Gaubert* majority relied on the nature of the action rather than the status of the actor (planning or operational level) to

agencies are to carry out the programs. In addition, the actions of Government agents involving the necessary element of choice and grounded in social, economic, or political goals of the statute and regulations are protected.

Id.

78. *Id.* at 324 (emphasis added).

79. *Id.*

80. *Id.* at 324–25.

81. *Id.* at 325 (emphasis added).

82. *See id.* at 322, 325. For a lucid explanation of how the *Gaubert* test applies to particular facts see Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 101–03 (2006) (illustrating how the *Gaubert* test would apply in suits relating to abuses at government-run Indian boarding schools).

determine whether the exception applies,⁸³ Justice Scalia, in his concurrence, opined “that there [was] something to the planning vs. operational dichotomy,”⁸⁴ and thus the dichotomy should play some part in the determination of whether the exception applies. Justice Scalia argued “that the level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter *and* the office of the decisionmaker.”⁸⁵ Applying this consideration to the question of whether a governmental employee that has been delegated the authority to make a policy-based decision should be presumed to make the decision based upon policy factors, Justice Scalia argued that the strength of the presumption should vary depending on the level of the actor. Specifically, he stated “the higher the policymaking-level, the stronger the presumption.”⁸⁶ Nonetheless, the *Gaubert* majority’s analysis appears to completely put *Dalehite*’s planning/operational distinction to rest.⁸⁷

Rather than focusing on the status of the actor or the type of deliberation conducted before the decision, the *Gaubert* majority’s analysis narrows in on the *nature* of the decision. If the action is made pursuant to a non-mandatory policy or regulation and susceptible to policy considerations, it falls within the exception’s scope; the status of the actor or the process involved is essentially irrelevant.

83. *Gaubert*, 499 U.S. at 325.

84. *Id.* at 335 (Scalia, J., concurring).

85. *Id.* Justice Scalia further explains:

In my view a choice is shielded from liability by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations.

Id. Justice Scalia provides the following example of when the position of the employee taking the action would be relevant in determining if the discretionary function applies:

Ordinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions. The dock foreman’s decision to store bags of fertilizer in a highly compact fashion is not protected by this exception because, even if he carefully calculated considerations of cost to the Government vs. safety, it was not his responsibility to ponder such things; the Secretary of Agriculture’s decision to the same effect is protected, because weighing those considerations *is* his task.

Id. at 335–36.

86. *Id.* at 337 (Scalia, J., concurring).

87. *Id.* at 325 (majority opinion) (“Discretionary conduct is not confined to the policy or planning level.”); *see also* Kraztke, *supra* note 47, at 19–20.

B. Reactions to Gaubert

Before the Court decided *Gaubert*, a number of commentators contended that *Berkovitz*'s two-pronged test applied the discretionary function exception too broadly.⁸⁸ The *Gaubert* Court's affirmation of the *Berkovitz* two-pronged test and addition of the "presumption" has similarly invoked scholarly criticism and proposals for change.⁸⁹ Over the past decade and a half, scholars have assailed *Gaubert* for a number of reasons. The various rationales for criticizing *Gaubert* fall into three rough categories: (1) the approach is inequitable for tort plaintiffs; (2) the approach goes against Congress's intent in including the exception in the FTCA; and (3) the government is neither properly deterred from committing torts nor has an incentive to regulate effectively in order to avoid tort liability. Despite these criticisms, other commentators have praised *Gaubert* for establishing a clear, workable standard.⁹⁰ Thus, in addition to discussing the negative commentary *Gaubert* has received, this Subpart will also discuss how *Gaubert* creates a workable and predictable standard.⁹¹

88. See, e.g., Harz, *supra* note 12, at 617-18; Krent, *supra* note 12, at 873 ("The exception . . . should be applied . . . only when other forces adequately constrain government actions."). But see David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 328 (1989) (arguing that post-*Varig* cases "set[] forth a sensible framework, rooted firmly in congressional intent").

89. See, e.g., John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223, 254-58 (1992) (advocating an approach that would result in a narrower application of the exception); Amy M. Hackman, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much Is Enough?*, 19 CAMPBELL L. REV. 411, 426-44 (1997); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1549-51 (1992) [hereinafter *Sovereign Immunity*]; Niles, *supra* note 4, at 1334; Peterson & Van Der Weide, *supra* note 23, at 465-73; see also Levine, *supra* note 3, at 1547 ("There is wide scholarly agreement on the failings of the FTCA caused by the discretionary function exception."). But see *Protecting Discretion*, *supra* note 22, at 386-88 (noting positive aspects of the *Gaubert* approach).

90. See *Protecting Discretion*, *supra* note 22, at 388; Grover Glenn Hankins, *The Federal Tort Claims Act: A Smooth Stone for the Sling*, 31 GONZ. L. REV. 27, 45-47 (1995); cf. Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2012 (1998) ("Although the [discretionary function] exception has proven difficult to apply, the most recent Supreme Court cases [*Berkovitz* and *Gaubert*] have created a two-part test for discretionary acts . . .").

91. This Part focuses primarily on the criticism or praise scholars have given *Gaubert*. For a federal circuit-by-circuit analysis of how federal courts dealt with cases after *Gaubert*, see Hackman, *supra* note 89, at 426-44.

I. Gaubert unfair for plaintiffs

Some commentators have contended that *Gaubert*'s addition of the "presumption" to the *Berkovitz* two-pronged test created an unfairly high hurdle for plaintiffs to overcome in order to bring an FTCA claim against the government. Specifically, many contend that the Supreme Court's current approach unfairly leaves an injured party without a remedy simply because the injury was caused by a government actor—even if that actor was acting in a role analogous to a private party.⁹² Specifically, one study observed that in the years between *Berkovitz* and *Gaubert*, plaintiffs "prevailed on at least one discretionary function claim" 43% of the time.⁹³ However, in the three years immediately following *Gaubert*, plaintiffs prevailed on at least one such claim only 23% of the time.⁹⁴ The researchers determined that the *Gaubert* "presumption" requiring that a decision be only "susceptible to policy analysis" was the principal cause of this decrease in plaintiff success.⁹⁵

Another commentator contended that the *Gaubert* presumption is detrimental to plaintiffs for two reasons.⁹⁶ First, "it allows [government] attorneys to drastically limit the time and . . . resources" expended before cases are dismissed, thus removing "the . . . incentives [caused by litigation and discovery costs] the government will have to settle a case."⁹⁷ Second, the *Gaubert* presumption severely limits the type of showing a plaintiff can make to avoid summary judgment dismissal.⁹⁸

92. See Niles, *supra* note 4, at 1279 (contending that the current interpretation of the discretionary function exception was so restrictive that the federal government's "tort liability . . . is . . . essentially identical to that applicable before the [FTCA] was passed"); Peterson & Van Der Weide, *supra* note 23, at 468–69 (noting a number of post-*Gaubert* cases that were dismissed under the discretionary function exception involving "issues one would think the courts were well-equipped to handle"); see also Hackman, *supra* note 89, at 411–12.

93. Peterson & Van Der Weide, *supra* note 23, at 465–66.

94. *Id.* at 466.

95. *Id.* at 465–73.

96. Niles, *supra* note 4, at 1330–31.

97. *Id.* at 1330.

98. *Id.* at 1330–31. Professor Niles explained:

Since the government need not make any factual showing, but must merely identify some policy issue that relates, or could conceivably relate, to the challenged action, the only option available to the plaintiff is to counter that argument by showing that the policy identified has no connection to the action.

Id. at 1330.

In contrast to these contentions that *Gaubert* places too great of a burden on plaintiffs, one commentator has argued that the Court's approach after *Gaubert* and *Berkovitz* is more favorable to plaintiffs than the Court's prior analyses.⁹⁹ Specifically, this scholar has contended that the Court's current approach favors plaintiffs because it clearly excludes actions that violate a mandatory statute, regulation, or policy from the discretionary function exception's scope.¹⁰⁰ This commentator took the view that this is a "formidable and compelling exclusion" from the exception's scope.¹⁰¹ Despite this view that certain aspects of the current approach may favor plaintiffs in certain situations, the prevailing view from commentators is that the Court's approach discretionary function exception after *Gaubert* unduly burdens plaintiffs suing the government under the FTCA.¹⁰²

2. *Gaubert goes against congressional intent in passing the FTCA as a whole*

From the FTCA's language, which submits the federal government to tort liability "in the same manner and to the same extent as a private individual under like circumstances,"¹⁰³ it is apparent that Congress intended courts to determine the federal government's liability for at least some of the negligent acts of its employees.¹⁰⁴ Some courts have reasoned that Congress included the discretionary function exception in the FTCA to keep the judiciary from "second-guessing" the policy-based decisions of other branches of government.¹⁰⁵ The legislative history supports these views of

99. Hankins, *supra* note 90, at 45-47.

100. *Id.* at 46 ("The Court in *Berkovitz* isolated a formidable and compelling exclusion to the protection afforded by the discretionary function shield; specifically, it stated that the failure to follow a course of action expressly mandated by federal statute, regulation, or policy does not constitute a discretionary act."). Although this commentary notes that a benefit to the plaintiffs is derived from *Berkovitz*, the article, published four years after *Gaubert*, does not indicate that *Gaubert* changed this benefit to plaintiffs.

101. *Id.*

102. See Levine, *supra* note 3, at 1547 (noting that "there is wide scholarly agreement on the failings of the FTCA caused by the discretionary function exception" and citing sources).

103. 28 U.S.C. § 2674 (2000).

104. See Niles, *supra* note 4, at 1299 ("This language served as a clear repudiation of the traditional absolutist concept of sovereign immunity, and was motivated by the notion that justice required that private citizens be given access to court-ordered compensation for the harms caused by the negligent acts of an ever-expanding federal government.").

105. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Vatig Airlines)*,

congressional intent.¹⁰⁶

Some have argued, however, that *Gaubert* gives the discretionary function exception a much broader effect than Congress contemplated or intended, and thus *Gaubert* effectively undermines the purposes of the FTCA.¹⁰⁷ For example, one scholar has noted that *Gaubert* undermines Congress's intent in passing the FTCA and essentially reinstates the doctrine of sovereign immunity:

The primary motivation for passage of the FTCA was the acknowledgment that there was no justification for a formal limitation on the liability of the federal government for run-of-the-mill torts committed by its employees. *Gaubert's* procedural and substantive limitations on this liability amounts to a veritable reassertion of this discarded limitation.¹⁰⁸

In addition to this scholarly criticism, federal judges in dissenting and concurring opinions have also expressed the view that the Court's broad application of the exception does not line up with Congress's intent in passing it.¹⁰⁹

467 U.S. 797, 813-14 (1984); see also *supra* note 21 and accompanying text.

106. See *supra* note 22 and accompanying text. But see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 874 (1992) (warning against over-reliance on legislative history).

107. See Niles, *supra* note 4, at 1353 ("[T]he Supreme Court's current interpretation of the exception expands the provision's limitations well beyond their intended scope . . ."); see also Harz, *supra* note 12, at 616-17 (arguing that the Tenth Circuit's application of the exception in the *Berkovitz* era undermines the FTCA's purposes).

108. Niles, *supra* note 4, at 1334; see also Peterson & Van Der Weide, *supra* note 23, at 448-53 (contending that *Gaubert* goes against the FTCA's legislative intent and prior precedent).

