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ARTICLE

**DOES THE TWO-PRONG TEST FOR
DETERMINING APPLICABILITY OF THE
DISCRETIONARY FUNCTION
EXCEPTION PROVIDE GUIDANCE
TO LOWER COURTS SUFFICIENT TO AVOID
JUDICIAL PARTISANSHIP?**

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Achieving consistency in decisions across judicial officers is an important objective.¹ Since litigants and the public at large are unlikely to follow court orders that are widely considered illegitimate, the effectiveness of the judiciary is significantly weakened if decisions are perceived to rest largely on the political or policy preferences of judges instead of objective principles such as reliance on precedent, disciplined legal reasoning, or persuasive statutory construction. Moreover, if litigants believe that judicial outcomes rest on the identity of the decision maker, they are more likely to engage in both forum shopping, which the judiciary has often disfavored as unprincipled and inefficient,² and judge shopping, “a practice which has been for the most part universally condemned.”³

This article assesses the extent to which the political or policy preferences of federal judges determine how they apply the discretionary function exception to the Federal Tort Claims Act (FTCA).⁴ The article uses the

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1. See, e.g., Robert Houghwout Jackson, *University Convocation*, 6 SYRACUSE L. REV. 219, 224–25 (1955) (trusting that law students “will learn that ‘a Government of laws and not of men’ may be an ideal, capable of only imperfect attainment, but that it is not a shallow clich[é]. They will believe in law, in its administration by men as detached, impersonal and dispassionate as humanly possible.”).

2. *Miles v. Ill. Central R.R. Co.*, 315 U.S. 698, 706 (1942) (Jackson, J., concurring).

3. *United States v. Haldeman*, 559 F.2d 31, 132 n.297 (D.C. Cir. 1976).

4. The exception is set forth at 28 U.S.C. § 2680(a) (2006). Subject to the discretionary function exception and many other exceptions, the Federal Tort Claims Act, enacted in 1946, affords the federal district courts exclusive jurisdiction of civil actions for money damages against the United States arising out of the negligent or wrongful acts or omissions of federal employees

political party of the appointing President as a proxy for these preferences, assuming that federal judges confirmed after nomination by a Democratic president (“Democratic-nominated judges”) are more likely than federal judges confirmed after nomination by a Republican president (“Republican-nominated judges”) to favor allowing tort suits against the government and therefore less likely to apply the discretionary function exception to bar such suits. If existing precedent and norms adequately constrain the expression of judicial policy preferences, this analysis should show little difference between Democratic-nominated judges and Republican-nominated judges in the application of the discretionary function exception. If, however, existing precedent and norms allow these preferences to control the holdings in FTCA actions, there should be a significant variance between Democratic-nominated judges and Republican-nominated judges in how often they hold that the discretionary function exception bars suit.⁵

The article concludes that federal Republican-nominated judges are more likely than Democratic-nominated judges to find that the discretionary function exception bars tort actions against the federal government. Almost all of the variance is explained by the different rates at which Republican-nominated judges and Democratic-nominated judges find satisfied the second prong of the discretionary function test, which assesses whether the tort action challenges governmental decision making that is susceptible to policy analysis. The party of the appointing president does not greatly influence the rate at which judges find the first prong of the discretionary function test satisfied, which addresses whether particular conduct is mandated by statute, law, or policy rather than being discretionary.

CONSIDERATIONS IN APPLYING THE FTCA’S DISCRETIONARY FUNCTION EXCEPTION

Deciding whether to hold the government liable in tort often carries a significant emotional and political charge. Many FTCA suits arise from incidents causing substantial loss of life, as well as widespread injury and property damage, generating sympathetic claims for compensation asserted against one of the few entities able to provide it fully.⁶ Particularly acute are

in situations where private persons would be liable to the claimant under applicable state law. 28 U.S.C. §§ 1346(b), 2671–80 (2006).

5. The analysis is based on a review of all FTCA cases addressing the discretionary function exception decided in a recent two-year period and available on the WestlawNext database.

