

Of Immigration Enforcement Violence, the FTCA, and the Supreme Court’s Decision in *Martin v. United States*

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ABSTRACT

*Recent high-profile allegations of law enforcement misconduct have increased the importance of the Federal Tort Claims Act (“FTCA”) as a vehicle for remedying and deterring governmental officials’ abuse. This Essay argues that courts have interpreted the FTCA’s discretionary function exception, which the Supreme Court in *Martin v. United States* recently held applies in the law enforcement context, too broadly. It contends that many operational decisions by law enforcement officers do not reflect the policy judgments Congress intended to protect through the exception, and that supervisory directives warrant immunity only when the directives themselves embody protected policy choices. On the other hand, the discretionary function exception should block tort claims when such policy choices are present even if plaintiffs assert that law enforcement officers’ conduct crossed a constitutional line, unless the unconstitutionality was clear. Accordingly, this Essay seeks to preserve remedies for victims of law enforcement misconduct while protecting policy-driven governmental decision-making.*

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INTRODUCTION

News abounds with stories of the atrocities inflicted by immigration officials on protesters and bystanders,¹ and coverage has revealed horrific tales of inhumane conditions for those incarcerated in “Alligator Alcatraz” and other detention centers.² Given that the Supreme Court has curtailed the availability of constitutional tort suits through *Bivens* actions so dramatically,³ those injured by government wrongdoing have begun filing suits under the Federal Tort Claims Act (“FTCA”),⁴ alleging tortious government conduct.⁵

¹ For just one example, Federal District Court Judge Ellis in Chicago stated that the use of force against protesters and journalists “shocks the conscience.” Heather Cherone, *Federal Judge Imposes Strict Restrictions on Immigration Agents’ Use of Force Against Protesters, Media, Clergy*, WTTW (Nov. 6, 2025, at 18:39 ET), <https://news.wttw.com/2025/11/06/federal-judge-says-border-patrol-chief-greg-bovino-lied-about-being-hit-rock-deploying> [<https://perma.cc/T4W9-B8Z2>]. See also Jack Healy, *Immigration Agent Is Charged with Assaulting a Protester*, N.Y. TIMES (Apr. 21, 2026), <https://www.nytimes.com/2026/04/21/us/durango-colorado-immigration-officer-charged-assault.html> [<https://perma.cc/6HMQ-76TS>] (describing an immigration agent’s assault of a protester in Colorado that led to criminal charges). The killings of Renee Good and Alex Pretti in Minneapolis further reflect the wanton violence inflicted by immigration authorities. See Meg Anderson, *Months After the ICE Shootings in Minnesota, a Federal Probe Remains Elusive*, NPR (Apr. 10, 2026, at 16:01 ET), <https://www.npr.org/2026/04/10/nx-s1-5775847/alex-pretti-renee-good-ice-shootings-federal-investigations> [<https://perma.cc/N9XX-448Z>].

² See, e.g., *New Findings Reveal Human Rights Violations at Alligator Alcatraz and Krome Detention Centers*, AMNESTY INTERNATIONAL (Dec. 4, 2025), <https://www.amnesty.org/en/latest/news/2025/12/estados-unidos-nuevas-investigaciones-revelan-violaciones-de-derechos-humanos-en-los-centros-de-detencion-de-alligator-alcatraz-y-krome-en-florida/> [<https://perma.cc/745H-KRNV>]; Katie Thomas, Jessica Silver-Greenberg & Melena Ryzik, *Sick Detainees Describe Poor Care at Facilities Run by ICE Contractors*, N.Y. TIMES (Feb. 14, 2026), <https://www.nytimes.com/2026/02/14/business/ice-health-care-corecivic-immigrants-detention.html> [<https://perma.cc/363U-7VKF>].

³ *Bivens* actions are named after *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, in which the Supreme Court ruled that, at least in some contexts, a plaintiff can sue a federal agent for damages when the plaintiff’s constitutional rights have been violated. 403 U.S. 388, 397 (1971). Since 1971, the Supreme Court has restricted the application of *Bivens*. See, e.g., *Ziglar v. Abbasi*, 582 U.S. 120 (2017) (rejecting a *Bivens* claim arising out of an FBI detention without bail of those suspected of being in the country illegally); *Hernandez v. Mesa*, 589 U.S. 93 (2020) (rejecting a claim arising when a Border Patrol agent killed a teenager across the Mexican border).

⁴ 28 U.S.C. § 2674; see also 28 U.S.C. §§ 1346(b), 2671–2680 (codifying the FTCA).

⁵ See, e.g., Letter from Ernest I. Herrera, MALDEF Regional Counsel, to Counsel for U.S. Department of Homeland Security (July 1, 2025), https://www.maldef.org/wp-content/uploads/2025/07/FTCA-J.-Garcia-Redacted_7-1-2025.pdf [<https://perma.cc/BPS3-FZGY>] (outlining a client’s claims under the FTCA against agents of U.S. Border Patrol and Immigration and Customs Enforcement); *Guerrero v. United States*, No. 26-11126 (D. Mass. filed Mar. 5, 2026) (describing the actions of U.S. Immigration and Customs Enforcement in a complaint filed under the FTCA).

Through the FTCA's enactment in 1946, Congress first waived the federal government's immunity from tort suit as long as liability for negligence existed under the laws of the state in which the action arose.⁶ At the same time, Congress explicitly precluded plaintiffs from recovering for eleven enumerated intentional torts,⁷ and later excluded *Bivens* claims as well.⁸ Congress also mandated several other exceptions to federal governmental liability, most notably that the challenged conduct cannot embody a "discretionary function" of government.⁹ In so doing, Congress sought to prevent the second-guessing of governmental policy through the medium of a tort suit. Therefore, under this discretionary exception, if (1) the statutory and regulatory framework leaves the government employee with a choice of how to proceed and (2) the challenged action stemmed from, or at least could have stemmed from,¹⁰ considerations of social, economic, or public policy, then the claim is blocked.

However, Congress more recently expanded the FTCA's waiver of immunity to include enumerated intentional torts committed by federal law enforcement agents.¹¹ So, if the immigration officials' conduct in firing tear

⁶ See 28 U.S.C. § 2674; Robert N. Johnson, *The Federal Tort Claims Act: A Substantive Survey*, 6 U. RICH. L. REV. 65, 65, 73 (1971).

⁷ See 28 U.S.C. § 2680(h).