109. See *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997) (Merrit, J., dissenting) ("Our Court's decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act."); *Allen v. United States*, 816 F.2d 1417, 1424-25 (10th Cir. 1987) (McKay, J., concurring). In 1987 Judge McKay opined the following:

It undoubtedly will come as a surprise to many that two hundred years after we threw out King George III, the rule that "the king can do no wrong" still prevails at the federal level in all but the most trivial of matters. After the passage of the Federal Tort Claims Act, many people, as well as the lower federal courts, assumed that the old governmental immunity from responsibility for negligent conduct that injures individual citizens was gone. Many endorsed what appeared to be the FTCA's policy that if the citizens at large benefited from a government program, that collective citizenry, not the isolated individual injured by the negligent conduct of the program, would bear the economic burden of that injury. This case dramatically illustrates that, as interpreted by the Supreme Court in [*Varig*], the FTCA (and for that matter Congress' injunction that a program be carried out safely) is largely a

Conversely, others have argued that a broad application of the discretionary function exception under *Gaubert* best effectuates Congress's intent in passing the FTCA. Specifically, one commentary notes that "[t]he legislator voting for the [FTCA in 1946] approved a cautious transfer of government tort responsibility from Congress [through private bills] to federal courts[,] . . . [rather] than to open the federal government to new theories of tort liability."¹¹⁰ In light of this view, the article argues that because the majority of private bills prior to the FTCA were for motor vehicle accidents caused by a government driver and granted awards of \$5000 or less,¹¹¹ the government's liability under the FTCA should be similar in scope.¹¹²

Considering this view, the best way to align the courts with Congress's intent in passing the FTCA, may be a broader reading of the discretionary function exception that protects the government from extensive liability arising from its regulatory activities. One could assert that *Gaubert's* broad application of the discretionary function exception accomplishes such a result. However, this argument ignores the fact that the Court's current approach may also have the effect of barring many of the types of claims that a plaintiff could have brought through a private bill prior to 1946.¹¹³

3. *Gaubert creates incentives for undesirable agency actions*

In addition to arguments that the *Gaubert* approach to the

false promise in all but "fender benders" and perhaps some cases involving medical malpractice by government doctors.

Id. (citation omitted).

110. *Reflections*, *supra* note 16, at 715.

111. This scholar notes that of the 162 private bills passed by Congress in 1940 and 1941, "[o]ne hundred and ten . . . redressed injuries caused by government drivers" and "the vast majority of the bills granted awards of \$5000 or less." *Id.* at 713-14.

112. *See id.* at 713-15.

113. For example, even prior to *Gaubert*, the Tenth Circuit in *Flynn v. United States*, 902 F.2d 1524 (10th Cir. 1990), applied the exception broadly to bar a claim that National Park Service Rangers caused an accident by negligently using the emergency lights on their vehicles. *Id.* at 1530-31. The court reached the conclusion that "[t]here being no fixed standards for training or use of emergency vehicles, the conduct of the federal employees falls within the discretionary function of the FTCA." *Id.* at 1531. The view of the legislative history discussed above indicates that the 1946 Congress would not have intended the discretionary function exception to bar this type of simple tort claim. Furthermore, *Flynn* comes very close to barring suits for "negligence in the operation of vehicles," something the Supreme Court in *Dalehite* made clear was not within the scope of the exception. *Dalehite v. United States*, 346 U.S. 15, 28 (1953). For a discussion of *Flynn*, see *Sovereign Immunity*, *supra* note 89, at 1550.

discretionary function is unfair and goes against congressional intent, other commentators have viewed such a broad application of the exception as having negative public policy implications.¹¹⁴ Specifically, one scholar noted that the possibility of tort liability “serve[s] to deter government officials from future negligent conduct” and thus the exception should only apply in situations where “the administrative and political process” effectively deter the governmental agent from acting negligently.¹¹⁵ This scholar contended that the standard the Supreme Court set out in *Berkovitz* and *Gaubert* applies the discretionary function exception to actions where the administrative or political processes do not effectively deter negligent action, and it thus applies the exception too broadly.¹¹⁶

Additionally, the approach under *Berkovitz* and *Gaubert* inadvertently creates an incentive for agency policymakers to delegate discretionary decisions to lower-level employees, even if providing the employees with mandatory directives would more effectively manage the agency. Because under *Berkovitz* and *Gaubert* “the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action

114. See Bagby & Gittings, *supra* note 89, at 287; Krent, *supra* note 12, at 886–92; see also Barry R. Goldman, Note, *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, 857 (1992).

115. Krent, *supra* note 12, at 886–87. Professor Krent’s proposed remedy is discussed in greater detail *infra* Part IV.B.1; see also Goldman, *supra* note 114, at 857 (“Governmental liability could deter the negligent conduct of federal employees in the same way liability deters private individual or corporate negligence. Even though government agents are not held personally liable in FTCA actions, the threat of a tort judgment against the government based on respondeat superior might nevertheless reduce negligent conduct.”).

116. The article in which Professor Krent fully laid out this “deterrence” function argument was published in 1991, less than one month after *Gaubert*, and only very briefly mentions *Gaubert* in a footnote. See Krent, *supra* note 12, at 882 n.57 (explaining that *Gaubert* was issued as Professor Krent’s article “went to press”). In his 1991 article, Professor Krent contended that *Berkovitz* applied the discretionary function exception too broadly. *Id.* at 890–91. In an article published the following year, Professor Krent affirmed that the exception is applied too broadly after *Gaubert* as well. See *Sovereign Immunity*, *supra* note 89, at 1549–51.

The nexus between the challenged actions and purposeful government policy is simply too attenuated, and even if the employees’ decision was ‘susceptible to policy analysis,’ no internal checks safeguard the challenged governmental action. . . .

[T]he benefits from judicial review in such contexts are likely to outweigh the harm to majoritarian governance.

Id. at 1550.

for an employee to follow,”¹¹⁷ the agency has an incentive to provide its employees with discretionary directives and thus avoid exposure to tort liability.¹¹⁸ For instance, in the absence of discretionary function exception concerns, planning-level officials for the U.S. Forest Service may believe that certain *mandatory* directives to lower-level employees regarding road maintenance and sign placement would best manage the forests to promote safe transportation and other agency goals. However, when viewed in light of the fact that creating a mandatory policy exposes the agency to FTCA liability, agency planners may opt to make directives discretionary. The result would be sacrificing a degree of safety and efficiency in order to bring actions within the scope of the discretionary function exception.

Two commentators have explained that under the Court’s current approach “lower-level regulators might be routinely charged to consider the ‘practical’ implications of regulatory operations. Regulator staff would be encouraged to ‘pepper’ their internal memoranda with policy wording to bring their implementation activities within the [discretionary function exception’s] protected zone.”¹¹⁹

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

118. Recent cases reveal that where the employee is delegated discretionary authority, a court is likely to find that the claim is barred by the discretionary function exception. *See, e.g., Walters v. United States*, 474 F.3d 1137, 1140 (8th Cir. 2007) (“Because the applicable regulations expressly required the BIA to consider the availability of funds in deciding whether to perform maintenance on its roads, we conclude the district court correctly held the discretionary function exception shields the government from suit in this case.”); *Cranford v. United States*, 466 F.3d 955, 959 (11th Cir. 2006) (holding that the exception bars a claim where a statute grants the Coast Guard discretion in determining whether to mark underwater obstructions).

119. Bagby & Gittings, *supra* note 89, at 238. Professor Krent notes a similar result: Moreover, taken on its face, the Court’s reasoning in *Berkovitz* seemingly creates a perverse incentive for agencies to permit government officials and employees to exercise more unguided discretion. According to the Court, the more that agencies vest their personnel with discretion, the greater the likelihood that the discretionary function exception will shield the government from tort liability. Certainly, an agency may have many reasons to limit the discretion of its own officials—whether to increase control within the agency, or to strive for uniformity—despite the disadvantage of exposing itself to liability. Nonetheless, the Court’s reasoning may spur some agencies, at least at the margin, to grant *more* discretion to subordinate officials, for as long as the officials violate no established policy, they apparently are immune from tort liability. Such a result is difficult to reconcile with a deterrence objective.

A number of other factors contribute to an agency's determination of when to delegate discretion to lower-level officials.¹²⁰ However, "at least at the margin," the approach under *Berkovitz* and *Gaubert* encourages an agency to delegate discretion to lower-level employees until the costs associated with other factors exceed the benefit gained by avoiding FTCA tort liability.¹²¹ In this sense, the *Berkovitz/Gaubert* approach makes it *artificially expensive* for an agency to enact mandatory regulations.

4. *Gaubert provides a standard that is predictable for litigants and workable for courts*

Although many commentators have highly criticized the effect of the *Gaubert* presumption's broad application of the discretionary function exception,¹²² others have praised a strict application of the *Gaubert* test because it removes much of the uncertainty that had previously characterized discretionary function analysis.¹²³ Furthermore, by affirming the two-pronged test articulated in *Berkovitz*, *Gaubert* provides subsequent courts deciding discretionary function cases with concrete guidance as to the test the Court will apply.

Gaubert did not change the first prong of *Berkovitz*'s two-pronged test.¹²⁴ Where the *Gaubert* Court's analysis adds clarity,

Krent, *supra* note 12, at 892.

120. Krent, *supra* note 12, at 892.

121. *Id.* Administrative agencies generally do not have statutory limitations preventing them from delegating discretionary functions. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383-84 (2004) ("[T]he typical administrative agency is authorized to use a range of distinct policymaking forms to effectuate its statutory mandate . . .").

122. See *supra* Parts IV.A.1-3.

123. *Protecting Discretion*, *supra* note 22, at 388; see also *supra* Part II.C.1 (discussing how the *Dalehite* Court failed to articulate a clear test to determine whether the discretionary function exception applies); *supra* Part II.C.3 (discussing the same with regards to the *Varig* Court). The move towards a more certain discretionary function analysis could be viewed as a gradual progression with each Supreme Court decision clarifying the analysis. Cf. *Reflections*, *supra* note 16, at 689 (noting, in an article published before *Gaubert* was decided, that "*Varig* and *Berkovitz* provide structure to discretionary function law at a time when it is badly needed"). However, considering the presumption the *Gaubert* Court created, *Gaubert* is the culmination of this trend towards greater certainty.

124. Under both *Berkovitz* and *Gaubert* the Court's analysis made it clear that the discretionary function exception never applies where there is a mandatory statute, regulation, or policy involved and the government employee acted contrary to the mandatory directive. See *Gaubert v. United States*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S.

however, is by creating the “strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations,” even if the employee did not actually take policy into consideration in taking the act in question.¹²⁵ The creation of this presumption streamlined for courts what may otherwise have been difficult evidentiary battles. In contrast to other scholarly commentators,¹²⁶ one has noted the adjudicative benefit that the *Gaubert* presumption provides:

If . . . the law were to demand that an official actually engage in reasoned decisionmaking, plaintiffs would scour records or construct testimony to show a lack of reasoned discretion. Defendants, by contrast, in support of their argument for a reasoned policy decision, would bring forward after-the-fact testimony that at best might involve selective memory and at worst undetectable perjury. We also would expect an increase in paperwork as a tort-averse agency made sure to document any actions that might lead to subsequent tort liability. The *Gaubert* rule eliminates or lessens the need for all that.¹²⁷

In essence, by removing the need for factual determinations based upon “selective memory” testimony and susceptible to “undetectable perjury,” the *Gaubert* presumption assures a more predictable standard for determining the applicability of the exception.¹²⁸ Conversely, from the viewpoint that the *Gaubert* approach is fundamentally unjust and goes against the congressional purpose of the FTCA,¹²⁹ the *Gaubert* approach’s increased predictability is of little value; it is just more predictable that plaintiffs will have their suits dismissed without an evidentiary fighting chance.¹³⁰ Nonetheless, it is important to be cognizant of this benefit

531, 536 (1988).

125. *Gaubert*, 499 U.S. at 324–25.

126. As discussed above, a significant body of scholarly commentary highly criticizes *Gaubert* and finds little value in it. See *supra* Parts III.B.1–3.

127. *Protecting Discretion*, *supra* note 22, at 388.

128. *Id.* But see Hackman, *supra* note 89, at 412 (arguing that even after *Gaubert* “[c]ourts have applied the exception on an ad hoc basis,” and litigants are “unable to predict the outcomes of their case”).

129. See *supra* Parts III.B.1–3.

130. See, e.g., Niles, *supra* note 4, at 1329–31 (recognizing but criticizing *Gaubert*’s procedurally streamlining effect). Another commentator has argued that considering the broad and “fluid” nature of the discretionary function exception, attempts to create a clear-cut analysis are unwise:

of the *Gaubert* approach in order to properly evaluate the value of alternative approaches to applying the discretionary function exception.