6. See, e.g., *Dalehite v. United States*, 346 U.S. 15, 17 (1953) (describing that following a disaster that killed nearly 600 people and caused thousands of injuries, over 300 suits were brought seeking \$200 million in damages, and recovery was denied); *Davis v. United States*, 597 F.3d 646 (5th Cir. 2009), cert. denied, 130 S.Ct. 1906 (2010) (barring suit challenging a government rescue effort following Hurricane Katrina, which killed nearly 2000 people and caused an estimated \$81 billion in property damage); *In re Katrina Canal Breaches Litig.*, 351 F. App’x 938 (5th Cir. 2009) (barring suit challenging the government’s response to Hurricane Katrina); *Freeman v. United States*, 556 F.3d 326 (5th Cir. 2009), cert. denied, 130 S.Ct. 154 (2009) (same); *St. Tammany Parish v. FEMA*, 556 F.3d 307 (5th Cir. 2009) (same); *In re FEMA Trailer Formalde-*

cases in which the government claims immunity from suit even if the claimants are able to prove that the government intended to injure them.⁷ Balancing these concerns are the difficulties courts would experience in attempting to assess and fault the conduct of sensitive executive or legislative decisions such as using herbicides to assist soldiers in combat,⁸ placing a bank into receivership,⁹ or failing to prosecute an alleged case of juror intimidation.¹⁰ Moreover, awarding compensation in situations where Congress has not so provided runs afoul of the constitutional provision barring the expenditure of federal funds “but in Consequence of Appropriations made by Law.”¹¹

The discretionary function exception provides that the district courts’ jurisdiction to hear tort actions against the United States does not extend to any claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved

hyde Prods. Liab. Litig., 719 F. Supp. 2d 677 (E.D. La. 2010) (barring claims that the government provided unsafe emergency housing to victims of Hurricanes Katrina and Rita); *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 649 (E.D. La. 2009) (finding the government liable for negligent maintenance of a navigation channel that contributed to the storm surge following Hurricane Katrina).

7. See, e.g., *United States v. Stanley*, 483 U.S. 699, 709 (1987) (O’Connor, J., concurring) (stating that the majority had applied the rationale of *Feres v. United States*, 340 U.S. 135 (1950), to bar an action alleging the “deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent”); *Walsh v. United States*, 328 F. App’x 806, 809 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 825 (2009) (holding that *Feres* bars a serviceman’s claim that a superior officer put arsenic in his drink).

8. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194, 198–200 (2d Cir. 1987).

9. See, e.g., *FDIC v. Irwin*, 916 F.2d 1051, 1053 (5th Cir. 1990); *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990).

10. *Smith v. United States*, 375 F.2d 243, 245, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

11. U.S. CONST. art. I, § 9, cl. 7. See generally the excellent discussion in Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009).

Congress has often provided compensation in situations where the courts have found that the FTCA waiver of immunity provides no relief. For example, following the decision in *Dalehite v. United States*, 346 U.S. 15 (1953), Congress enacted the Texas City Disaster Relief Act, Pub. L. No. 84-378, 69 Stat. 707 (1955) to compensate the victims of the Texas City disaster. See also Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (codified as amended at 38 U.S.C. § 1116 (2006)) (providing compensation to veterans for wartime disabilities due to the use of certain herbicides in Vietnam era); Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. No. 100-321, 102 Stat. 485 (amending 38 U.S.C. § 1112(c) (2006)) (providing compensation to veterans for wartime disabilities due to radiation exposure); Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified as amended at 42 U.S.C. § 2210 (2006)) (providing compensation to victims of atomic testing and uranium mining); Energy Employees Occupational Illness Compensation Program Act of 2000, Pub. L. No. 106-398, 114 Stat. 1654 (codified at 42 U.S.C. §§ 7384-85 (2006)) (providing compensation to individuals with work-related illnesses associated with working in the Department of Energy’s nuclear weapons complex). See generally JAYSON & LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 1.06 [7] (Matthew Bender 2011).