⁸ In the 1988 Westfall Act, which amended the FTCA, Congress specified that if the Attorney General certified that the federal employees sued were acting at the relevant time within the outer scope of their employment, then they would be dismissed from suit and the United States substituted as the defendant. See 28 U.S.C. § 2679(c)–(d); Paul F. Figley, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 354–56 (2011). In so doing, Congress excluded claims against the United States "brought for violation of the Constitution of the United States," leaving the *Bivens* route against individual officials intact. 28 U.S.C. § 2679(b)(2)(A). Prior to the Westfall Act, those injured could choose to sue the individual federal defendants for injuries suffered but at the risk that the defendants would be judgment-proof. See Figley, *supra* note 8, at 354.

⁹ 28 U.S.C. § 2680(a).

¹⁰ I explore the different approaches *infra* Section I.A.

¹¹ The intentional torts include those for assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process. 28 U.S.C. § 2680(h). Congress defined law enforcement agents to include "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.*

gas at protesters¹² or ramming cars¹³ constitutes an intentional tort, such as assault under state law, then the FTCA could provide an avenue for relief.¹⁴ Similarly, if those picked up by federal agents and warehoused in federal detention centers can cite false imprisonment under state law for their detention,¹⁵ an avenue for federal tort relief should be available.

Indeed, the Supreme Court in *Martin v. United States*¹⁶ recently increased (somewhat) the prospect of successful suit under the FTCA by overturning the Eleventh Circuit's application of the intentional tort waiver in two critical respects. First, in *Martin*, the Court held that in intentional tort cases, the United States could not defend a claim under the Supremacy Clause, removing a potential defense for the government.¹⁷ The Eleventh Circuit had held that, consistent with the reasoning in *In re Neagle*,¹⁸ state law should be overridden when federal officials comply with the executive branch's commands, as the deputy marshal in *In re Neagle* did when protecting the life of a threatened Supreme Court Justice.¹⁹ The Supreme Court reasoned, however, that in light of Congress's choice in the FTCA to predicate liability on the law of the state in which the tort arose, the Supremacy Clause defense was unavailing.²⁰ In other words, after *Martin*, the federal government cannot defend against suit based solely on the fact that its immigration enforcement agents were acting within the outer scope of their duties while pursuing a public mission.

¹² One court found that federal agents used "rubber bullets, tear gas, pepper balls, and other crowd control" measures on newsgatherers and protesters. *L.A. Press Club v. Noem*, 799 F. Supp. 3d 1036, 1063 (C.D. Cal. 2025); see also Roque Planas, *US Federal Forces Blind Two Protesters Shot in the Face with 'Less-Lethal' Munitions*, THE GUARDIAN (Jan. 17, 2026, at 8:00 ET), <https://www.theguardian.com/us-news/2026/jan/17/protesters-blind-us-federal-agents> [<https://perma.cc/E6NS-889J>] (describing the circumstances in which two protesters were shot with "less-lethal munition(s)" at close range, causing lasting damage).

¹³ Ruby Cramer, *Shot by Border Patrol, Then Called a "Domestic Terrorist,"* NEW YORKER (Mar. 12, 2026), <https://www.newyorker.com/news/annals-of-immigration/shot-by-border-patrol-then-called-a-domestic-terrorist> [<https://perma.cc/5BSV-5PL2>].

¹⁴ Under the waiver, Congress did not permit jury trials or punitive damages and required that those injured first present an administrative claim prior to filing suit. 28 U.S.C. § 2675(a) (requiring administrative claim); 28 U.S.C. § 2402 (prohibiting jury trials).

¹⁵ See, e.g., Nicole Foy, *We Found That More than 170 U.S. Citizens Have Been Held by Immigration Agents. They've Been Kicked, Dragged and Detained for Days.*, PROPUBLICA (Oct. 16, 2025, at 12:00 ET), <https://www.propublica.org/article/immigration-dhs-american-citizens-arrested-detained-against-will> [<https://perma.cc/4M88-6V7P>].

¹⁶ 605 U.S. 395 (2025).

¹⁷ *Martin*, 605 U.S. at 409–13.

¹⁸ 135 U.S. 1 (1890).

¹⁹ *Martin*, 605 U.S. at 410–13. In *In re Neagle*, the Supreme Court held that federal officers, in this case a deputy U.S. marshal who shot a man attempting to attack a U.S. Supreme Court Justice, are immune from state criminal actions when the act arose out of their job responsibilities. *Id.*; see *infra* notes 59–62 and accompanying text.

²⁰ *Martin*, 605 U.S. at 410–13.

Second, and pointing the other way, the Court held that the Eleventh Circuit erred in holding that the discretionary function exception in the FTCA applied only to torts based on negligence rather than intentional conduct.²¹ This part of the Supreme Court's ruling protected the government, imposing an obstacle to suit for those injured by federal agents' overreach. Consistent with *Martin*, if the federal government can show that its law enforcement agents' actions are "grounded in the policy of the regulatory regime" and "susceptible to policy analysis," then the suit should be dismissed even if a tort under state law had been committed.²²

The two holdings in *Martin* bring to light unresolved tensions in elaboration of the discretionary function exception. On the one hand, plaintiffs can sue the federal government in tort to recover for their injuries, even when the injury arose from officials pursuing a governmental mission. But if efforts in furtherance of that mission reflect the type of government discretion protected under the discretionary function exception, the suit is to be dismissed and recourse blocked. Those holdings leave significant terrain unexplored, particularly in the law enforcement context. For instance, does the discretionary function exception protect law enforcement officials when they decide whom to investigate, whom to search, when to arrest, and when to use force? Moreover, if law enforcement officers carry out a directive issued by their superiors, can that conduct give rise to an FTCA claim? And, finally, if law enforcement agents' conduct crosses a constitutional line, can the discretionary function exception still protect the government?

Accordingly, this Essay explores the tension between the two parts of the *Martin* holding to determine when federal law enforcement agents can be successfully sued under the FTCA. This Essay first argues that, despite several courts of appeals' decisions to the contrary,²³ the split-second determinations of law enforcement officers may reflect discretion but often do not reflect the public policy concerns protected by the discretionary function exception. Second, it argues that, when law enforcement officers are carrying out the directives of superiors, the discretionary function exception protects the government only if the directives themselves reflect the type of discretion protected under the FTCA. Finally, this Essay argues, in contrast to the majority of appellate courts to reach the issue—and the vast majority of commentators who have weighed in²⁴—that the government should lose the benefit of the discretionary function exception defense only

²¹ *Id.* at 401–07.

²² *United States v. Gaubert*, 499 U.S. 315, 325 (1991) (providing further interpretation of the FTCA's discretionary function exception).

²³ *See infra* Section III.A.

²⁴ *See infra* Section III.C.

if plaintiffs can demonstrate that the governmental conduct violates firmly established constitutional or statutory commands.