IV. POSSIBLE ALTERNATIVES TO THE GAUBERT APPROACH

A number of possible alternative approaches for applying the discretionary function exception complement the various criticisms of the *Gaubert* test. Although these alternative approaches vary significantly in their details, they fall within two broad categories: first, those that follow *Gaubert*'s basic conceptual focus on the *nature* of the action but apply this analysis in a way that narrows the scope of the discretionary function exception; second, other possible approaches that advocate abandoning the analytical approach followed in the *Berkovitz/Gaubert* two-pronged test altogether and adopting some alternative analytical framework that applies the exception more narrowly.¹³¹ This Subpart will review approaches

The risk of establishing an analytical model is that the Court may be striving for unattainable exactitude. The appearance of exactness conceals a fluid boundary between an injured person's right to tort recovery and governmental immunity. The discretionary function exception does not compel a predictable and "correct" outcome in every case. An analytical model cannot change this. . . . [T]he discretionary function exception is not susceptible to ready formulae and precise tests.

Kratzke, *supra* note 47, at 55–56.

131. In addition to the possible approaches discussed herein, one commentator has proposed legislatively adopting a "model [that] would replace the FTCA with an administrative agency that would adjudicate and compensate tort claims against the federal government." Levine, *supra* note 3, at 1554. This proposal, however, focuses more on the organization and fiscal management of his proposed administrative agency, than any particular analytical framework for narrowing the application of the discretionary function. See *id.* at 1554–64. Likewise, another commentator has contended that "[i]t is time for Congress to evaluate the wisdom of some of the statutory exceptions [to the FTCA] and to consider whether their repeal might be in order." William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1108 (1996). However, a critique of these proposals to reform the discretionary function exception through legislation is beyond the scope of this Comment.

Another commentary presents an alternative approach to the discretionary function exception that focuses on resolving causation issues raised by "based upon" language in some courts, rather than narrowing its application. Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 698–99 (1997). Rather than narrowing the scope of the discretionary function exception, in the context it applies, this proposed approach seeks to "prevent[] FTCA plaintiffs from avoiding the discretionary function exception by mere artful pleading and thereby protects executive-branch discretionary decisionmaking from the skewing effects of tort litigation." *Id.*

within each of these rough categories. In discussing the first category of approaches, this Subpart will review how recent Ninth Circuit cases reflect an attempt to narrow the exception's scope by refining the two-pronged test.

*A. Reworking the Court's Current Focus on the Nature of the Action
To Apply the Discretionary Function Exception More Narrowly*

As discussed above, the focus of the analysis after *Gaubert* is on the nature of the action.¹³² One commentary suggests the possibility of narrowing the discretionary function exception's scope through approaches that have the same analytical focus on the nature of the action. Although this approach diverges from the Court's current two-pronged test, it maintains essentially the same focus on the nature of the action, as opposed to the status of the actor or the process involved in taking the action. This Subpart of the Comment considers a scholarly commentary that advocates such an approach, illustrates how several recent Ninth Circuit cases reflect aspects of the refinements these commentators proffer, and finally discusses the issues raised by these approaches.

I. Peterson and Van Der Weide's approach

Although, as discussed below, some scholarly commentaries view the Court's current approach as fundamentally flawed,¹³³ Peterson and Van Der Weide's alternative follows the same basic analytical focus on the nature of the action under *Gaubert* but advocates a test that would apply the exception more narrowly.¹³⁴

This proposed approach entails adopting a *three*-pronged test that, although facially appearing different from the current two-pronged test,¹³⁵ similarly focuses on the nature of the action.¹³⁶ In

132. See *supra* Part III.A.

133. See *infra* Parts III.B.1-3.

134. See Peterson & Van Der Weide, *supra* note 23, at 486-502.

135. The Court's two-pronged test is discussed *supra* Parts II.C.3-III. Briefly, the *Berkovitz* two-pronged test sets the standard that the discretionary function exception applies only when: (1) there is no "federal statute, regulation, or policy [that] specifically prescribes a course of action for an employee to follow," and thus "the action is a matter of choice for [an employee]"; and (2) the action is "based on considerations of public policy." *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). For a brief summary of how *Gaubert* modified the second prong of the *Berkovitz* test, see *infra* note 138.

136. See Peterson & Van Der Weide, *supra* note 23, at 486-502.

their article, Peterson and Van Der Weide specifically proposed that “[d]iscretionary function immunity ought to be reserved for (1) actual decisions (2) made by government officials possessing authority to direct policy (3) in consideration of legitimate policy factors.”¹³⁷ Peterson and Van Der Weide’s requirement for “actual decisions . . . in consideration of . . . policy factors” is simply a rejection of the *Gaubert* presumption¹³⁸ and a return to what most federal courts viewed was the requirement under *Berkovitz* prior to *Gaubert*.¹³⁹ Similarly, the requirement that “government officials possess[] authority to direct policy” is a refinement of the first prong of the Court’s two-pronged test. Peterson and Van Der Weide’s proposal would require that a governmental official, who is not at the policymaking level, have an affirmative authorization to make certain policy decisions in order for the exception to apply.¹⁴⁰

Finally, the view of “legitimate policy factors” under Peterson and Van Der Weide’s approach is decidedly narrower than that contemplated in *Berkovitz* and *Gaubert*. Peterson and Van Der Weide’s article contends that “[p]olicy factors exist [only] when the

137. *Id.* at 486. Under the current approach, the focus is more on whether the actions were discretionary than if they were taken after considering policy factors. *See, e.g.*, *United States v. Acorn Tech. Fund L.P.*, 429 F.3d 438, 446 (3d Cir. 2005) (summarily stating that the actions were based on consideration of policy factors after determining that the actions in question were discretionary).

138. The *Gaubert* presumption is discussed above in Part III. As a brief review of the presumption, *Gaubert* modified the second prong of the *Berkovitz* test and held that there is “a strong presumption” that the discretionary function exception applies “if a regulation allows the employee discretion,” even if the employee did not actually consider policy, so long as “the nature of the actions taken . . . are susceptible to policy analysis.” *Gaubert v. United States*, 499 U.S. 315, 324–25 (1991).

139. *See* Peterson & Van Der Weide, *supra* note 23, at 465–73. After surveying cases, Peterson & Van Der Weide note that “after *Gaubert* . . . the new presumption and the shift of emphasis from actual to hypothetical policy considerations . . . significantly increase[d] the proportion of government defendants able to satisfy the second prong of the *Berkovitz* test and obtain discretionary function immunity.” *Id.* at 465. The implication of this observed shift is that prior to *Gaubert*, courts were requiring a showing of actual consideration of policy factors.

140. *Id.* at 491–95.

If courts are to leave untouched what could be blatant blunders based on a decisionmaker’s declaration that she relied on a policy factor in reaching her conclusion, the decisionmaker should be an official whose responsibilities include taking such matters into account. . . .

[I]f an official has no express policy authority, none of his decisions are immune; if he had express policy authority, immunity is limited to the policy factors expressly reserved to his judgment.

Id. at 491, 493.

'cost of precaution' element in the Learned Hand negligence formula cannot be computed because reasonable people widely disagree about the costs and benefits of certain governmental activities."¹⁴¹ In sum, Peterson and Van Der Weide's proposal would substantially narrow the discretionary function exception's scope by doing away with the *Gaubert* presumption and refining how courts view discretionary authority and policy factors under the *Berkovitz* test.

2. Judicial application

Peterson and Van Der Weide's proposal may have found some inroads with federal courts that are giving less weight to the *Gaubert* presumption and are viewing policy-decisions more narrowly. This is especially apparent in several recent Ninth Circuit cases considering the applicability of the discretionary function exception.¹⁴²

a. *Oberson v. United States Department of Agriculture*. In

141. *Id.* at 495–502. Peterson and Van Der Weide provide the following issues as examples of those involving policy factors from their viewpoint: "[H]ow important is preserving the environment, strengthening national defense or protecting civil rights?" *Id.* at 496; see also Medora Marisseau, Comment, *Seeing Through the Fallout: Radiation and the Discretionary Function Exception*, 22 ENVTL. L. 1509, 1523–28 (1992) (similarly arguing for a narrower view of what constitutes policy decisions).

142. Cases decided in other Federal Circuits since *Gaubert* similarly indicate other attempts to chip away at the effect of the *Gaubert* presumption in situations dealing with safety regulations. See, e.g., *Myers v. United States*, 17 F.3d 890, 895–96 (6th Cir. 1994) (reasoning that the discretionary function exception did not apply to action by mine safety inspectors because, even "though [the actions] involve[d] a significant degree of choice," they were nonetheless "not grounded in regulatory policy"); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992); cf. *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 290 (3d Cir. 1995) (Roth, J., dissenting) (citing *Ayala* in support of the proposition that "judgment guided purely by scientific or other objective principles does not involve discretion for purposes of the discretionary function exception"). But see *Bernaldes v. United States*, 81 F.3d 428, 429 (4th Cir. 1996) (affirming the lower court's contention that the *Myers* court erred in holding "that questions of safety involved objective non-policy based factors").

Despite the apparent frustration with *Gaubert* in several federal circuits, this Comment focuses on recent cases in the Ninth Circuit because they exhibit a *current* trend away from *Gaubert*, illustrate how undesirable policy incentives influence agency action, and reflect scholarly commentary on the discretionary function exception. For analyses of *Myers*, *Fisher Bros. Sales*, and *Bernaldes* see Hackman, *supra*, note 89, at 428–32. For a detailed discussion of how the discretionary function exception applies to mine inspections, see generally Jay Lapat & James P. Notter, Note: *Inspecting the Mine Inspector: Why the Discretionary Function Exception Does Not Bar Government Liability for Negligent Mine Inspections*, 23 HOFSTRA LAB. & EMP. L.J. 413 (2006).

2006, the Ninth Circuit held in *Oberson v. United States Department of Agriculture*¹⁴³ that the discretionary function exception did not cover the United States Forest Service's failure to post a warning sign at a hill on a snowmobile trail.¹⁴⁴ At the beginning of its analysis, the *Oberson* court laid out the Supreme Court's two-pronged test and cited to *Gaubert* and *Berkovitz*.¹⁴⁵ The court then applied the first prong of the test and summarily determined that "[t]here is no serious claim that the Forest Service's actions . . . were mandated by statute, policy or regulation."¹⁴⁶

The court's application of the second prong, however, is more surprising in light of the facts. In describing the second prong of the test, the court stated that the exception applies to discretionary "action[s] involv[ing] 'a decision *susceptible* to social, economic, or political policy analysis.'"¹⁴⁷ Thus, the *Oberson* court essentially stated *Gaubert*'s rule that the action need only be *susceptible* to—as opposed to actually based on or the result of—policy analysis for the exception to apply.¹⁴⁸ Despite this rule, the *Oberson* court nevertheless held that the exception did not apply in this case because "the [Forest] Service offer[ed] no [acceptable] evidence to show that its failure to post a warning was the result of a policy decision."¹⁴⁹ Specifically, the court held that "[i]n the absence of any

143. 441 F.3d 703 (9th Cir. 2006).

144. *Id.* at 712.

145. *See id.* at 710 (citing *Gaubert v. United States*, 499 U.S. 315, 322–25 (1991) and *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988)).

146. *Id.*

147. *Id.* (quoting *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (emphasis added)).

148. *Id.*; *see Gaubert*, 499 U.S. at 325 ("The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis."); *see also supra* Part III.A.