be abused.”¹² Congress considered this exclusion to be extremely important in precluding “unwarranted judicial interference with the essential functions of government”¹³ and in limiting the primary scope of the FTCA to “garden-variety torts” and “quotidian wrongs.”¹⁴ To determine whether the discretionary function exception applies, federal courts use the two prong approach articulated by the Supreme Court in *Berkovitz v. United States*¹⁵ and affirmed by the Court in *United States v. Gaubert*.¹⁶ First, the act must be discretionary in that it involves “an element of judgment or choice” rather than being specifically prescribed by a federal statute, regulation, or policy that leaves the employee “no rightful option but to adhere to a mandatory directive.”¹⁷ Second, if the employee exercises judgment or choice, the challenged action or decision must be based on considerations of public policy,¹⁸ that is, “susceptible to policy analysis.”¹⁹

Application of the first prong of the discretionary function test—that the challenged act or conduct is not prescribed by a mandatory directive—is usually straightforward. Some legal disagreements exist, for example, over whether allegations or findings of unconstitutional conduct necessarily preclude a finding that this prong of the test has been met on the ground that no official has the discretion to act unconstitutionally.²⁰ Elasticity also exists as to how formal the government “policy” that divests employees of discretion must be. One court, for example, has held that the notation “[I]et’s be sure all our [officers] are enforcing this”—handwritten by a U.S. Forest Service supervisor on correspondence from another agency discussing a prohibition on possession, storage, or discarding of food where it would be accessible to wildlife—precluded the government from relying on the discretionary

12. 28 U.S.C. § 2680(a) (2006). A virtually identical provision appears in the Stafford Disaster Relief Act, 42 U.S.C. § 5148 (2006). The same analysis applied to the FTCA’s discretionary function exception has been applied to this provision as well. See JAYSON & LONGSTRETH, *supra* note 11, § 12.01. Although no similar statutory language appears in the Suits in Admiralty Act, the federal courts of appeals have each implied a discretionary function exception into that act, finding that separation of powers concerns dictate this result. *Id.* § 1.07[1].

13. JAYSON & LONGSTRETH, *supra* note 11, § 11.02.

14. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 n.4 (2004) (internal quotation marks omitted); *id.* at 757 n.5 (Ginsburg, J., concurring).

15. 486 U.S. 531 (1988). See generally JAYSON & LONGSTRETH, *supra* note 11, § 3.48.

16. 499 U.S. 315 (1991). See generally JAYSON & LONGSTRETH, *supra* note 11, §§ 3.52, 12.06.

17. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536).

18. *Id.* at 322–23.

19. *Id.* at 325.

20. *Compare* *Castro v. United States*, 608 F.3d 266, 268 (5th Cir. 2010) (en banc), *cert. denied*, 131 S.Ct. 902 (2011) (applying the discretionary function bar without addressing plaintiff’s allegations that the conduct at issue violated her Fifth Amendment rights), *with* *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009) (asserting that the discretionary function exception does not “shield conduct that transgresses the Constitution”), *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (same), *and* *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (“The Constitution can limit the discretion of federal officials such that the FTCA’s discretionary function exception will not apply.”).

function exception to bar a claim that negligent failure to enforce the order resulted in a harmful bear attack.²¹ By contrast, the First Circuit has held that when the applicable statute and regulations unambiguously confer discretion on particular government employees, “informal rules” purporting to limit that discretion cannot control application of the discretionary function exception.²² Imposing liability for violation of a mandatory directive has also been precluded where doing so would undermine the purpose of the regulatory scheme creating the directive.²³ For the most part, however, whether the first prong of the discretionary function test is met involves an objective, largely factual inquiry: either a mandatory directive prescribing a specific course of conduct for government employees to follow exists or it does not.

Whether a particular discretionary decision is susceptible to the kind of policy analysis that the discretionary function exception is designed to protect is a far more indeterminate inquiry. The Supreme Court has consistently rejected attempts to provide specific rules to guide the lower courts’ consideration of this question. In *United States v. Varig Airlines*,²⁴ the Supreme Court disclaimed any ability “to define with precision every contour of the discretionary function exception” and rejected the view that the exception should protect only decisions made by high-level officials, not ordinary employees.²⁵ In *Berkovitz*, the Court rejected the government’s argument that the exception “precludes liability for any and all acts arising out of the regulatory programs of federal agencies.”²⁶ In *Gaubert*, the Court rejected the distinction between formulating plans or policies and conducting day-to-day operational activities, finding that “[d]iscretionary conduct is not [limited] to the policy or planning level.”²⁷ *Gaubert* also rejected the argument that the government must show, as a factual matter, that the

21. *Konchel v. United States*, 49 F. Supp. 2d 1155, 1158–59 (D. Ariz. 1998).