I. A BRIEF SNAPSHOT OF CONGRESS’S WAIVER OF IMMUNITY IN THE FTCA

Congress has never waived its own immunity from damage actions in tort.²⁵ Thus, individuals harmed by congressional negligence in passing or failing to pass legislation cannot recover in court for any resulting injuries. Importantly, however, this immunity reinforces the separation of powers: For courts to second-guess the wisdom of such legislative actions or omissions through the medium of a tort suit would provide the judiciary with increased power to determine the appropriate bounds of legislation, and judges’ opinions would accordingly cast a shadow over future legislative efforts.²⁶ Given that Congress has not waived its own immunity from suit, members of Congress need not internalize the costs of their negligent legislation, except through potential voter discontent come Election Day.

However, through the FTCA, Congress subjected the executive branch to liability for tortious conduct “to the same extent as a private individual under like circumstances.”²⁷ The law of the forum where the tortious conduct arose governs the action.²⁸ Accordingly, if a private individual could be sued for negligently sideswiping a car under state law, so too could a government driver committing comparable conduct.

But Congress declined to enact a blanket waiver. In large part, the exceptions in the FTCA serve to protect majoritarian policy from second-guessing through the medium of a tort suit.²⁹ For instance, the FTCA excludes claims “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”³⁰ Thus, those

²⁵ Under our system of sovereign immunity, civil suit against the government is precluded unless Congress consents to suit. Moreover, the Constitution’s Speech or Debate Clause provides members of Congress with additional protection. TODD GARVEY, CONG. RSCH. SERV., R45043, UNDERSTANDING THE SPEECH OR DEBATE CLAUSE 1–2 (2017) (explaining that the Speech or Debate Clause serves as the source of “general immunity from liability” for members of Congress for claims related to legislative decisions).

²⁶ *Id.* (indicating that the Clause prevents “judicial powers from being used to improperly influence or harass legislators through retaliatory litigation”).

²⁷ 28 U.S.C. §§ 1346(b), 2674.

²⁸ See 28 U.S.C. § 1346(b)(1).

²⁹ The underlying justification of sovereign immunity in a republic is the concern for majoritarian policymaking. See Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1529–31 (1992).

³⁰ 28 U.S.C. § 2680(j). In addition, the FTCA precludes claims arising in a foreign country or on international waters. 28 U.S.C. § 2680(k). See, e.g., *US Strikes Another Vessel and Kills 3 Men It Says Were Trafficking Drugs in the Eastern Pacific*, AP (Apr. 16, 2026, at 8:08 EDT), <https://apnews.com/article/cartels-pentagon-pacific-trump->

suspected drug dealers injured or killed by the United States military in the Caribbean or Pacific would not have a tort claim if the government could persuade a court that the actions were taken “during time of war.”³¹ Similarly, Congress exempted “[a]ny claim for damages caused by the imposition or establishment of a quarantine,”³² and “[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.”³³ Permitting suit in these contexts would give judges too much say over governmental policymaking, even if the injury stemmed from negligent governmental actions. In enacting the FTCA, Congress also precluded suit against the United States for intentional torts by its agents,³⁴ presumably due to a determination that the government should not be responsible for the intentional misconduct of individual employees.

A. *The Discretionary Function Exception*

Congress also excluded any claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused” from the FTCA’s waiver of sovereign immunity.³⁵ Congress thereby determined that the judiciary should not second-guess the discretionary functions of government officials through tort suits because of the potential interference with executive branch policymaking.³⁶ Agency rules and regulations should be protected because, much like legislation, they are responsive to the democratic process. Permitting tort actions might well undermine such policymaking while yielding only limited benefits in the form of compensation and deterrence. Moreover, the House Report accompanying the FTCA explained that the exception was designed “to preclude application of the bill to a claim against

3783ee3dbeaa127ba59137f2f81dc9bb [https://perma.cc/K6BA-KF4J] (reporting on American “anti-cartel actions in international waters”).

³¹ See, e.g., *DOJ Drafts Legal Opinion Backing Immunity for US Troops Involved in Boat Strikes*, *Sources Say*, REUTERS (Nov. 12, 2025, at 15:55 EST), <https://www.reuters.com/world/us/doj-drafts-legal-opinion-backing-immunity-us-troops-involved-boat-strikes-2025-11-12> [https://perma.cc/H4T2-PKT5] (explaining that the United States is facing pressure about its strikes on drug vessels).

³² 28 U.S.C. § 2680(f).

³³ 28 U.S.C. § 2680(i). The FTCA also exempts any tort occurring in a foreign country, but the killings have apparently taken place in international waters. 28 U.S.C. § 2680(k); see *US Strikes Another Vessel and Kills 3 Men It Says Were Trafficking Drugs in the Eastern Pacific*, *supra* note 30.

³⁴ 28 U.S.C. § 2680(h); see *supra* note 8 and accompanying text (explaining how the Westfall Act reduced the tort liability for individual government employees).

³⁵ 28 U.S.C. § 2680(a).

³⁶ Gregory C. Sisk, *Immunity for Imaginary Policy in Tort Claims Against the Federal Government*, 100 NOTRE DAME L. REV. 729, 734–35 (2025).

a regulatory agency . . . based upon an alleged abuse of discretionary authority.”³⁷ The legislative history clarifies that governmental actions reflecting policy judgments were to be shielded: “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.”³⁸

The Supreme Court first interpreted the discretionary function exception in *Dalehite v. United States*.³⁹ As part of the effort to provide food for a ravaged Europe after World War II, the United States decided to ship fertilizer overseas.⁴⁰ While awaiting export to France in 1947, the stored fertilizer caused explosions that leveled the port of Texas City, Texas, resulting in severe loss of life and property.⁴¹ In rejecting the subsequent suit for damages under the FTCA, the Court stressed that the protected discretion referred to “the discretion of the executive or the administrator to act according to one’s judgment of the best course.”⁴² Thus, the exception “includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations.”⁴³

As the Supreme Court later stated when rejecting a challenge to the Federal Aviation Administration’s decision to spot-check airlines for safety as opposed to inspecting each aircraft individually, the purpose of the exception is to “prevent ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”⁴⁴ The question of an agency’s priorities and allocation of resources is to be assessed politically, not judicially. On the other hand, judicial interference with nondeliberative agency decisions is less likely to disrupt the appropriate balance of powers. Those implementing actions are not the stuff of which national policy is made. In *Indian Towing Co. v. United States*,⁴⁵ the Supreme Court earlier distinguished between policy formation and policy implementation, contrasting a government decision about whether and where to build a lighthouse with the negligent failure to ensure that the lighthouse’s light was working.⁴⁶ The Court stressed that the government “was obligated to use due care to make certain that the

³⁷ H.R. REP. NO. 79-1287, at 5–6 (1945).