149. *Oberson*, 441 F.3d at 711, 712. In *Oberson* the government argued that the decision to not mark the hazard was based on policy because it was the result of the Forest Service's trail "warranting" process. The Forest Service would "warrant" the trail by having an employee ride the trail at the speed-limit and then identifying and marking hazards. The trail in question had been warranted according to this practice in 1993 at 35 mph. In 1996 the Forest Service raised the speed limit on the trail to 45 mph "solely for consistency with the speed limit in effect in adjacent Yellowstone National Park," but did not re-warrant the trail at 45 mph. *Id.* at 709–10. Even though the court determined that the Forest Service's decision to warrant trails was a valid discretionary action, the court held that it had no bearing in this case because the Forest Service did not re-warrant the trail at 45 mph. *Id.* at 711. The court summarily rejected the government's "argument that the decision not to re-warrant the trails in 1996 was protected by the discretionary function exception" by stating that the argument "misses the

evidence that the failure to post a warning or remedy the hazard was the product of a policy choice, we conclude that the discretionary function exception did not shield the Forest Service from liability.”¹⁵⁰

To support its holding, the *Oberson* court also cited to a pre-*Gaubert* Ninth Circuit case, *Summers v. United States*.¹⁵¹ In that case, the court held the discretionary function did not apply to the National Park Service’s failure to place signs on the beach “to identify and warn of the danger [of hot coals] to barefoot visitors.”¹⁵² Moreover, the *Oberson* court cited to another pre-*Gaubert* case, *Seyler v. United States*,¹⁵³ for the proposition that “we doubt that any decision not to provide adequate signs would be of the nature and quality that Congress intended to shield from tort liability.”¹⁵⁴

In reaching this holding, the court distinguished *Childers v. United States*,¹⁵⁵ a 1995 case in which the Ninth Circuit held that the discretionary function exception covered “the decision not to post signs and to close portions of Yellowstone National Park,” on the grounds that in *Childers* the actions “were the result of policy decisions regarding how best to manage the park during winter.”¹⁵⁶

point.” *Id.* Thus, the court determined that the government’s only evidence of a policy decision making was “its [misplaced] reliance on the 1993 warranting process,” which the court rejected. *Id.*

The *Oberson* court’s scrutiny of whether the government’s proffered policy reasons are valid or “misplaced” seems to, at least in part, embrace Peterson and Van Der Weide’s proposal that the scope of discretionary function “immunity [should] be reserved for decisions involving genuine policy variable.” Peterson & Van Der Weide, *supra* note 23, at 496; *see also supra* notes 139–41 and accompanying text.

150. *Oberson*, 441 F.3d at 712.

151. 905 F.2d 1212 (9th Cir. 1990).

152. *Id.* at 1216. The reliance on *Summers* is particularly interesting in light of the fact that the decision has been criticized as bad law after *Gaubert* in at least one other federal circuit court. *See Rosebush v. United States*, 119 F.3d 438, 443–44 (6th Cir. 1997).

153. 832 F.2d 120 (9th Cir. 1987).

154. *Id.* at 123 (internal quotation marks and citations omitted) (quoted in *Oberson*, 441 F.3d at 711–12).

155. 40 F.3d 973 (9th Cir. 1995).

156. *Oberson v. U.S. Dep’t of Agric.*, 441 F.3d 703, 711 (9th Cir. 2006); *see Childers*, 40 F.3d at 976.

Unable to maintain all the trails in the park, cognizant that posting warning signs would inadvertently attract visitors to unmaintained trails, and unable to post signs throughout the park, National Park Service could only decide to close large portions of the park, or to keep the park open, provide visitors with information on the hazards, and take steps to discourage visitors from going to hazardous areas. *Id.* For negative commentary on *Childers*, *see Hackman, supra* note 89, at 411.

The *Oberson* court held that, unlike the Park Service in *Childers*, the Forest Service's actions were not the result of a policy decision.¹⁵⁷

The *Oberson* court articulates the second prong of the *Berkovitz/Gaubert* test as requiring only that the decision be "susceptible to . . . policy analysis."¹⁵⁸ In applying this test, however, the court required that the decision was "the result" or "product of a policy choice."¹⁵⁹ The *Oberson* court's holding embraces the view of some commentators¹⁶⁰ and essentially returns to the *Berkovitz* analysis that required decisions to be actually "based on considerations of public policy."¹⁶¹

b. Soldano v. United States. *Soldano v. United States* also exhibits the trend in the Ninth Circuit to narrow the scope of the discretionary function exception.¹⁶² Like *Oberson*, the court in *Soldano* applied the *Berkovitz/Gaubert* test and held that the discretionary function exception did not apply to an agency action dealing with public safety.¹⁶³ Unlike *Oberson*, however, the *Soldano* court did not cite to anything based upon *Gaubert*'s "susceptible to policy analysis" language in laying out the second prong of the test.¹⁶⁴ Rather, *Soldano* focused on the *Gaubert* Court's incorporation of the *Berkovitz*'s rule that "[r]he exception 'protects only governmental actions and decisions based on considerations of

157. *Oberson*, 441 F.3d at 711–12.

158. *Id.* at 710 (quoting *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (emphasis added)).

159. *Id.* at 711–12.

160. See *supra* Part IV.A.1 (discussing how Peterson and Van Der Weide have advocated this approach). Obviously, however, the *Oberson* holding does not embrace all of these commentators' various proposals on how to refine the discretionary function analysis. See *supra* Part IV.A.1.

161. *Berkovitz v. United States*, 486 U.S. 531, 537 (1988) (emphasis added). Another possible reading of the *Oberson* holding is that the government's actions did not fall within the discretionary function exception because the government failed to proffer any acceptable evidence that the decision was "susceptible to policy analysis." *Gaubert v. United States*, 499 U.S. 315, 325 (1991).

162. *Soldano v. United States*, 453 F.3d 1140 (9th Cir. 2006).

163. *Soldano* involved, *inter alia*, a claim that the discretionary function exception did not cover the National Park Service's decision to set a speed limit at 35 mph on a road with a curve with less than 180 feet of sight distance. *Id.* at 1144, 1146. The court determined that the exception did not apply because the Park Service acted in violation of mandatory standards, which allowed a speed limit of 35 mph only if there was at least 225 feet of sight distance. *Id.* at 1148–51.

164. *Gaubert*, 499 U.S. at 325.

public policy.”¹⁶⁵ By avoiding *Gaubert*’s “susceptible” language, the *Soldano* court appeared to lay out a rule that rejected *Gaubert*’s application of the discretionary function exception to situations where the decision is merely susceptible to, but not based upon, consideration of policy factors. Further, in a footnote, the *Soldano* court rejected the government’s contention “that it had no obligation to adduce [specific evidence of policy consideration], but could instead rely on hypothetical justifications indicative of a social, economic, and political judgment” and cited to *Oberson* for support.¹⁶⁶ Thus, the *Soldano* court affirmed the adjustment to the *Gaubert/Berkovitz* rule the Ninth Circuit laid out in *Oberson*, and further eroded the breadth of the exception.

In sum, these recent Ninth Circuit cases indicate a trend towards a narrower application of the discretionary function exception. This trend focuses on requiring government defendants to show that decisions were based upon actual policy considerations rather than susceptible to policy analysis. These cases also indicate that at least some courts are moving in the direction of those commentators that have advocated a return to requiring proof of actual consideration of policy factors in order for the exception to apply.

3. Issues Raised by Refining the Two-Pronged Test

Approaches based on refining the Court’s current two-pronged test raise a number of issues. First, both Peterson and Van Der

165. *Soldano*, 453 F.3d at 1145 (quoting *Gaubert*, 499 U.S. at 323).

166. See *id.* at 1150 n.7. This discussion is arguably dicta, however. The court determines that the government’s actions violated a mandatory regulation, and apparently should have determined that the exception does not apply under the first prong of the *Berkovitz/Gaubert* test without moving onto the second prong. *Id.* at 1148–51. Accordingly, it may not have been necessary for the court’s holding to discuss issues relating to the second prong.

In a case decided the year after *Gaubert*, the Ninth Circuit similarly required the government to show “that each and every one of the alleged acts of negligence (1) involved an element of judgment and (2) that the judgment was grounded in social, economic, or political policy” in order for the exception to apply. *Prescott v. United States*, 973 F.2d 696, 702–03 (9th Cir. 1992). Although the *Soldano* court does not cite *Prescott*, the case indicates that the Ninth Circuit did not immediately apply *Gaubert*’s presumption. See Peterson and Van Der Weide, *supra* note 23, 466–67 (contending that the *Prescott* court acted “in apparent disregard of *Gaubert*”); see also Kiehn v. United States, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993) (questioning the validity of *Prescott*); Sarah Jean Crooks, Note, *Prescott v. United States: The Discretionary Function Exception Strikes Again*, 74 OR. L. REV. 365, 372–78 (1995) (discussing the implications of *Prescott*). *Soldano* reflects *Prescott* by exhibiting a current trend in the Ninth Circuit to erode *Gaubert*. *Soldano*, 453 F.3d at 1150 n.7.

Weide's approach, and the Ninth Circuit cases discussed above, do away with the *Gaubert* presumption and require the government defendant to show that the action was *actually* based upon consideration of policy factors in order to get the benefit of the discretionary function exception. Doing away with the *Gaubert* presumption, as these approaches propose, however, would require courts to engage in often difficult determinations of whether "an official actually engage[d] in reasoned decisionmaking" before taking the action.¹⁶⁷ As mentioned above, one commentator has noted that such a rule would likely cause "an increase in paperwork as a tort-adverse agency ma[kes] sure to document any actions" and would also encourage defendants to "bring forward after-the-fact testimony that at best might involve selective memory and at worst undetectable perjury."¹⁶⁸ Peterson and Van Der Weide's proposal, and the Ninth Circuit's approach in *Oberson* and *Soldano*, would require courts to make such difficult evidentiary determinations.

Furthermore, Peterson and Van Der Weide's proposal to apply a narrower view of what constitutes a "policy" decision¹⁶⁹ could also be problematic for courts. Specifically, this narrower view of policy decisions could possibly exclude many decisions that truly are based on policy considerations. For example, Peterson and Van Der Weide cited to an unpublished Ninth Circuit opinion, *Shively v. United States*, as an example of where the factors the government considered in making a discretionary decision were not "true policy factors."¹⁷⁰ In *Shively*, the court determined that the discretionary function exception applied to the Forest Service's decision not to fence in grazing lands along a highway because the Service balanced concern "that fencing could pose a safety hazard to snowmobilers in the winter months . . . against the danger to motorists driving on the unfenced highway."¹⁷¹ Despite the fact that snowmobiling on public

167. *Protecting Discretion*, *supra* note 22, at 388; *see supra* Part III.B.4.

168. *Protecting Discretion*, *supra* note 22, at 388.

169. Peterson & Van Der Weide, *supra* note 23, at 495-502; *see also supra* note 141 and accompanying text.

170. Peterson & Van Der Weide, *supra* note 23, at 497-98 (citing *Shively v. United States*, No. 92-16354, 1993 WL 312758 (9th Cir. 1993) (unpublished table decision)).

171. *Shively*, 1993 WL 312758, at *2. The court also considered the "forestry objectives [of permitting] cattle and deer movement and vegetation growth." *Id.* Peterson and Van Der Weide, however, do not mention this in their assessment of the opinion. *See* Peterson & Van Der Weide, *supra* note 23, at 497-98.

lands can be a very political and divisive issue,¹⁷² Peterson and Van Der Weide concluded that “[t]hese factors fit nicely into the Hand negligence formula.”¹⁷³ This example illustrates how Peterson and Van Der Weide’s excessively narrow view of “true policy factors” would require a court to find that the discretionary function exception does not cover many discretionary agency actions, even those based on consideration of certain policy factors. Such a result goes squarely against the exception’s purpose of “prevent[ing] judicial ‘second-guessing’ of legislative and administrative” policy decisions.¹⁷⁴

B. Proposals to Discard the Court’s Two-Pronged Test and Adopting an Alternative Analytical Framework

In contrast to the approaches discussed above, which merely seek to refine the Court’s current two-pronged test, some commentators advocate adopting an alternative analytical framework for determining the applicability of the discretionary function exception. This Subpart will review each of these approaches individually by first surveying the key elements of each approach and then discussing the issues raised by that approach.