22. *Irving v. United States*, 162 F.3d 154, 165–67 (1st Cir. 1998) (en banc), cert. denied, 528 U.S. 812 (1999).

23. See *Abreu v. United States*, 468 F.3d 20, 30 (1st Cir. 2006) (providing a narrow reading of the waiver in favor of retaining governmental immunity).

24. 467 U.S. 797, 813 (1984). See generally JAYSON & LONGSTRETH, *supra* note 11, § 3.43.

25. *Varig Airlines*, 467 U.S. at 813. In his concurrence in *Gaubert*, Justice Scalia stated that while the level at which the decision is made may not be controlling, it is often relevant to the discretionary function inquiry, since officials at higher levels are more likely to base decisions on social, economic, and political policy. *United States v. Gaubert*, 499 U.S. 315, 335–37 (1991) (Scalia, J., concurring). See generally JAYSON & LONGSTRETH, *supra* note 11, § 12.09 (describing that although the rank of the acting employee cannot be used as a conclusive test, “[t]he level or status of the official, whose conduct is under challenge, may be useful as an additional factor in determining whether the conduct is discretionary”).

26. *Berkovitz v. United States*, 486 U.S. 531, 538 (1988). The court remanded for a determination of “whether agency officials appropriately exercise policy judgment in determining that a vaccine product complies with the relevant safety standards.” *Id.* at 545.

27. *Gaubert*, 499 U.S. at 325–26. Before *Gaubert*, “a large body of decisional law developed utilizing the ‘planning level’ versus ‘operational level’ dichotomy as a ready formula for solving the frequently difficult problem of application of the discretionary function exception.” JAYSON & LONGSTRETH, *supra* note 11, § 12.09.

employee actually weighed competing policy considerations in order to demonstrate that the challenged actions were intended to be protected by the discretionary function exception.²⁸ Instead of focusing inquiry on “the agent’s subjective intent in exercising the discretion conferred,” courts must analyze whether the nature of the actions taken demonstrate that they are “susceptible to policy analysis.”²⁹

In cases where the holding turns on whether the second prong of the discretionary function test is satisfied, the open-ended nature of the inquiry into whether particular decisions or actions are “susceptible to policy analysis” appears to afford judges considerable freedom to reach the result that reflects their preferred balance between permitting redress for government wrongs and protecting essential governmental functions. By contrast, since application of the first prong of the discretionary function test usually involves a more objective inquiry, the influence of a judge’s personal political or policy preferences on holdings that turn on this issue should be substantially less. Because the discretionary function exception is so heavily litigated, a meaningful empirical analysis of whether the holdings in FTCA discretionary function cases in fact reflect this expected difference is practicable.

METHOD USED TO DETERMINE THE INFLUENCE OF PERSONAL JUDICIAL
PREFERENCES IN APPLYING THE DISCRETIONARY
FUNCTION EXCEPTION

This article uses the political party affiliation of the appointing president as the proxy for a judge’s attitude towards affording immunity from suit to the government.³⁰ The article assumes that federal judges nominated by Democratic presidents have greater concern than those nominated by Republicans for providing compensation to injured parties and for addressing and deterring government wrongdoing. Conversely, it assumes that judges nominated by Republican presidents have greater concern than Democratic-nominated judges for deferring to the actions of the executive and legislative branches and avoiding the chilling effect of tort suits on these actions. Thus, Democratic-nominated judges are assumed to correlate with those judges who have a narrow view of what conduct is properly viewed as susceptible to policy analysis and is thus immune from suit under the discretionary function exception. Republican-nominated judges are assumed to

28. *Gaubert*, 499 U.S. at 324–25.

29. *Id.* at 325.

30. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2168 (1998) (using political party affiliation as the proxy for whether judges shared the policy views of industry groups or individuals and nongovernmental public interest organizations in cases involving challenges to federal regulations).

correlate with those judges having a broad view of the range of conduct that is susceptible to policy analysis.