³⁸ *Id.*

³⁹ 346 U.S. 15 (1953).

⁴⁰ *Id.* at 19–20.

⁴¹ *Id.* at 22–23.

⁴² *Id.* at 34.

⁴³ *Id.* at 35–36.

⁴⁴ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

⁴⁵ 350 U.S. 61 (1955).

⁴⁶ *Id.* at 69.

light was kept in good working order.”⁴⁷ It is difficult to see how a decision whether to change a light bulb stems from any policy decision that should be protected from judicial second-guessing. The Supreme Court in *United States v. Gaubert*⁴⁸ more recently reaffirmed this idea, holding that, when the executive branch has been given the congressional authority to implement a statute, “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 agencies are to carry out the programs.”⁴⁹

The discretionary function exception stands for the principle that, although tort claims under the FTCA are critical to deter negligent government conduct and compensate injured parties, they are not the forum in which to facilitate merits challenges to regulations, rules, and other governmental policies—the latter agency enactments instead are challenged through the political process or through lawsuits predicated on statutes such as the Administrative Procedure Act (“APA”).⁵⁰

Implementation of the discretionary function exception has led to two principal disagreements among the courts of appeals. First, courts have disagreed as to whether the discretionary function exception protects governmental actions that *could* reflect policy, or rather actions pursued only after government officials assessed the political, economic, and social dimensions at stake.⁵¹ In *Gaubert*, the Court considered an action brought by individuals who claimed that federal officials negligently regulated a failing financial institution.⁵² The Court stated that, to determine whether the exception is applicable, lower courts should focus on “the nature of the actions taken and on whether they are susceptible to policy analysis.”⁵³ To

⁴⁷ *Id.* Although, as will be discussed *infra* in Section III.A, many lower courts have ignored the distinction between formation of policy and implementation of it, the Supreme Court seemingly reaffirmed the appropriateness of that approach in *Berkovitz v. United States*, 486 U.S. 531, 547 (1988).

⁴⁸ 499 U.S. 315 (1991).

⁴⁹ *Id.* at 323.

⁵⁰ 5 U.S.C. §§ 551–559.

⁵¹ Compare *Gonzalez v. United States*, 814 F.3d 1022, 1032–33 (9th Cir. 2016) (holding that law enforcement officials’ conduct was within the discretionary function exception because crime investigation decisions “involve policy judgments at the core of the executive branch”) with *Coulthurst v. United States*, 214 F.3d 106, 109–11 (2d Cir. 2000) (holding that the discretionary function exception does not apply when an inspector’s decision not to inspect machines resulted from motivations separate from “economy, efficiency, and safety” because those motivations would not be based on governmental policy).

⁵² *Gaubert*, 499 U.S. at 318–19.

⁵³ *Id.* at 325.

the dismay of some,⁵⁴ many lower courts have read that language in *Gaubert* to require only that the government official's action *could* have stemmed from policy considerations, rather than *did*.⁵⁵ In other words, those lower courts do not require evidence of actual planning but rather that the conduct merely be "susceptible of policy analysis."⁵⁶ Evidence of planning would at least provide some assurance that the policy pursued by the government—even if later found negligent—was checked by prior deliberation within the government, including considerations of the policy's long-term impact. The political process serves, to some extent, as a protection from government misfeasance, but lower courts by and large have not insisted on evidence that the challenged conduct derived from a considered process.⁵⁷ Although a failure to change a light bulb, as discussed in *Indian Towing Co.*,⁵⁸ should not be shielded under the discretionary function exception, a failure to inspect at all might be, depending on whether the failure stemmed from, or at least could have stemmed from, a policy decision.

Second, lower courts have disagreed about whether the discretionary function exception applies if the governmental employee's conduct should have been constrained by prior rules and policy.⁵⁹ In *Berkovitz v. United States*,⁶⁰ the Court instructed that if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,"⁶¹ then the employee has no discretion and "no rightful option but to adhere to the directive."⁶² Some courts and commentators have construed that language broadly to conclude that, because governmental employees never have the

⁵⁴ See, e.g., Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789, 1820–21 (2021); *Federal Tort Claims Act—Discretionary Function Exception and Law Enforcement Proviso*—Martin v. United States, 139 HARV. L. REV. 377, 382 (2025); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 898–900 (1991).

⁵⁵ See, e.g., Lam v. United States, 979 F.3d 665, 670–71 (9th Cir. 2020); Gonzalez v. United States, 851 F.3d 538, 541–42 (5th Cir. 2017); S.R.P. ex rel. Abunabba v. United States, 676 F.3d 329, 330–31 (3d Cir. 2012); see Sisk, *supra* note 36, at 753–56.

⁵⁶ The exception is the Third Circuit. See Cestonaro v. United States, 211 F.3d 749, 753–55 (3d Cir. 2000) ("That torts stemming from garden variety decisions fall outside the discretionary function exception is consistent with a primary motive behind the FTCA.").

⁵⁷ See, e.g., Laurence v. United States, 851 F. Supp. 1445, 1450–51 (N.D. Cal. 1994).

⁵⁸ See *Indian Towing Co. v. United States*, 350 U.S. 61, 62 (1955); see *supra* text accompanying notes 45–47.

⁵⁹ Compare *Irving v. United States*, 909 F.2d 598, 600 (1st Cir. 1990) (finding that, if there was a violation of law or policy that left no room for judgment, the discretionary function exception did not apply) with *Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995) (finding that a violation of law or policy is not dispositive in determining if the discretionary function exception applies).

⁶⁰ 486 U.S. 531 (1988).

⁶¹ *Id.* at 536.

⁶² *Id.*

discretion to violate regulatory, statutory, or constitutional commands, courts should *first* determine whether the employee’s action violated a rule, statute, or constitutional provision—even if the statute or constitutional provision had never been construed previously in similar contexts—before determining whether the employee’s action was “susceptible to policy analysis.”⁶³ Others have concluded that the Supreme Court more narrowly intended to convey that government employees could not act with protected discretion if their superiors in the executive branch had previously articulated a “specific” policy to the contrary.⁶⁴ Part III will explore that disagreement.

B. *The Law Enforcement Proviso*

In 1974, Congress amended the FTCA to expand its waiver of tort immunity to cover intentional torts committed by federal law enforcement officers.⁶⁵ Responding to a series of incidents in which federal officials armed with no-knock warrants mistakenly intruded into the homes of terrified civilians, Congress determined that the waiver should extend to “any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.”⁶⁶ Thus, at least with respect to law enforcement officers, including those involved in immigration roundups, recourse for most intentional and negligent torts can be obtained through the medium of a tort suit under the FTCA, subject, however, to the discretionary function exception defense.⁶⁷

II. THE *MARTIN* DECISION

In a terse 2025 decision, the Supreme Court summarily rejected the Eleventh Circuit’s invocation of a Supremacy Clause defense to protect the federal government in an FTCA action.⁶⁸ The case arose when a six-member Federal Bureau of Investigation (“FBI”) Special Weapons and Tactics team raided the wrong house in suburban Atlanta while searching for a gang hideout.⁶⁹ The team members used a flash-bang grenade to gain entry and

⁶³ Sisk, *supra* note 36, at 745.