1. The “process approach”

a. Overview of the process approach. The so-called “process approach,” developed by Professor Harold Krent, calls for a rejection of the Supreme Court’s current focus on the “nature of the governmental action challenged,”¹⁷⁵ and contends that the analysis

172. See, e.g., Earthjustice, *Victories: Restricting Snowmobile Use in Yellowstone National Park* (Dec. 23, 2003), http://www.earthjustice.org/our_work/victory/restricting_snowmobile_use_in_yellowstone_national_park.html (describing how the Clinton and Bush administrations have dealt with snowmobiling in Yellowstone National Park differently); see also Lisa W. Foderaro, *Snowmobilers vs. Hikers in the Adirondacks*, N.Y. TIMES, Feb. 16, 2007, at F1 (describing a controversy surrounding use of snowmobiles on state lands in New York).

173. Peterson & Van Der Weide, *supra* note 23, at 497–98, n.179.

174. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

175. Krent, *supra* note 12, at 874; see *Varig*, 467 U.S. at 813 (“[I]t is the nature of conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.”) (emphasis added); see also *Gaubert v. United States*, 499 U.S. 315, 322 (1991) (quoting *Varig*, 467 U.S. at 813); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (same).

should “hinge . . . on the process by which that action is reached.”¹⁷⁶ The process approach would primarily limit discretionary function protection to “deliberate, considered policies formulated by agency personnel.”¹⁷⁷ In making this determination, reviewing

[c]ourts [would] scrutinize the contested agency action to determine whether it stemmed from a deliberate decision that is likely to be followed in the future [in which case the exception would apply] or from a case specific judgment of an individual agency employee [in which case the exception would not apply].¹⁷⁸

Professor Krent’s article presents two theoretical justifications for the process approach. First, potential tort liability under the FTCA serves a deterrence function that provides an incentive for governmental agencies to prevent “future negligent conduct.”¹⁷⁹ While tort liability provides the incentive to act reasonably, application of the discretionary function exception removes this incentive.¹⁸⁰ Thus, Professor Krent contended that courts should apply the exception only where the administrative process will serve to deter negligent action.¹⁸¹ Second, Professor Krent argued that while judicial review of agency policy actions would implicate separation of powers concerns,¹⁸² there are generally no such separation of powers

176. Krent, *supra* note 12, at 874.

177. *Id.* at 906. The process approach would also apply the discretionary function exception to a limited category of non-deliberated discretionary decisions not made pursuant to the administrative process. *Id.* at 874. Professor Krent explains that the exception should exclude “agency conduct which would not otherwise be reviewable under administrative law principles” from the possibility of FTCA liability. *Id.* Professor Krent further explains, however, that such “instances are few and far between” and provides only prosecutorial discretion, investigatory discretion, foreign policy initiatives, and agency failure to act as possible examples. *Id.* at 874, 902–03. Thus, the process approach’s primary effect of limiting the discretionary function exception’s scope to actions made through the administrative process is of the most concern here.

178. *Id.* at 906.

179. *Id.* at 886–87.

180. *Id.* at 887.

181. *Id.* at 893 (“The more effectively the administrative process checks agency activities, the less the need for the monitoring of a tort action.”).

182. *Id.* at 895–96. Professor Krent explains that this is particularly a concern when reviewing federal government action under state tort law because

[s]ubjecting all agency policies to the check of state negligence law could undermine the supremacy of agency policy making—a result that Congress presumably did not intend. . . .

Moreover, the judiciary’s power to impose damages for unreasonable agency conduct furnishes a strong incentive to agencies to conform their

concerns in a court reviewing “nondeliberative actions.”¹⁸³

As an example of how the process approach would function, consider where the Court in *Berkovitz* determined that the discretionary function did not protect an official who violated a mandatory regulation requiring him to gather certain information for manufacturers of vaccines.¹⁸⁴ Professor Krent observed that in such a situation, a process approach analysis would similarly hold the exception inapplicable “because the [official’s] failure to follow [agency] rules did not stem from any considered policy.”¹⁸⁵ However, the process approach would not support the *Berkovitz* Court’s additional “indicat[ion] that the discretionary function exception would have protected other agency officials’ decisions not to reject a vaccine lot found to be nonconforming if the agency had vested the officials with such broad discretion.”¹⁸⁶ Professor Krent’s article explains that because “the officials’ failure to reject the lot does not in and of itself constitute policy,” under the process approach, “the discretionary function exception [would] not apply.”¹⁸⁷

Essentially, the process approach would include agency discretion used to create rules, regulations, and policies made in the administrative process within the scope of the discretionary function exception. However, the process approach would exclude any case-specific discretionary decisions made by an official or employee

conduct to whatever the judiciary is likely to deem reasonable (under state law).

Id.

183. *Id.* at 899. Citing to Professor Krent’s article, one federal judge argues “that sometimes government decisions requiring tradeoffs between cost and safety deserve the protection of the discretionary function exception, and sometimes they do not,” and that such a determination “depends at least in part on *the process* by which government decisions are made.” *Smith v. Wash. Metro. Area Transit Auth.*, 290 F.3d 201, 217–18 (4th Cir. 2002) (Michael, J., concurring in part and dissenting in part) (emphasis added).

184. See *Berkovitz v. United States*, 486 U.S. 531, 542–43 (1988). The Court explains:

The [agency] has no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive. Accordingly, to the extent that petitioners’ licensing claim is based on a decision of the [agency] to issue a license without having received the required test data, the discretionary function exception imposes no bar.

Id.

185. Krent, *supra* note 12, at 908–09.

186. *Id.* at 909; see *Berkovitz*, 486 U.S. at 546–48.

187. Krent, *supra* note 12, at 909.

pursuant to the agency's rules, regulations, or policies. That is, if an agency promulgated a rule instructing officials to use their professional judgment in making certain case specific determinations, the process approach would include the agency's decision to create such a rule within the scope of the discretionary function exception. Conversely, however, the official's discretionary use of her professional judgment pursuant to that rule would not fall within the exception under the process approach.

b. Issues raised by the process approach. Although the process approach would preserve separation of powers and allow FTCA tort liability to deter negligent governmental activity where an effective check might not exist, some commentators have suggested that it applies the discretionary function exception too narrowly and "places too high of a burden on the government."¹⁸⁸ Similarly, the process approach could also create incentives with undesirable policy implications. Specifically, an agency seeking to avoid tort liability would avoid delegating discretionary authority to operational level employees. This is illustrated by considering the National Park Service's sign policies at issue in *Childers v. United States*.¹⁸⁹ The *Childers* court summarized the Park Service's sign policies¹⁹⁰ as allowing park rangers to make "policy-based" decisions regarding where and what type of warning signs to post in National Parks by "balanc[ing] access with safety, and tak[ing] into account conservation and resources in designing area plans and making individual trail determinations."¹⁹¹ Under the *Berkovitz/Gaubert* two-pronged test, the *Childers* court determined that such decisions were covered by the discretionary function exception.

Yet under the process approach, such case-specific determinations by an operational level employee would not fall within the discretionary function exception.¹⁹² Accordingly, the

188. Peterson & Van Der Weide, *supra* note 23, at 488 n.149 ("We believe that Krent's approach places too high of a burden on government. If government agents were forbidden from acting in the absence of full agency deliberation, government agencies would be hamstrung in their efforts to carry out their missions wisely and expeditiously.").

189. 40 F.3d 973 (9th Cir. 1994).

190. The *Childers* court determined that these policies were laid out in "a statute (16 U.S.C. § 1), regulations, and guidelines." *Id.* at 975-76.

191. *Id.* at 976.

192. See Krent, *supra* note 12, at 908-09; see also *supra* notes 177-78 and accompanying text.

agency might fail to delegate discretionary actions to operational level employees—for fear of falling outside the scope of the discretionary function exception—even though those employees might be in the best position to make policy decisions. On the other hand, if the Park Service were to create a sign policy of mandatory rules, there is a high likelihood that operational level employees' actions would fall outside of the scope of the discretionary function exception because the actions would not fully comply with one of these rules. Thus, in regard to the placement of signs in the park, the Park Service would have a net incentive to create rules that are non-discretionary yet easily followed—even if such rules are less effective in assuring public safety and attaining the Park Service's other goals.¹⁹³ In sum, the process approach could both create an incentive for agencies to regulate ineffectively¹⁹⁴ and leave agencies “hamstrung in their efforts to carry out their missions wisely and expeditiously.”¹⁹⁵

2. The “ad hoc inquiry” model

a. Overview. Professors John W. Bagby and Gary L. Gittings have advocated rejecting the *Gaubert* rest for a more detailed, “ad hoc inquiry into each case.”¹⁹⁶ In proposing this more detailed approach, Bagby and Gittings rejected the “inconsistent semantic dichotomies that guided traditional [discretionary function exception] analysis” and presented a flexible model for “a two phase analytical process.”¹⁹⁷ The model's first phase requires a court to “determine that legislative authority is delegated to the agency to exercise public

193. Thus the process approach may create incentives for agencies to regulate ineffectively in order to avoid tort liability; these incentives are similar to those that the Court's current approach creates. See Bagby & Gittings, *supra* note 89, at 238; Krent, *supra* note 12, at 886–87; *supra* Part III.B.3.

194. Because these decisions are made through the administrative process, this process provides some “check” to prevent agencies from regulating ineffectively. See *supra* note 115 and accompanying text. However, considering that the participants in the administrative process may be more concerned with factors other than generalized safety, the administrative process may not fully check this incentive. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 561–63, 567–71 (2000) (summarizing public choice theory as holding that “[p]rivate groups manipulate, pressure, bargain, and bribe to benefit themselves at the expense of others”); see also *infra* note 260.

195. Peterson & Van Der Weide, *supra* note 23, at 488 n.149; see also *supra* note 184 and accompanying text.

196. Bagby & Gittings, *supra* note 89, at 230.

197. *Id.*

policy discretion” and, through a possibly “complex” analysis, determine “the scope of the delegated authority.”¹⁹⁸ The second phase of the Bagby and Gittings model “directs the court to examine the nature of the decision making process that leads to the challenged action” and directs the court to

focus[] on four elements: (1) defining policy and discovering the ‘policy content’ of the particular factors weighed in the decision; (2) the degree of deliberation over courses of action (a considered decision); (3) the link between the challenged decisions and the agency’s policy choice; and (4) the lack of known, objective standards to guide the decision.¹⁹⁹

Professors Bagby and Gittings’s proposal advocates a more complex and detailed review that reflects aspects of Professor Krent’s proposal and the Peterson and Van Der Weide proposals. Like Peterson and Van Der Weide’s proposal, the Bagby and Gittings model would require that the agency had actually delegated authority to the actor to make the discretionary decision. However, the Bagby and Gittings model would further require that the *agency* have “legislative authority . . . to exercise public policy discretion.”²⁰⁰ Moreover, the second phase’s consideration of “the degree of deliberation” echoes Professor Krent’s focus on the process used to make a decision. Yet unlike Professor Krent’s approach, the Bagby and Gittings model would consider deliberations outside of the legislative or administrative process.

b. Issues raised by the “ad hoc inquiry” model. As aspects of the Bagby and Gittings model are similar to other approaches, the model raises some of the same issues as other approaches. Specifically, similar to Peterson and Van Der Weide’s proposal, the Bagby and Gittings model could put courts in a situation where they must second-guess legislative or agency determinations of what constitutes

198. *Id.* As to determining the “scope of the [agency’s] delegated authority,” Professors Bagby and Gittings explain that this delegated authority is “authority that forces agency action through a specified decision path that narrows the agency’s discretion.” *Id.* They further explain that “[t]his specified path analysis can be complex, sometimes involving (1) deviations from, (2) conflicts in, (3) careless implementation of, or (4) [in]consistencies [sic] with the legislature’s prescription.” *Id.*

199. *Id.*

200. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

“policy.”²⁰¹ The first phase of the Bagby and Gittings model proposes that courts determine whether the agency has been delegated authority to “exercise public policy.”²⁰² Moreover, the second phase of their model would require a court to “defin[e] policy.”²⁰³ As discussed above, judicial review of an agency’s determination of what constitutes a policy decision essentially creates the separation of powers issues that Congress intended to prevent in enacting the discretionary function exception.²⁰⁴

Similarly, by directing a court to “discover[] the ‘policy content’ of the particular factors weighed in the decision,”²⁰⁵ the Bagby and Gittings model would require courts to grapple with evidentiary issues of whether the official actually considered policy factors. As discussed above in describing Peterson & Van Der Weide and the Ninth Circuit’s approach, courts would often have to make these determinations based on after-the-fact testimony and unreliable evidence.²⁰⁶ Moreover, the more detailed, “ad hoc inquiry into each case” that the Bagby and Gittings model proposes could result in different courts analyzing discretionary function questions in a variety of different ways, and thus increase uncertainty for litigants.²⁰⁷

3. *The “Functional Approach”*

a. Overview of the functional approach. More recently Professor Mark Niles proposed the “functional approach” to analyzing the applicability of the discretionary function exception.²⁰⁸ Under the functional approach, the discretionary function exception would only apply to “tort claim[s that] challenge[] a governmental action which involves the kind of discretionary determination that should be made without the distorting threat of litigation, or that calls on a court to second-guess a policy judgment.”²⁰⁹

201. *Id.*

202. Bagby & Gittings, *supra* note 89, at 230.

203. *Id.*

204. See *supra* Part II.B (discussing Congress’s intent in creating the discretionary function exception).

205. Bagby & Gittings, *supra* note 89, at 230.

206. See *supra* Part IV.A.3.

207. Bagby & Gittings, *supra* note 89, at 230; cf. *supra* Part III.B.4 (discussing how the *Gaubert* test is predictable and workable for courts).

