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*“Nothing But Mischief”: The Federal Tort Claims Act and the Scope of Discretionary Immunity*

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Abstract by Heather Sidwell

The Federal Tort Claims Act (FTCA) is a revolutionary statute that on one hand “waives” the sovereign immunity of the United States government in cases arising out of torts committed by its employees and offices, and on the other retains some traditional limitations on governmental liability against such claims, most notably the discretionary function exception. The passage of the FTCA exposed the government to liability and costs inherent in civil litigation. It was motivated by the notion that justice required that private citizens be given access to court-ordered compensation for harms caused by negligent acts of the expanding federal government. However, the FTCA’s waiver of sovereign immunity is not complete. The Act includes specific substantive exceptions based on concerns about the functional impact on government and policymaking. The central purpose of the discretionary function exception was to provide that acts or omissions of government employees exercising due care in implementing statutes or regulations would be shielded from liability.

This article argues that a series of Supreme Court decisions has resulted in a re-interpretation of the FTCA that essentially mirrors the state of federal tort liability in place before the FTCA went into effect. The author asserts that the Court’s current interpretation of the discretionary function exception is based on a concept of absolute formal sovereign immunity that does not fit our governmental system and that was rejected by Congress when it passed the FTCA. After providing background on the nature of governmental liability prior to the FTCA and a discussion of the evolution of sovereign immunity, this article reviews the language and legislative history of the FTCA to demonstrate the clear intent of the discretionary function exception. A survey of Supreme Court jurisprudence illustrates the progression from the Supreme Court’s earliest interpretations of the exception to the most recent articulation in *United States v. Gaubert*.

The author argues that the *Gaubert* decision creates a far more limited scope of federal tort liability than Congress intended with its broad waiver of sovereign immunity. *Gaubert*, the author contends, completely severs the analysis of the discretionary function exception from what Congress chose as its defining foundation - the traditional common law limitations on the liability of government officials with discretionary authority. An alternative interpretation that would require courts to apply a more traditional functional analysis to adjudications of allegations of discretionary liability is proffered as a more reasonable and textually grounded interpretation of the discretionary function. This proposed functional approach would provide a more appropriate balance between federal immunity and government liability. The author draws from two examples, the Empire State Building crash of 1945 and the New Mexico fire of 2000, to demonstrate how such adjudications would be different under the current incarnation of the discretionary function exception, as compared to the proposed functional interpretation, in an attempt to show that the proposed functional interpretation would more effectively preserve the FTCA’s intended balance between federal liability and immunity.