⁶⁴ E.g., Nathan Li, Comment, *When the Rules Burn: A New Approach to Governmental Discretion in Firefighting Operations*, 25 U. CHI. LEGAL F. 675, 701 (2025).

⁶⁵ John Charles Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 498–500 (1976).

⁶⁶ 28 U.S.C. § 2680(h).

⁶⁷ See Boger, Gitenstein & Verkuil, *supra* note 65, at 525–32.

⁶⁸ See *Martin v. United States*, 605 U.S. 395 (2025).

⁶⁹ *Id.* at 399.

assaulted the occupants before realizing their mistake.⁷⁰ The Eleventh Circuit held that “the inquiry that determines if the Supremacy Clause bars state-law liability is whether a federal official’s acts ‘have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range’” of federal law.⁷¹ To the Eleventh Circuit, the “Supremacy Clause enshrine[d] the basic principle that federal law supersedes state law whenever they conflict.”⁷²

The appellate court fashioned this defense based on the Supreme Court’s decision over a century earlier in *In re Neagle*,⁷³ in which the Court exonerated a Deputy U.S. Marshal whom the President had charged with protecting a Supreme Court Justice on Supremacy Clause grounds.⁷⁴ When the Marshal killed a would-be assailant of the Justice, he was arrested for murder under California law,⁷⁵ prompting the Supreme Court to overturn the California decision based on the Supremacy Clause.⁷⁶ Accordingly, consistent with this century-old reasoning, the Eleventh Circuit granted summary judgment to the government.⁷⁷

In *Martin*, however, the Supreme Court held that the Eleventh Circuit had misunderstood the FTCA.⁷⁸ The Court stated that “[b]ecause the FTCA’s liability rule incorporates state law, in most cases there is no conflict for the Supremacy Clause to resolve.”⁷⁹ Furthermore, given that “Congress has . . . expressly bound the federal government to accept liability under state tort law on the same terms as a ‘private individual,’”⁸⁰ the Supremacy Clause defense was unavailing.⁸¹ The Eleventh Circuit’s approach would have defeated liability any time federal employees’ actions “bear[ing] ‘some nexus with furthering federal policy’” violated state law.⁸² Under this approach, the government arguably would have had a solid Supremacy Clause defense in a suit arising from assaults committed by immigration enforcement agents because the agents’ conduct, for the most part, had been

⁷⁰ *Id.*

⁷¹ *Martin v. United States*, No. 23-10062, 2024 WL 1716235, at *7 (11th Cir. Apr. 22, 2024) (quoting *Kordash v. United States*, 51 F.4th 1289, 1293 (11th Cir. 2022)).

⁷² *See Kordash*, 51 F.4th at 1293.

⁷³ 135 U.S. 1 (1890); *see also Kordash*, 51 F.4th at 1293–94 (applying *Neagle*’s reasoning).

⁷⁴ *See In re Neagle*, 135 U.S. at 57, 75–76.

⁷⁵ As was the Justice himself! For a glimpse at the backstory, see Harold J. Krent, *The Legacy of In re Neagle*, in *THEN & NOW: STORIES OF LAW AND PROGRESS* 60–65 (2013).

⁷⁶ *In re Neagle*, 135 U.S. at 75–76.

⁷⁷ *Martin*, 2024 WL 1716235, at *7–*8.

⁷⁸ *See Martin*, 605 U.S. at 400–03, 415.

⁷⁹ *Id.* at 411.

⁸⁰ *Id.* at 412 (quoting 28 U.S.C. § 2674).

⁸¹ *Id.* at 414.

⁸² *Id.* at 403 (quoting *Denson v. United States*, 574 F.3d 1318, 1348 (11th Cir. 2009)).

closely connected with their efforts to locate individuals without proper documentation.

But while invalidating the Supremacy Clause defense, the Court affirmed that the discretionary function exception applied to intentional as well as negligent torts committed by law enforcement officers.⁸³ If the discretionary function exception did not apply to intentional torts, then the government would be liable irrespective of the policy decisions that underlie the challenged tortious conduct. Arguably, the same concerns for protecting government discretion exist irrespective of whether the tort is intentional or not. The discretionary function exception protects the government, but in a narrower range of cases than would the Supremacy Clause defense.⁸⁴ The fact that the government employees accused of a tort were engaged in a governmental mission when the tort occurred would not be sufficient.⁸⁵ With the discretionary function exception, those injured by Border Patrol agents, for instance, must be prepared to rebut possible governmental arguments that the aggressive tactics arose out of a strategic policy decision by Border Patrol senior officials to induce fear of the law enforcement officers and prompt those without legal papers to self-deport.⁸⁶

III. REMAINING ISSUES AFTER *MARTIN*

Pursuant to *Martin*, law enforcement officers' abrasive activities, however tortious, may nonetheless be protected by the discretionary function exception, but not by the Supremacy Clause.⁸⁷ In other words, the fact that the officers were acting pursuant to a government mission does not provide the government a defense under the Supremacy Clause, and the suit can proceed.⁸⁸ On the other hand, if the tortious actions—whether negligent or intentional—stemmed from the exercise of a discretionary function, then the

⁸³ *Id.* at 403.

⁸⁴ *See Martin*, 605 U.S. at 420 (Sotomayor, J., concurring).

⁸⁵ *See id.* at 402.

⁸⁶ As discussed *infra* in Section III.B, even if the brutality exhibited by Border Patrol officers stemmed from directives of higher-up officials, it is not clear whether such directives reflect the type of economic, social and political policy protected by the discretionary function exception. Law enforcement strategy involves discretion, but the courts have yet to reach a consensus on when such strategies should be protected. On the other hand, as argued *infra*, the situation-specific action by the agents in resorting to violence generally should not be protected, because those actions do not in themselves typically reflect the policy considerations that the discretionary function exception protects, unless the violence arises from a perceived need to protect public safety.

⁸⁷ *See Martin*, 605 U.S. at 409, 414.

⁸⁸ *See id.* at 409–10.

suit is barred.⁸⁹ This Part examines how best to understand the minimal space between the two holdings in *Martin*.