208. Niles, *supra* note 4, at 1335–52.

209. *Id.* at 1337.

Professor Niles further explains that such a rule prevents judicial second-guessing of policy decisions and “the possibility that a federal official will make policy judgments based on fear of the consequences of litigation.”²¹⁰ Furthermore, the functional approach rejects *Gaubert’s* “presumption” and would require an actual policy decision.²¹¹ Essentially, the functional approach would consider whether the government is acting in a governing or non-governing capacity, and would not apply the discretionary function exception to “non-governing acts.”²¹²

b. Issues raised by the functional approach. The functional approach aims to apply the discretionary function exception to prevent judicial second-guessing of policy decisions and “policy judgments based on fear of the consequences of litigation.”²¹³ However, beyond articulating this aim, the functional approach provides very little guidance to a court attempting to apply it. The functional approach’s distinction between governing and non-governing actions was rejected early on by the Supreme Court as too vague to provide a workable standard.²¹⁴ In *Indian Towing* the Court described the “non-governmental” versus “governmental” distinction as a “quagmire that has long plagued” courts in other areas of law.²¹⁵ The Supreme Court subsequently affirmed this view that the governmental vs. non-governmental dichotomy is unworkable.²¹⁶ Thus, although the explanation of the functional

210. *Id.* at 1338.

211. *Id.* at 1341 (“Pursuant to this functional approach . . . the exception would be applicable only in instances where a government official had actually made a policy judgment, and not where a policy could have been considered but was not.”).

212. *Id.* at 1338 (“When the government acts in a non-governing capacity—when it performs some sort of function or service that could be performed by a private party—there is no compelling reason, as a matter of law, to treat the acts any differently than if they were performed by a private party.”). This governing/non-governing distinction in the functional approach echoes Amy Hackman’s proposal that courts should make “a threshold inquiry as to whether the challenged action involves a uniquely governmental function” before conducting the Court’s two-pronged test. Hackman, *supra* note 89, at 412, 445–46.

213. Niles, *supra* note 4, at 1338.

214. *Indian Towing v. United States*, 350 U.S. 61, 65 (1955).

215. *Id.*; see *supra* Part II.C.2 (discussing *Indian Towing*).

216. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 812 (1984) (citing *Indian Towing’s* discussion rejecting the “uniquely governmental functions” analysis); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (rejecting the dichotomy between “traditional”/“integral” governmental functions and other governmental functions as “unsound in principle and unworkable in practice”).

approach raises important issues about the theoretical foundation of the Court's current approach,²¹⁷ without more guidance, the functional approach fails to present a workable alternative.

V. PROPOSED INCENTIVE RECOGNITION APPROACH: A NEW TWO-STEP ANALYSIS

This Comment agrees with scholarly commentaries contending that the *Gaubert* approach undermines Congress's intent in passing the FTCA and creates a situation where an agency's negligent behavior goes unchecked. However, all of the previously discussed alternative approaches to discretionary function analysis leave certain issues unresolved. Specifically, none of these alternatives provide a solution that is both workable for courts and adequately deals with the undesirable incentives for agencies caused by the Court's current approach. Thus, this Comment proposes a novel analysis based on recognizing and avoiding the undesirable incentives that other approaches to the discretionary function exception create.

This Comment's proposed analysis is termed the "incentive recognition" approach, because it is based on a recognition of the undesirable policy incentives that the existence of the discretionary function exception creates. Under this proposed approach, a reviewing court would engage in a two step analysis.²¹⁸ First, the court would determine whether the decision was made through the administrative/legislative *process*. If so, the exception applies. If not, the court would then move to the second step. In the second step, the court would evaluate the action under three required criteria: (1) the governmental officer was *affirmatively* delegated the authority to use discretion in considering *specific* policy factors; (2) the officer, before the decision, received training making her aware of the specific policy factors she was to consider; and (3) the officer was provided access to the information necessary to make the policy-based decision. If all three of these requirements are met, the court should apply a presumption that the discretionary function exception applies to the governmental action in question.

217. See Niles, *supra* note 4, at 1324-42.

218. This test is facially similar to the Court's current two-pronged test in that both involve a two-step analysis; however, as illustrated in the discussion below, the two-step analysis proposed in this Comment and the Court's current approach are substantively quite different.

The presumption created by the incentive recognition approach strikes a balance that both promotes efficient agency management and provides a workable test for courts. Unlike the *Gaubert* presumption—which presumes that the exception applies if the action is merely “susceptible to policy analysis”²¹⁹—for the incentive recognition approach’s presumption to apply, the government must make a showing that indicates the action was made by an actor with the affirmative authorization, training, and information necessary to take the discretionary action. Further, unlike under *Berkovitz*, the incentive recognition approach’s presumption avoids forcing a court to decide the case based on potentially unreliable evidence.²²⁰

A plaintiff can overcome this presumption with evidence that, despite having the authority and necessary tools, the governmental officer nonetheless did not base his decision on consideration of policy factors. Conversely, if the officer was not affirmatively authorized and did not have the reasonably necessary tools to make the policy determination involved, the government would face tort liability pursuant to the FTCA—even if the actor considered policy factors in making the decision.

This Part will first provide an overview of this proposed approach by examining each of its steps individually. Part V.B then illustrates how the approach would apply in particular fact scenarios. Part V.C then discusses how the incentive recognition approach addresses issues left unresolved by other approaches and addresses possible counterarguments to the application of this standard. In this discussion, Part V.C illustrates how, by avoiding the undesirable policy incentives created under the Court’s current and other alternative approaches, this proposed approach better effectuates the purposes of the discretionary function exception and the FTCA as a whole.

A. Overview of the Incentive Recognition Approach

As explained above, the incentive recognition involves a two-step analysis. This Subpart will examine these steps individually and explain how a reviewing court would apply each.

1. Step one: Action taken through the administrative or legislative

219. *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

220. See *Protecting Discretion*, *supra* note 22, at 388; *infra* Part III.B.4.

process

The first step in the incentive recognition approach is based on Professor Krent's "process approach"²²¹ and entails the same analysis. Accordingly, the first step of the incentive recognition approach would only place discretionary actions reached through the administrative or legislative process within the scope of the discretionary function exception.²²² As an analysis based on the process approach, under this first step, administrative decisions to authorize employees to make discretionary decisions would fall within the scope of the exception, but the actions that employees take pursuant to that authority would not.²²³

The significant difference between the first step of the incentive recognition approach and Professor Krent's process approach is that the former has a second step which would allow the discretionary function exception to apply in certain situations where the decision was not made through the administrative or legislative process.²²⁴ If, after applying this first step, the reviewing court determines that the decision was made through the administrative or legislative process, the discretionary function exception applies. If the decision was not made through such a process, the reviewing court moves on to the second step.

2. Step two: Actor was affirmatively delegated the specific authority, received training on policy factors, and had the necessary information

Under the incentive recognition approach, a decision not reached in the administrative or legislative process is presumed to fall within the scope of the discretionary function exception only when: (1) the officer was affirmatively delegated the specific authority to take the policy-based discretionary action at issue, (2) the officer had received training necessary to make the policy-based decision, and (3) the officer had the information necessary to make the decision

221. Krent, *supra* note 12, at 906; *see supra* Part IV.B.1 (discussing the process approach).

222. *See* Krent, *supra* note 12, at 906 ("Courts should apply the discretionary function exception to protect deliberate, considered policies formulated by agency personnel.").

223. *Id.* at 906-08.

224. Under a pure process approach analysis, the exception would generally not apply to decisions that are not reached through either legislative or administrative process. *See supra* Part IV.B.1.

based on policy factors. Conversely, if these three requirements are not met, the discretionary function exception conclusively does not apply to the action in question.

The first requirement mandates that the governmental actor must be *affirmatively* granted the authority to make the specific type of policy determination at issue through the administrative or legislative policy. Additionally, the grant of authority must specify which policy factors the officer has authority to consider. This requirement is necessary in order for a court to determine, under the next part of its analysis, whether the officer had the tools reasonably necessary to make a determination based on these policy factors. Requiring an affirmative, specific grant of authority would compel a government defendant to point to a specific regulation or policy granting the authority to take discretionary action in order for the exception to apply. Such a requirement diverges from the Court's current practice of deeming the actor to have the authority to act with discretion in the absence of a mandatory "federal statute, regulation, or policy."²²⁵ Requiring an affirmative delegation of the specific authority would prevent administrative policymakers from causing innumerable types of decisions to fall within the exception's scope by simply *not* enacting mandatory regulations or policies.²²⁶ One could contend that this rule would encourage agency officers to make sweeping policies that grant every employee large amounts of discretion over every decision in order for the actions to fall within the exception. However, this incentive is limited by the condition that the delegation of authority be *specific* and the additional requirements discussed below that the employee be given the training and information necessary to make the specific policy-based decision.²²⁷

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

226. Take, for example, the speed limit at issue in *Soldano* discussed *supra* Part IV.A.2.b. In that case the court determined that the discretionary function exception did not apply because the Park Service employees set the speed limit too high in violation of a mandatory regulation. *Soldano v. United States*, 453 F.3d 1140, 1147–48 (9th Cir. 2006); *see also supra* note 163 and accompanying text. Yet, had there only been a regulation granting officials generalized discretion to manage the park as appropriate, under the Court's current analysis, the government would need only to show that the decision could have been based on policy in order for the exception to apply. Under the incentive recognition approach, however, the exception would only apply if the officials were affirmatively delegated specific authority to consider certain delineated policy factors in setting speed limits on park roads.

227. As explained below, *see infra* Part V.C.2, this incentive for the agency to broadly

Step two of the incentive recognition approach would further require that the officer be provided with both the training and information necessary to make the decision at issue, based upon the policy factors the officer has authority to consider. Specifically, the officer must have received at least some training, in some form, informing her of the specific policy factors she is to consider in taking the discretionary action. Moreover, the officer must have access to all information necessary to weigh the policy factors she is authorized to consider in exercising her specifically delegated discretion.

This training and information requirement is based in part on Peterson and Van Der Weide's contention that the discretionary function exception should not apply to actions taken by officials who "[do] not likely possess the requisite experience in making policy decisions" or "[do] not regularly receive the social, political, and economic data to make the decision wisely."²²⁸ However, a reviewing court runs the risk of violating separation of powers by scrutinizing too closely an agency's decision to grant discretionary authority to employees at a particular level.²²⁹ That is, determining the qualifications and resources needed to take policy-based discretionary actions is itself an agency policy determination that a court cannot review without encroaching upon the executive's separate powers.²³⁰ Thus, in assessing whether the training and information provided was sufficient to make the decision based on the relevant policy factors, the reviewing court must *not* subjectively consider whether, taking into account the officer's experience and overall educational background, it was *wise* for the officer to have such policy discretion.