If, as expected, the open-ended nature of the second prong of the discretionary function test allows personal attitudes and preferences to be freely translated into holdings, and if the party affiliation proxy used here is valid, there should be a substantial difference between Republican-nominated judges and Democratic-nominated judges in the frequency with which the second prong of the test is found to immunize the government from suit. Similarly, if the more objective nature of the first prong of the test does in fact substantially constrain the ability of judges to reach holdings consistent with their policy preferences, Republican-nominated judges and Democratic-nominated judges should find the first prong applicable at about the same rate.

To obtain a random sample of decisions for the purpose of testing these propositions, all opinions available on WestlawNext dated between January 1, 2009, and February 18, 2011, that included one or more holdings on the applicability of the discretionary function exception were reviewed.³¹ The opinions were initially divided between opinions issued by Republican-nominated judges, Democratic-nominated judges, and United States magistrate judges. Cases decided by split appellate panels were placed in both the Republican-nominated judges and the Democratic-nominated judges groups. Within each group, the opinions were further divided into three categories: (1) cases holding that the discretionary function exception barred one or more claims; (2) cases holding that the discretionary function exception did not bar one or more claims because the conduct at issue was specifically mandated by federal law, regulation, or policy; and (3) cases holding that the discretionary function exception did not bar one or more claims because the conduct at issue was not susceptible to policy analysis. Where a case involved multiple claims, some of which were barred and some of which were not, it was placed in the barred category as well as in one or both of the not barred categories as applicable. If a decision held that neither prong of the discretionary function test was satisfied with respect to a particular claim, it was placed in both of the not barred categories.

THE EFFECT OF PERSONAL PREFERENCES IN ANALYZING THE DISCRETIONARY FUNCTION EXCEPTION

The 161 cases heard by political appointees as opposed to magistrate judges were decided by a total of 245 judges, 162 Republican-nominated

31. A total of 182 cases fit these criteria, twenty-one of which were issued by United States magistrate judges. One decision issued by a United States magistrate judge who was later confirmed as a United States District Judge was classified as a decision issued by a Democratic-nominated judge. A list of the cases as grouped is attached as an Appendix to this article.

judges (66.1%) and 83 Democratic-nominated judges (33.9%). Of the 162 Republican-nominated judges, 132 (81.5%) decided or joined decisions holding claims barred by the discretionary function exception; nineteen (11.7%) decided or joined opinions holding that the exception did not apply because a specifically mandated course of conduct removed all permissible discretion; and eleven (6.8%) decided or joined opinions holding that the exception did not apply because the challenged conduct was not susceptible to policy analysis. Of the eighty-three Democratic-nominated judges, fifty-seven (68.9%) decided or joined decisions holding claims barred by the discretionary function exception, ten (12.8%) decided or joined opinions holding that the exception did not apply because a specifically mandated course of conduct removed all permissible discretion, and sixteen (19.3%) decided or joined opinions holding that the exception did not apply because the challenged conduct was not susceptible to policy analysis.

Overall, the vast majority of decisions are in favor of the government. This is not surprising; just as prosecutors win most criminal cases in large part because they pick which cases to file, the government should prevail in most cases in which the discretionary function defense is raised because it selects the cases in which it will assert the defense.³² In fact, if the local United States Attorney's Office handles the defense of the United States in a particular matter, the Torts Branch of the Civil Division of the United States Department of Justice in Washington must authorize assertion of the discretionary function defense in that action. As a result, in the overwhelming majority of cases reviewed, the partisan affiliation of the decision maker did not affect the outcome of the case. Republican-nominated judges were 12.6% more likely than Democratic-nominated judges to find claims barred by the discretionary function exception (82.5% to 68.9%), suggesting that the identity of the decision maker affects approximately one in every eight cases.³³

32. Most federal circuit courts of appeals hold that courts lack jurisdiction over claims to which discretionary function applies; therefore, in these circuits, trial and appellate courts may raise the issue *sua sponte* under FED. R. CIV. P. 12(b). See JAYSON & LONGSTRETH, *supra* note 11, § 7.02[1]. Such cases present a small minority of the cases in which the discretionary function defense is put in issue. None of the 182 cases reviewed for this article appeared to present a situation in which the government had failed to raise the discretionary function defense but the court nevertheless raised the issue *sua sponte*.