A. Conduct of Law Enforcement Officers

First, *Martin* makes it abundantly clear that the law enforcement proviso is alive and well for those who contest the lawless behavior of law enforcement officials who abuse their authority.⁹⁰ Grabbing bystanders during an immigration enforcement action and throwing them to the ground should be subject to suit, whether framed as a tort arising from negligent or intentional conduct. Similarly, subjecting undocumented detainees to sexual abuse by immigration agents would be plainly actionable under the intentional tort proviso.⁹¹ The discretionary function exception in no way protects such conduct.⁹²

Nonetheless, courts have struggled to determine whether law enforcement officers exercise the type of policy judgment protected by the discretionary function exception, and the Supreme Court has yet to enter the fray.⁹³ Some lower courts have held that the discretionary function exception broadly protects law enforcement efforts, given the difficult choices law enforcement officers must make.⁹⁴ The Eighth Circuit's decision in *Hart v. United States* is representative.⁹⁵ There, the plaintiff brought suit under the FTCA, alleging tort claims arising from a government agent's failure to secure an individual following arrest, immediately after which the individual committed suicide.⁹⁶ The court held that the discretionary function exception protected the government in light of the discretion that law enforcement officials must always exercise when making an arrest: "[W]e readily conclude a federal law enforcement officer's on-the-spot decisions concerning how to effectuate an arrest—including how best to restrain, supervise, control or trust an arrestee—fall within the discretionary function

⁸⁹ See *id.* at 415.

⁹⁰ See *id.* at 404–07.

⁹¹ See Press Release, Dep't Just., U.S. Customs and Border Protection Officer Indicted on Federal Civil Rights Charges for Allegedly Sexually Assaulting and Robbing Women (Dec. 9, 2025), <https://www.justice.gov/usao-ndil/pr/us-customs-and-border-protection-officer-indicted-federal-civil-rights-charges> [<https://perma.cc/HPL4-WF2H>]; Healy, *supra* note **Error! Bookmark not defined.**

⁹² See *Sutton v. United States*, 819 F.2d 1289, 1294 (5th Cir. 1987) ("A government agent who departs from the duties of an investigator and embarks on an intentional abuse . . . exceeds the scope of his authority and acts outside his discretion.").

⁹³ See, e.g., *Milligan v. United States*, 670 F.3d 686, 693–95 (6th Cir. 2012).

⁹⁴ See, e.g., *Doherty v. United States*, 905 F. Supp. 54, 56 (D. Mass. 1995).

⁹⁵ 630 F.3d 1085 (8th Cir. 2011).

⁹⁶ *Id.* at 1087–88.

exception.”⁹⁷ Although there was no evidence in the case that the arresting officer weighed options before letting the arrestee go back into the house, the court held that the discretionary function defense applied.⁹⁸ To the court, the discretionary nature of a decision to arrest, and how to effectuate the arrest, should be protected.⁹⁹

Although the *Hart* court correctly noted the discretion intrinsic in any law enforcement operation, the actions of law enforcement officers, whether in attempting to control crowds or apprehend suspects, often do not reflect policy based on economic, social, or even public safety concerns. To be sure, at times a decision to arrest may stem from an interest in ensuring the safety of others, or a warrantless search in a home may stem from a perceived need to protect a third party in the house. But at times, the challenged law enforcement action or inaction cannot be ascribed to any policy concern.

For instance, in *Gonzalez v. United States*,¹⁰⁰ the Ninth Circuit accepted the government’s discretionary function exception defense based on an FBI official’s failure to warn a family about a pending home invasion, which resulted in two fatalities.¹⁰¹ To be sure, the FBI official may have declined to warn the family for many reasons—such as the lack of credibility of the information he received or a concern for tipping off the gang that was the subject of the investigation too soon—but the failure to warn may have stemmed instead from indolence, as the plaintiff survivor alleged.¹⁰² Nonetheless, the court dismissed the FTCA claim because the failure to warn *conceivably* could have been based on discretion, noting that the decision would be “the same whether or not [the officer]’s decision in fact involved the subjective weighing of policy considerations. . . . [T]he government is not required to prove either that an affirmative decision was made, or that any decision actually involved the weighing of policy considerations.”¹⁰³ And the court in *M.M.B.B. v. United States*¹⁰⁴ recently held that the discretionary function exception blocked an FTCA claim for failure to provide medical care to a detainee in distress because “this type of decision

⁹⁷ *Id.* at 1090; *see also* *Medina v. United States*, 259 F.3d 220, 224–25 (4th Cir. 2001) (finding the decision of whether to arrest was protected under the discretionary function exception).

⁹⁸ *See Hart*, 630 F.3d at 1089.

⁹⁹ *See id.* at 1090.

¹⁰⁰ 814 F.3d 1022 (9th Cir. 2016).

¹⁰¹ *See id.* at 1037.

¹⁰² *See id.* at 1026.

¹⁰³ *Id.* at 1023.

¹⁰⁴ No. 1:24-CV-5031, 2025 WL 2645912 (N.D. Ga. Sep. 15, 2025).

is grounded in policy.”¹⁰⁵ No evidence existed that the officer weighed public safety or other policy considerations in declining to procure aid.¹⁰⁶

Indeed, decisions such as those in *Hart* and *Gonzalez* reduce the *Gaubert* test to one step instead of two. If a law enforcement officer is free to respond to an incident in a number of ways, then, according to *Hart* and *Gonzalez*, the final decision should be protected by the discretionary function exception.¹⁰⁷ These decisions bypass the second step of the *Gaubert* test, namely that the discretion must be steeped in public policy.¹⁰⁸ At times, law enforcement officers must balance issues of public safety and individual rights, as in determining when force is needed to restrain a crowd or when a no-knock entry into the home is permitted. But to hold that every law enforcement decision contains sufficient discretion to fall within the discretionary function exception would undermine Congress’s very purpose in waiving immunity for both negligent and intentional torts committed by law enforcement officers. After all, the plaintiff in *Gonzalez* specifically alleged that the FBI did not communicate the warning simply through inadvertence.¹⁰⁹

Consider, under similar facts, that the plaintiff instead alleged that the FBI officers had not relayed the warning out of spite for the victim. Such inaction would likely constitute an intentional tort under state law, but the *Gonzalez* court’s reasoning would bar the action even before the plaintiff could seek evidence corroborating the “intentional” failure to communicate the warning.¹¹⁰ Similarly, in *M.M.B.B.*, the officer might not have sought medical aid because of dislike for the detainee.¹¹¹ In other words, the discretionary function exception contemplates that the court must at times assess the motivations underpinning the federal law enforcement officer’s actions—how otherwise could intentional torts be demonstrated? Courts

¹⁰⁵ *Id.* at *8.