In sum, in order for the discretionary function exception to presumptively apply under the second step, the employee must have: (1) been affirmatively authorized to exercise discretion in making

delegate discretionary authority is offset by the agency's burden to comply with the incentive recognition approach's other requirements.

228. Peterson and Van Der Weide, *supra* note 23, at 492.

229. Under the Court's current broad application of the exception, the possibility of a court too closely scrutinizing whether an agency should delegate authority in particular or not has not been an issue. That is, considering that under *Gaubert* the discretionary function exception applies to actions the government can show are "susceptible to policy analysis," a court does not review whether delegation was proper. *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

230. See *supra* note 21 and accompanying text (discussing the separation of powers function the discretionary function exception is intended to serve).

certain specific policy-based decisions, (2) received training on how to make such a policy-based decision, and (3) had access to information or data necessary to make a decision based on those policy factors. A plaintiff can overcome this presumption by showing that, despite these criteria being met, the action was nonetheless not policy driven.

B. Application of the Incentive Recognition Approach

Before more closely examining the theoretical justifications for the incentive recognition approach and comparing it to other approaches, it is helpful to illustrate how this approach would apply to fact scenarios that courts have faced previously. Specifically, such examples demonstrate how the proposed analysis is workable for courts and removes undesirable incentives for agencies to regulate ineffectively.

Take, for example, the FAA's "spot-check" regulations at issue in *Varig*.²³¹ In *Varig*, the Court considered whether the exception covered both the FAA's decision to delegate policy discretion to operational level employees in "conduct[ing] compliance reviews" of aircraft and the application of this "spot-check" program in a particular case.²³² Under the first step of the incentive recognition analysis, a court would determine whether the decision was made through the administrative or legislative process. Accordingly, a court would determine that the FAA made its decision either through the administrative process or by an FAA official acting individually. Applying the first step, a court would determine that the decision to promulgate regulations creating the "spot-check" program would fall within the administrative process, while the case-by-case application of the program was not. Thus, the decision to promulgate the "spot-check" regulations would fall within the exception under the first step, and the court would proceed to the second step to determine whether the application of "spot-check" in a particular case is presumably covered by the exception or not.

Under the second step, a court would most likely determine that, according to the facts at issue in *Varig*, the exception would presumably apply to these actions. Specifically, the FAA regulations

231. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 816-19 (1984) (discussing the "spot-check" program).

232. *Id.* at 820.

expressly instruct the employee to consider the manufacturer's experience in assessing how closely to "spot-check."²³³ Provided that the government could show that the FAA trained the official on these factors and provided the official access to the information regarding the manufacturer's experience, the discretionary function exception would presumably cover these actions under the proposed analysis. A plaintiff, however, could overcome this presumption by showing that, despite having received training, the employee nonetheless failed to consider policy factors in applying the "spot-check" program in that particular instance.

As another example, the facts in *Childers* can be used to show whether actions taken by National Park Service employees pursuant to the Service's sign policies would come within the scope of the discretionary function exception under the incentive recognition approach.²³⁴ *Childers* involved the question of whether park rangers' decision not to post a sign warning of hazards on a trail that was unmaintained during the winter was covered by the discretionary function exception.²³⁵ The Ninth Circuit held that the exception did apply, reasoning that "a statute, regulations, and guidelines . . . leave [discretionary] decisions, either explicitly or implicitly, in the hands of NPS rangers."²³⁶ Under the incentive recognition approach, however, the Park Service's regulations and guidelines would be scrutinized more closely. Specifically, under the second step²³⁷ of the

233. *Id.* at 817-18. The regulations the Court quotes specifically state:

Conformity determination may be varied depending upon circumstances. A manufacturer's policies, quality control procedures, experience, inspection personnel, equipment, and facilities will dictate the extent of conformity inspection to be conducted or witnessed by [CAA employees]. . . . In the case of an inexperienced manufacturer whose ability is unknown, it may be necessary to conduct a high percentage of conformity inspections until such time as the [CAA] inspector feels he can safely rely to a greater degree upon the company inspectors. He may then gradually reduce his own inspection or witnessing accordingly.

Experienced manufacturers having previously demonstrated the acceptability of their quality control and inspection competence . . . should benefit by greater [CAA] confidence. In such cases, conformity determination may be made through a planned system of spot-checking critical parts and assemblies and by reviewing inspection records and materials review dispositions.

Id. (quoting CAA MANUAL OF PROCEDURE § .330).

234. See *Childers v. United States*, 40 F.3d 973 (9th Cir. 1994).

235. *Id.* at 974.

236. *Id.* at 975-76 (citation omitted).

237. It is clear from the facts in *Childers* that each case-by-case decision by a park ranger of where to place a warning sign is not made through the administrative process. Accordingly,

proposed analysis, a reviewing court would determine whether rangers had been *affirmatively* delegated the authority to take the *specific* discretionary actions at issue; a regulation that merely “leaves [discretion] . . . implicitly . . . in the hands of [its] rangers [or other employees]” would not pass muster.²³⁸ Further, the government would have to show that the specific employees in question received training on the policy factors they were to consider and had access to information necessary to make the policy-based discretionary decision.

Therefore, the decision at issue in *Childers* would not come within the discretionary function exception under the incentive recognition approach; park rangers were not affirmatively delegated specific discretionary authority. However, the Park Service could structure its regulations in such a way that the decision would presumably²³⁹ come within the exception. Specifically, the Park Service would need to create a regulation or policy affirmatively delegating operational level rangers the authority to consider certain specified policy factors in determining how to warn of hazards.²⁴⁰ Moreover, the Park Service would need to provide its rangers with training on the specific policy factors they are to consider and the information or data necessary to make such policy-based decisions.

An agency most likely could, with relative ease, create the regulations and implement the training necessary for many of its

such decisions would come within the scope of the exception under the first step of the incentive recognition approach’s two-step analysis. However, were the Park Service to, through the administrative process, promulgate *mandatory* regulations or policies to place signs based on specific criteria (specific weather conditions, number of visitors in the park, frequency of use of a particular trail or area, etc.), such a decision at the policymaking level would come within the discretionary function exception.

238. *Id.*

239. As explained above, the incentive recognition approach would allow a plaintiff to overcome this presumption with a showing that the governmental employee actually did not consider the policy factors she was authorized to. *See supra* text accompanying note 220.

240. The *Childers* court notes that the reason rangers do not put warning signs on trails that are not maintained during the winter is “because it is impractical in such a large area and the signs may attract visitors and mislead them into believing the trails are inspected and maintained.” *Childers*, 40 F.3d at 976 n.5. Under the incentive recognition approach the decision not to place signs “because it is impractical” would fall within the exception’s scope only if the regulation specifically authorized rangers to make the policy decision of how to best use the agency’s resources to promote safety. *Id.* Likewise, the decision not to place signs out of concern that “the signs may attract visitors” would fall within the exception’s scope only if the operational level park rangers were specifically authorized to use their professional judgment to consider the effect of placing such warning signs. *Id.*

employees' discretionary actions to presumptively come within the discretionary function exception under the incentive recognition approach. Yet the agency would need to take some affirmative action, rather than "leav[ing discretion] in the hands of [its] rangers [or other employees]" by simply failing to create mandatory regulations.²⁴¹ Such a requirement would help an agency consciously consider, through the administrative process, the specific type of actions it seeks to shield from tort liability. By requiring an agency to affirmatively delegate discretionary authority and train its employees in order for the discretionary function to apply to day-to-day agency actions, the incentive recognition approach would remove the "perverse incentive[]" for an agency to not regulate.²⁴²

C. How the Incentive Recognition Approach's Two Step Analysis Differs from and Compares with Other Possible Approaches

Commentators have derided the broad scope of the discretionary function exception under the Court's current two-pronged test as contrary to Congress's intent and as placing an unfair burden on plaintiffs.²⁴³ Furthermore, commentators have noted that the Court's current approach creates a situation where there is no effective "check" to deter governmental agencies from acting negligently and even creates "perverse incentives" for governmental agencies to regulate ineffectively.²⁴⁴ However, as discussed above, the proposed alternative approaches either do not adequately address these problems or create other problems. This Subpart illustrates how the incentive recognition approach adequately resolves the problems with the Court's current approach without creating the problems caused by other proposed approaches. This Subpart also addresses possible arguments against adopting the proposed two-step analysis.

1. Workable rule creating proper agency incentives

Unlike several of the approaches discussed above, the incentive recognition analysis narrows the scope of the discretionary function

241. *Id.* at 975-76.

242. *See* Krent, *supra* note 12, at 892.

243. *See supra* Part III.B.1-2.

244. Krent *supra* note 12, at 892 ("[T]aken on its face, the Court's reasoning in *Berkovitz* seemingly creates a perverse incentive for agencies to permit government officials and employees to exercise more unguided discretion."); *see supra* Part III.B.3.

exception without creating the evidentiary problems caused by requiring a showing of an actual policy decision.²⁴⁵ Recall that such a determination compels courts to make factual determinations on unreliable evidence.²⁴⁶ The second step of this Comment's proposed analysis, however, requires the government to show that (1) the official was affirmatively delegated the authority to consider certain specific policy factors in taking the action, (2) the official had received training on the relevant policy factors, and (3) that the officer had the information necessary to make a decision based upon those policy factors. By requiring these three conditions in order for the discretionary function exception to presumptively apply to actions not made within the formal administrative or legislative process, this analysis applies the exception significantly more narrowly than the Court's current approach under *Gaubert*. Yet this analysis avoids the problems created by requiring a showing of an actual policy decision. Evidence of whether the official was authorized to consider policy factors and received training on those factors is not susceptible to unreliable after-the-fact testimony that the decision was based on policy factors. Because a court would not delve into the wisdom of delegation decisions,²⁴⁷ the court simply determines whether the government has met the three criteria.

Furthermore, rather than wasting agency resources developing after-the-fact explanations as to how the action was policy-based, under this Comment's proposed analysis, the agency will presumably further agency goals by focusing its attention on ensuring that the employees making discretionary decisions are authorized and trained to do so. In other words, under the proposed analysis, the possibility of tort liability would motivate agencies to ensure that they properly train their employees to make policy-based decisions (something that would benefit the operation of the agency overall). Under a rule requiring a showing of an actual policy decision, the agency would be motivated to expend resources developing testimony after-the-

245. Specifically, the following proposed approaches would require the government to make a showing of an actual policy decision: (1) Peterson and Van Der Weide's approach, *see* Peterson & Van Der Weide, *supra* note 23, at 486; *supra* notes 122–25 and accompanying text; (2) the Bagby and Gittings model, *see* Bagby & Gittings, *supra* note 89, at 230; *supra* text accompanying notes 205–06; (3) the functional approach, *see* Niles, *supra* note 4, at 1337; *supra* Part IV.B.3; and (4) the Ninth Circuit's approach in *Oberson and Soldano*, *see supra* Part IV.A.2.

246. *Protecting Discretion*, *supra* note 22, at 388; *see also supra* Part III.B.4.

247. *See supra* notes 229–30.

fact (an activity that does not benefit the operation of the agency overall).