It is also possible that district court judges are more likely to draft opinions when applying the discretionary function bar, since doing so often results in a final, appealable opinion, than when they find the bar inapplicable and further proceedings may well moot any sovereign immunity determination. This explanation appears to be belied by the fact that district judges find the exclusion applicable less often than do appellate judges, who render either a published or an unpublished opinion in virtually every case.

33. United States magistrate judges found cases barred by the discretionary function exception in fifteen of twenty-one cases, or 71.4% of the time. They found that the exception did not apply because a specifically mandated course of conduct removed all permissible discretion in four cases, or 19% of the time, and they held that the exception did not apply because the challenged conduct was not susceptible to policy analysis twice, or 9.5% of the time.

Republican-nominated judges and Democratic-nominated judges found the discretionary function exception inapplicable because the conduct at issue was governed by a specific, mandatory directive at similar rates: 11.7% for Republican-nominated judges and 12.8% for Democratic-nominated judges. This suggests that the first prong of the discretionary function test is sufficiently explicit to prevent the personal policy preferences of federal judges from controlling how cases turning on application of this prong of the test are resolved. It also suggests that judges deciding FTCA cases do not base decisions on their personal policy preferences where the facts and the law applicable to an issue direct a particular result with reasonable clarity.

Democratic-nominated judges found the discretionary function exception inapplicable because the conduct at issue was not susceptible to policy analysis at a rate nearly three times higher than did Republican-nominated judges: 19.8% to 6.8%. This suggests that the second prong of the discretionary function test allows judges applying it to reach a result based on their particular policy preferences and that federal judges take advantage of this opportunity in deciding FTCA cases that turn on this issue.

These results do not significantly change when published decisions are compared with unpublished decisions. Republican-nominated judges apply the discretionary function bar 81.8% of the time in published decisions and 81.2% of the time in unpublished decisions. Democratic-nominated judges apply the discretionary function bar 64.7% of the time in published decisions and 71.4% of the time in unpublished decisions.

The results did show a significant difference between appellate judges and trial court judges: appellate judges were significantly more likely than trial court judges to hold actions barred by the discretionary function exception. Court of appeals judges nominated by Republicans applied the discretionary function bar 88.9% of the time, compared with 75.6% for Republican-nominated district court judges. For Democratic-nominated judges, the comparable figures are 87.1% for appellate judges and 57.7% for district court judges. This disparity does not appear to be explained by any difference in the types of cases considered; while many of the appellate cases involve self-represented prisoners challenging security decisions and conditions of confinement, and are routinely disposed of in unpublished opinions, this is true of many of the district court cases as well. The theory that appellate judges reflect the partisan views of the appointing president more strongly than district court appointees might explain the results as to Republican-nominated judges but would predict a result for Democratic-nominated judges contrary to what is actually observed.³⁴

34. It is not clear that the greater frequency with which Democratic-nominated appellate judges found cases barred by the discretionary function exception as compared with Democratic-nominated trial court judges can be explained by the presence of Republican-nominated judges alongside them on many of the appellate panels rendering the decisions. In many of the cases in

The Department of Justice's oversight over when the defense can be raised appears to provide the most likely explanation for the different rates at which district judges and appellate judges hold that the discretionary function exception bars suits. The discretionary function defense cannot be raised by the government on appeal unless the Appellate Section of the Civil Division as well as the Torts Branch approves. Because rejection of the discretionary function defense on appeal may control the result in similar cases arising in the same circuit and, if the rationale of the opinion is persuasive, may adversely affect the government's position in many other cases arising outside of the circuit as well, the Department of Justice is more reluctant to assert the defense in marginal cases on appeal than in the district court. Unless the Appellate Section's review is either completely ineffective or counterproductive, the government's success rate in advancing the discretionary function argument on appeal should be greater than its success rate in the district courts for this reason alone.³⁵