¹⁰⁶ Similarly, the court in *Carrillo v. United States*, No. 2:25-cv-00219, 2025 WL 3187389 (D.N.M. Nov. 14, 2025) could apparently find that all crashes attributed to law enforcement car chases gone awry should be protected, irrespective of whether public safety demanded that urgency, because of the policy considerations involved. *Id.* at *6. However, a crash resulting from a chase of a serial killer may be far different from a crash resulting from excessive speed in tracking down a pickpocket, and a crash resulting from a dangerous driving maneuver by law enforcement agents may not reflect the discretion that the exception protects.

¹⁰⁷ See *Willis v. Boyd*, 993 F.3d 545, 549 (8th Cir. 2021) (holding that discretionary function exception can protect careless action); *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993) (same).

¹⁰⁸ See *United States v. Gaubert*, 499 U.S. 315, 323 (1991).

¹⁰⁹ See *Gonzalez v. United States*, 814 F.3d 1022, 1026 (9th Cir. 2016).

¹¹⁰ See *id.* at 1031.

¹¹¹ See *M.M.B.B. v. United States*, No. 1:24-CV-5031, 2025 WL 2645912, at *8 (N.D. Ga. Sep. 15, 2025).

have erred in not permitting plaintiffs to present evidence that failures to act—as well as affirmative actions—stemmed from carelessness as opposed to considerations of public safety.

Moreover, Congress adopted the law enforcement proviso after multiple no-knock raids conducted by law enforcement agents went awry.¹¹² The very premise of the law enforcement proviso is that intentional torts committed by law enforcement officers—including assaults and false imprisonment—should be subject to suit under the FTCA.¹¹³ Under *Hart* and *Gonzalez*, however, the plaintiffs, even in the no-knock scenario that gave rise to the congressional enactment of the proviso, could not have recovered because of the many options that the law enforcement officers could have chosen in effectuating the arrest in the former case, and in not communicating the threat in the latter.¹¹⁴

At the other end of the spectrum, some courts have held that law enforcement agents' actions rarely reflect the discretion the discretionary function exception protects because the actions in no way set policy for the future.¹¹⁵ At most, law enforcement agents' actions reflect the implementation of policy, not policy itself, a distinction the Supreme Court suggested in *Indian Towing Co.*¹¹⁶ For instance, in *Caban v. United States*,¹¹⁷ immigration agents detained a citizen from Puerto Rico for several days at Kennedy Airport, holding him until they could assure themselves that his claim of citizenship was valid.¹¹⁸ Upon release, the citizen sued for false imprisonment, and the federal government defended its decision in part by asserting that the agents' actions were discretionary, even if arguably negligent.¹¹⁹ The immigration agents had innumerable choices—how much information to collect before determining the individual was a citizen, how long the interrogation should last, and so forth.¹²⁰ In holding that the

¹¹² See, e.g., *Sutton v. United States*, 819 F.2d 1289, 1295–97 (5th Cir. 1987); see *supra* Section I.B.

¹¹³ See *Sutton*, 819 F.2d at 1296.

¹¹⁴ See *Martin v. United States*, 605 U.S. 395, 420 (2025) (Sotomayor, J., concurring) (“Courts . . . should not ignore the existence of the law enforcement proviso, or the factual context that inspired its passage, when construing the discretionary-function exception. . . . [A]ny interpretation [of the discretionary function exception] should allow for liability in the very cases Congress amended the FTCA to remedy.”). The Eleventh Circuit on remand from the Supreme Court in *Martin* reached a similar conclusion, holding that forced entry into the wrong house was protected under the discretionary function exception. See *infra* note 175 and accompanying text.

¹¹⁵ See *Myles v. United States*, 47 F.4th 1005, 1012 (9th Cir. 2022).

¹¹⁶ See *Indian Towing Co. v. United States*, 350 U.S. 61, 63–70 (1955).

¹¹⁷ 671 F.2d 1230 (2d Cir. 1982).

¹¹⁸ See *id.* at 1230–32.

¹¹⁹ See *id.* at 1232.

¹²⁰ See *id.* at 1230–32.

discretionary function exception defense did not apply, the Second Circuit reasoned that:

[W]e find that the activities of the INS agents who detained appellant do not fall within the purview of § 2680(a) because the activities are not the kind that involve weighing important policy choices. . . . In contrast, the promulgation of regulation 8 C.F.R. § 235.1 is a discretionary act entitled to immunity under § 2680(a) because setting down that rule involves balancing the government's interest in protecting its citizens' welfare against the applicant's interest in a fair and just determination of his rights. Thus, if Caban were suing the INS for adopting this regulation, he would find his case properly dismissed under § 2680(a) even if he could show that the regulation resulted directly in his detention in Brooklyn for six days.¹²¹

Although the court recognized that law enforcement intrinsically involves choices, it found that such choices do not typically embody “the sort of generalized social, economic, and political policy choices that Congress intended to exempt from tort liability.”¹²²

Indeed, on-the-spot decisions by law enforcement officials do not necessarily reflect the concerns for immunizing government policy that underlie the discretionary function exception. Decisions as to whom to investigate and prosecute may be discretionary, but not law enforcement officers' situation-specific decisions to push back protesters or engage in a high-speed car chase. Nonetheless, courts are understandably reluctant to second-guess spur-of-the-moment actions by law enforcement officials no matter the result.¹²³ And, as *Martin* held, Congress, in enacting the law enforcement proviso, retained the discretionary function exception,

¹²¹ *Id.* at 1233 (8 C.F.R. § 235.1 lists the information that anyone at the border must show upon request).

¹²² *See id.*; *see also* *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987) (“While law enforcement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability” (citing *Caban*, 671 F.2d 1230)).

¹²³ *See* *Davis v. Waller*, 44 F.4th 1305, 1316 (11th Cir. 2022) (“In examining whether an officer's use of deadly force is reasonable, we recognize that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” . . . And “[w]e are loath to second-guess the decisions made by police officers in the field.” (first quoting *Long v. Slaton*, 508 F.3d 576, 580 (11th Cir. 2007); then quoting *Vaughan v. Cox*, 343 F.3d 1323, 1331 (11th Cir. 2003) (alteration in original)).

suggesting that the defense would be relevant in at least a considerable swath of law enforcement contexts.¹²⁴

An approach resting between the poles of *Caban* and *Hart* may well be appropriate in harmonizing the congressional intent to permit suit for both intentional and negligent torts committed by law enforcement officials while retaining the discretionary function exception in those contexts. Courts could ensure some accountability by requiring the federal law enforcement officer involved in a suit to articulate the public policy concerns, however misguided, underlying their actions. Courts would have to consider testimony, dashcam footage, and any documentary evidence to determine whether the law enforcement officers' conduct involved weighing public policy concerns as opposed to carelessness or spite.