The incentive recognition approach narrows the scope of the discretionary function exception while providing a more workable rule and creates better policy incentives than a rule requiring the government to show actual consideration of policy factors. The same holds true when comparing this proposed analysis with other aspects of other scholarly proposals. For example, while the incentive recognition approach involves a workable two-step analysis, the “function approach” would require courts to find and draw a line between governing and non-governing capacities.²⁴⁸ As discussed in Part IV, such a vague test leads to disparate results.²⁴⁹ Such a situation provides governmental agencies little guidance in managing agency operations and gives plaintiffs little indication as to their chances of recovery.²⁵⁰

Likewise, although a *purely* “process approach” based analysis provides a clear, workable standard,²⁵¹ it also inhibits governmental agencies in the fulfillment of their missions.²⁵² As explained above, if governmental agencies only get the benefit of the exception for discretionary decisions made through the administrative process, agencies would have an incentive to create easily complied with mandatory policies.²⁵³ Without officers making at least some policy-based discretionary decisions outside of the administrative process, smooth operation of the agency would suffer. The incentive recognition approach, however, avoids this problem by allowing policy-based decisions made outside of the administrative process to presumptively fall within the scope of the exception so long as the agency meets the three factors articulated under step two of the proposed analysis. Thus, under this Comment’s proposed approach the agency would have more flexibility to operate in the way that

248. See Niles, *supra* note 4, at 1335–52; *supra* Part IV.B.3.a.

249. See Part IV.B.3.

250. See *supra* Part IV.B.3.b.

251. See Krent, *supra* note 12, at 906; *supra* Part IV.B.1.a.

252. See *supra* Part IV.B.1.b; see also Peterson & Van Der Weide, *supra* note 23, at 488 n.149.

253. Recall that this means that an agency uses the administrative process to delegate authority to make discretionary, policy-based decisions to lower level employees, the decision to delegate such authority is protected by the exception, *but discretionary decisions made by employees pursuant to this authority are not protected by the exception.* See *supra* Part III.B.3; see also Krent, *supra* note 12, at 892.

would best fulfill the agency's mission; as long as the three requirements of step two are met, the agency could delegate discretionary actions without concern over tort liability exposure.

2. Incentive recognition approach effectively counters concerns of other approaches

As discussed above in Part III.B.3 the Court's current approach to the discretionary function exception has been further criticized as leaving negligent behavior by agencies unchecked.²⁵⁴ As a brief review, the argument is that exposure to tort liability serves generally to "deter" negligent action. However, in broadly applying the exception to situations where the political or administrative process does not effectively "check" negligent action by a governmental agency, the Court's current approach leaves nothing to deter an agency from acting negligently. In a similar vein, scholars have criticized the first prong of the Court's current test as creating a "perverse incentive" for an agency not to regulate effectively.²⁵⁵ Since under the Court's current approach, if an official acts contrary to a mandatory directive her actions always fall outside the scope of the exception, an agency has an incentive to give employees non-mandatory directives—even if such directives are less effective in attaining agency objectives.

The incentive recognition approach would effectively deal with both of these problems created by the Court's current approach. Both steps of the proposed two-step analysis work in conjunction to deter agency negligence in several ways. First, in limiting the exception's scope to agency decisions made through the legislative or administrative process, a process that involves "prior deliberations" and is "responsive in some way to the democratic process,"²⁵⁶ the first step of the proposed analysis would generally apply the exception only where the political or administrative process would provide some "check" on imprudent and negligent agency actions.²⁵⁷

254. See Krent, *supra* note 12, at 886–91.

255. See *id.* at 892.

256. *Id.* at 898.

257. There are instances where public choice concerns show that the political or administrative process may not effectively deter an agency from acting negligently in a way that may harm a broad public interest. See *id.* at 888–89 ("Public interest groups certainly exist, but they cannot be relied upon to exert effective political pressure upon the government in most contexts involving tortious conduct by the government."); see also *supra* note 189. However,

In the same vein, the exception only applies under the second step if the agency has affirmatively delegated to an employee the authority to consider specific policy factors and trained her on these factors. The result of this requirement would be a narrower application of the exception, which would thereby allow tort liability to deter negligent action in a range of circumstances larger than under the Court's current analysis. Furthermore, by requiring government agencies to train authorized employees on the policy factors, the second step would make it more likely that employees would effectively perform their responsibilities.

This Comment's proposed analysis similarly removes the "perverse incentives" to regulate ineffectively. Under the Court's current approach an agency can cause actions to come within the exception's scope by simply refraining from enacting mandatory regulations or policies. On the other hand, under the two-step analysis proposed here, the exception only applies to the decisions of individual agency officials if the agency takes affirmative steps through the administrative process to delegate the authority, train the officer on the policy-based decisions, and provide the officer with necessary information. Delegating authority and training employees would come at a cost to the agency. Thus, the agency would have to engage in a cost-benefit analysis to determine whether it is worth the hassle of authorizing and training, or more economical to simply accept the risk of tort liability. Under the current approach the cost of mandatory regulations artificially outweighs their benefit.²⁵⁸ The proposed analysis, however, would balance the scales, at least to some extent, by requiring the agency to bear the costs associated with affirmatively delegating authority and assuring that the authorized employee is trained on the relevant policy factors.²⁵⁹

refusing to apply the discretionary function exception to a decision made through the legislative or administrative process would require a court to review a governmental agency's deliberate policy decisions. Doing so would implicate significant separation of powers issues and undermine Congress's manifest intent in passing the discretionary function exception. See 28 U.S.C. § 2680(a) (2000); Krent, *supra* note 12, at 894-902; Yoo, *supra* note 21, at 29. Accordingly, at a minimum, the discretionary function exception should apply to decisions made through the administrative or legislative process.

258. See *supra* Part III.B.3. One could say that in enacting a mandatory regulation, the agency is creating a liability, because if an employee acts in violation of the regulation, her actions are not within the discretionary function exception.

259. Because the costs to an agency to fulfilling step two of the incentive recognition approach would vary significantly, determining such costs is beyond the scope of this Comment.

In addition to the actual monetary costs associated with promulgating regulations or policies that delegate specific authority, training employees, and providing access to necessary information, the administrative and legislative processes similarly require the agency to enact extremely broad policies and training in order to remove all of its activities from tort liability.²⁶⁰ Take, for example, the National Park Service's sign policy at issue in *Childers*. In order to completely remove the Park Service's liability arising for its employees' negligent failure to place signs, the agency could conceivably authorize all of its employees to use discretion in placing signs based upon a broad policy factor such as the Park Service's fiscal concerns.

Under the incentive recognition approach, however, the Park Service is unlikely to delegate such authority for two reasons. First, in order for the discretionary function exception to presumptively apply, the Park Service would also have to train all its employees on how to make decisions based on the Park Service's fiscal concerns and provide all employees with the information or data (budgets, costs of supplies, risk assessments, etc.) necessary to make discretionary sign placement decisions based on fiscal policy. The high costs of training employees and providing them with information would likely prove prohibitive. Second, the Park Service would be required to *affirmatively* delegate such broad discretionary action and authorize the necessary training/information access through the administrative process. The absurdity of delegating every ranger the authority to consider the Park Service's overall fiscal policy in determining where to place a sign would likely prevent such an action from being approved through the administrative process.

Even though the costs incurred by the agency to fulfill the requirements of step two may not completely offset the benefit gained by avoiding tort liability in every instance, such requirements would give the agency pause before delegating authority in order to bring actions within the exception's scope. Moreover, as discussed above, the training requirements of step two would assist in well

260. To be sure, agencies are to some extent politically accountable for every delegation of authority, and thus an external check of sorts exists to prevent government wrongdoing. If public pressure warrants, a high ranking official may rescind the delegation or change its terms. The efficacy of such a check, however, is open to question. Krent, *supra* note 12, at 892. Although the extent of its effect is questionable, political accountability provides some check on agency action.

informed policy decision making, and thus, in theory, lead to smoother agency operation.²⁶¹

3. Possible arguments against adopting an incentive recognition analysis

Despite the apparent merits of the incentive recognition approach, one could contend that it goes against Congress's intent in creating the discretionary function exception and violates separation of powers. This section will address each of these arguments.

a. Congressional intent. One could argue that by focusing on the *process* used to arrive at the decision, as opposed to the *type* of decision, step one of the incentive recognition approach does not align with the language of the statute. That is, because the statute providing the exception uses the language "discretionary function," Congress intended the focus to be on the quality or nature of the action—not the process by which it was taken.²⁶² Thus, one could contend that despite the merits of this Comment's proposed analysis,²⁶³ a court could not permissibly apply it without Congress amending the language of the statute. This argument would hold more weight if the statute were viewed outside of the context in which it really operates. Viewed in light of the incentives created by the exception, administrative agencies may make their decisions "discretionary" for the sole purpose of getting the benefit of the discretionary function exception.²⁶⁴ It becomes apparent that the process must be used as a proxy for the nature (discretionary) of the

261. See *supra* Part III.B.3.

262. See 28 U.S.C. § 2680(a) (2000). This statute provides that the FTCA does not apply to:

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.

Id.

263. The merits of the process approach that Professor Krent lays out are discussed *supra* Part IV.B.1. However, Professor Krent's article provides little guidance as to how the process approach can be reconciled with the statutory language. See Krent, *supra* note 12.

264. See *supra* Part III.B.3.

action in order to avoid undermining Congress's overall purpose in passing the FTCA and the exception.

It is widely believed that Congress enacted the discretionary function exception in order to prevent tort suits, or even the threat of tort suits, from inhibiting the ability of governmental officials to make policy decisions.²⁶⁵ Despite this intention, a discretionary function analysis based on the "nature" of the action inadvertently puts tort liability concerns at the very heart of agency policymaking. As discussed above, under the "nature of the action" element (first prong) of the Court's current two-pronged test, an agency has an incentive to create rules granting authority to lower level employees to take discretionary actions rather than regulating such employees through mandatory directives.²⁶⁶ The determination of when an agency will or will not delegate authority to lower level employees is a fundamentally policy-based decision. Under the "nature of the action" approach, however, such determinations are necessarily swayed by concerns over tort liability exposure. The end result is that the agency is making policy decisions based upon the concern for avoiding exposure to tort liability; this end result goes squarely against Congress's intent in including the discretionary function exception in the FTCA.

The incentive recognition approach uses process as a proxy to determine whether the action is discretionary in nature or not, and, in so doing, it avoids these problems. Considered in the proper context—one in which mere existence of the discretionary function exception affects agency policymaking—the analysis proposed here effectuates a situation where agency policymaking is less inhibited by tort liability concerns than under the Court's current "nature of the action" analysis.

b. Separation of powers. One could further argue that by requiring a court to review an agency's determination that an official had the

265. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984); H.R. REP. NO. 77-2245, at 10 (stating that the discretionary function exception was intended to prevent tort actions brought to test "the constitutionality of legislation, or the legality of a rule or regulation"); Krent, *supra* note 12, at 886 n.67 ("The fear of suit may chill even the most responsible government official from taking vigorous action."); see also *supra* note 20.

266. See *supra* note 117 and accompanying text; see also Bagby & Gittings, *supra* note 89, at 238; Krent, *supra* note 12, at 892.

training and information reasonably necessary to make the policy-based decision, the second step of the proposed analysis violates separation of powers. That is, one could contend that determining the qualifications and resources needed to make policy-based decisions is in itself a policy-based decision that a court cannot review without encroaching upon the agency's powers.

This argument misconstrues the type of review the incentive recognition approach requires. As explained above, the court would base its review upon the specific policy factors that the official was authorized to consider.²⁶⁷ Based upon these policy factors, all the court reviews is whether the officer had access to the information and training necessary to make the decision. Such a review does not require a court to subjectively consider the agency's wisdom in delegating discretion to a particular level of employees. Rather, a reviewing court simply determines whether the employee had the resources necessary to consider the policy factors and make the policy determination delegated to him.

VI. CONCLUSION

The broad application of the discretionary function exception under the Supreme Court's most recent test undermines Congress's purpose in including the exception in the FTCA. Congress intended that the discretionary function exception to tort liability not interfere with governmental policy. The Court's application of the exception in *Gaubert* and *Berkovitz* undermines this purpose by creating a "perverse" incentive for governmental agencies to regulate ineffectively in order to avoid tort liability exposure under the FTCA. Furthermore, the "presumption" created in *Gaubert* applies the exception so broadly as to undermine the purpose of the FTCA as a whole. This Comment accordingly agrees with other commentators that the Court's current approach is untenable. A number of commentators have proposed alternative tests or approaches that would narrow the scope of the exception. These approaches, however, do not effectively avoid creating the incentive for agencies to regulate ineffectively, or they present other issues that would make them difficult for courts to apply. An analysis based on the "incentive recognition" approach proposed in this Comment

267. See *supra* text accompanying note 225.

presents a solution that is both workable for courts and avoids creating undesirable incentives for agencies.

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