CONCLUSION

This review of recent discretionary function decisions indicates that reducing the open-ended nature of the inquiry under the second prong of the discretionary function test would reduce the disparity between Democratic-nominated judges and Republican-nominated judges in the frequency with which they hold the government immune in such cases. Introducing more concrete guidelines, however, is also likely to tilt the balance between permitting suit and protecting executive and legislative functions. In the main, the Supreme Court's rejection of such guidelines in the past, notably the planning level/operational level distinction, has served to expand the application of the exception and reduce the scope of the FTCA's waiver of immunity.³⁶ Bright-line tests proposed as replacements, such as the suggestion that balancing competing safety concerns can never constitute a legitimate policy consideration,³⁷ would likely expand the government's amenability

which Democratic-nominated appellate court judges found the discretionary function exception applicable, one or two Republican-nominated judges were also on the panel. In the sole case involving three Democratic-nominated judges, however, the panel found the exclusion applicable. *See, e.g.,* U.S. Aviation Underwriters, Inc. v. United States, 562 F.3d 1297 (11th Cir. 2009). In *Downs v. United States*, 333 F. App'x 403 (11th Cir. 2009), a panel of three Republican-nominated judges found the exclusion inapplicable. In addition, if a panel effect existed, it should also reduce the percentage of cases in which Republican-nominated judges find the exclusion applicable. Instead, the percentage increases for Republican-nominated judges as well as Democratic-nominated judges.

35. The author would like to acknowledge and thank Alexander A. Reinert, Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, for providing this insight in a private conversation during the conference at which this paper was presented.

36. *See* United States v. Varig Airlines, 467 U.S. 797, 813 (1984); United States v. Gaubert, 499 U.S. 315, 324–26, 335–37 (1991); Berkovitz v. United States, 486 U.S. 531, 538, 545 (1988). *See generally* JAYSON & LONGSTRETH, *supra* note 11, §§ 3.43, 12.09.

37. *Bailey v. United States*, 623 F.3d 855, 863–65 (9th Cir. 2010) (Fletcher, J., dissenting).

to suit as well. Since in the vast majority of cases addressing the discretionary function exclusion the party affiliation of the judge appears to make little if any difference, such tests should be considered on their own merits, rather than as tools necessary to achieve greater consistency.

APPENDIX

Cases Decided by Republican-Nominated Judges**1. Claim(s) Held Barred****a. Courts of Appeals**

- (2) *Bailey v. United States*, 623 F.3d 855 (9th Cir. 2010).
- (12) *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) (en banc).
- (2) *Collins v. United States*, 564 F.3d 833 (7th Cir. 2009).
- (3) *Davis v. United States*, 597 F.3d 646 (5th Cir. 2009).
- (2) *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009).
- (3) *Fothergill v. United States*, 566 F.3d 248 (1st Cir. 2009).
- (2) *Freeman v. United States*, 556 F.3d 326 (5th Cir. 2009).
- (3) *Hart v. United States*, 630 F.3d 1085 (8th Cir. 2011).
- (3) *Indemnity Insurance Co. of North America v. United States*, 569 F.3d 175 (4th Cir. 2009).
- (2) *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009).
- (2) *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010).
- (2) *St. Tammany Parish v. FEMA*, 556 F.3d 307 (5th Cir. 2009).
- (3) *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010).
- (2) *Heffington v. Bush*, 337 F. App'x 741 (10th Cir. 2009).
- Jasso v. United States Forest Service*, 376 F. App'x 760 (9th Cir. 2010).
- (3) *Morales v. United States*, 371 F. App'x 528 (5th Cir. 2010).
- (2) *Morgen v. United States Department of the Navy*, 323 F. App'x 515 (9th Cir. 2009).
- Osprey Ship Management, Inc. v. Foster*, 387 F. App'x 425 (5th Cir. 2010).
- (3) *Patel v. United States*, 398 F. App'x 22 (5th Cir. 2010).
- Reichhart v. United States*, 408 F. App'x 441 (2d Cir. 2011).
- (2) *Rodriguez v. United States*, 415 F. App'x 143 (11th Cir. 2011).
- (3) *Tokio Marine Nichido Fire Insurance v. United States*, 379 F. App'x 660 (9th Cir. 2010).
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(2) *Osprey Ship Management, Inc. v. Foster*, 387 F. App'x 425 (5th Cir. 2010).

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