Although the *Caban* court may have swept too broadly in suggesting that the agents' decision to detain an individual to assess citizenship status can *never* stem from concerns for public safety, there may have been no evidence that the agents made any cost-benefit assessment as to how much information they needed to resolve the plaintiff's status. The court did not specify whether the agents could have presented a successful defense if they explained why they believed they lacked sufficiently credible information as to the individual's citizenship status and what steps they took to ascertain that status.¹²⁵

Consider as well the recent district court decision in *Carmer v. United States*,¹²⁶ in which the plaintiff sued under the FTCA for serious injuries she received when officers struck her during a peaceful protest near the White House following George Floyd's death.¹²⁷ Officers allegedly knocked her down without warning and struck her repeatedly with batons.¹²⁸ The court held that the officers sent to contain the crowd were empowered to use discretion during the protest, but "*specific decision[s]* to shove and hit plaintiff [were] not grounded in policy considerations."¹²⁹ Unlike in *Caban*, the court recognized that the split-second decisions of law enforcement officers might reflect the type of policy protected under the discretionary function exception, but found that unless the officers could articulate the public policy goals underlying their actions, the exception would not apply.¹³⁰ In the case itself, the officers evidently could not articulate any such

¹²⁴ See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809–11 (1984).

¹²⁵ See *Caban v. United States*, 671 F.2d 1230, 1235 (2d Cir. 1982).

¹²⁶ No. 22-1100 (BAH), 2025 WL 2674766 (D.D.C. Sep. 18, 2025).

¹²⁷ *Id.* at *1–4.

¹²⁸ *Id.* at *3.

¹²⁹ *Id.* at *11.

¹³⁰ *Id.* at *11–12.

public policy justification for the violence, and the general discretion afforded to law enforcement officers in choosing crowd control tactics did not suffice.¹³¹ *Carmer* reflects the approach that, when law enforcement officials single out individuals in enforcement actions—whether through apprehension, crowd control, or investigation—no policy is set for the future, and such situation-specific actions do not generally reflect a balancing of public safety and individual rights. In other words, when applying the discretionary function exception to the law enforcement context, courts must make a contextual determination whether the officers’ assault or excessive speed stemmed from an effort, reasonable or not, to protect public safety.

Post-*Martin*, courts face the difficult task of ascertaining when law enforcement agents’ actions reflect the belief, however mistaken, that public policy demands quick action as opposed to when officers lash out without regard for public safety. Similarly, courts must determine whether law enforcement actions singling out individuals for enforcement were triggered by public safety concerns, by assertions of power for their own sake, or even by clerical mistakes. The discretionary function exception, however, should protect law enforcement officers only when their acts involve the public safety considerations that Congress wished to shield from judicial second-guessing. Law enforcement actions based on inadvertence or spite do not so qualify.¹³²

B. *Decisions of Law Enforcement Supervisors*

Second, what if the enforcement tactics are directed by high-ranking officials? A border patrol chief may order those beneath him to seize anyone who looks Hispanic or has an accent.¹³³ One Border Patrol policy evidently

¹³¹ See *id.* at *11–12.

¹³² Courts are split, however, as to whether carelessness can be protected under the discretionary function exception. Compare *Coulthurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000) (carelessness not protected), and *Rich v. United States*, 811 F.3d 140, 147 (4th Cir. 2015) (same), with *Willis v. Boyd*, 993 F.3d 545, 549 (8th Cir. 2021) (carelessness protected), and *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993) (same). The key should not be carelessness *per se*, but rather whether the objective of preserving public safety led to the challenged action.

¹³³ See Elizabeth Findell, Ruth Simon, Michelle Hackman & Tarini Parti, *The White House Marching Orders That Sparked the L.A. Migrant Crackdown*, WALL ST. J. (June 9, 2025, at 21:00 ET), https://www.wsj.com/us-news/protests-los-angeles-immigrants-trump-f5089877?eafs_enabled=false [<https://perma.cc/NFD4-3SDY>]; Andrew Donohue, Sergio Olmos & Wendy Fry, *He misled the public about his last big immigration sweep. Now he’s leading the Border Patrol in LA*, CALMATTERS (June 13, 2025), <https://calmatters.org/investigation/2025/06/los-angeles-border-patrol-chief/> [<https://perma.cc/T59Y-WS68>]; *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 9 (2025) (Sotomayor, J., dissenting) (arguing that the Court’s decision to stay lower court injunction allows the government to “seize anyone who looks Latino, speaks Spanish, and appears to

permits arrests and deportations based upon administrative warrants alone.¹³⁴ Should such actions be protected by the discretionary function exception? There is no doubt that the higher up in government the decision is made, the more likely it is that the decision has been widely vetted and is “susceptible to policy analysis.”¹³⁵ And an FTCA suit challenging such broad policies should not be successful.¹³⁶ But not every decision by a law enforcement supervisor should be immune from challenge due to the discretionary function exception.

Interestingly, President Trump himself seemingly determined that the FTCA permits tort actions arising from the conduct of highly placed government officials. Before entering office for the second time, President Trump filed two administrative claims under the FTCA—the one publicly released requested millions of dollars in damages for tortious injuries he allegedly received arising out of the Biden Department of Justice’s investigation and prosecution regarding the classified documents he spirited

work a low wage job,” and recounting how President Trump’s deputy chief of staff told border patrol officers to “just go out there and arrest illegal aliens,” while other senior officials told officers “[i]f it involves handcuffs on wrists, it’s probably worth pursuing” (first quoting Findell et al., *supra* note 133; then quoting José Olivares, *US Immigration Officers Ordered to Arrest More People Even Without Warrants*, THE GUARDIAN (June 4, 2025, at 7:00 EDT), <https://www.theguardian.com/us-news/2025/jun/04/immigration-officials-increased-detentions-collateral-arrests> [<https://perma.cc/VWJ7-7CRL>])).

¹³⁴ Press Release, Dep’t Homeland Sec., DHS Sets the Record Straight on Administrative Warrants and American Public Support of President Trump’s Deportations of Illegal Aliens (Feb. 4, 2026), <https://www.dhs.gov/news/2026/02/04/dhs-sets-record-straight-administrative-warrants-and-american-public-support> [<https://perma.cc/PL86-YY6H>].

¹³⁵ *United States v. Gaubert*, 499 U.S. 315, 325 (1991). In interpreting the discretionary function exception, the Supreme Court initially distinguished between decisions reached at the planning and operational level. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955); *E. Air Lines v. Union Trust Co.*, 221 F.2d 62, 76 (D.C. Cir. 1955), *aff’d per curiam*, 350 U.S. 907 (1955). The Supreme Court in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), later stressed 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.”

¹³⁶ *See, e.g., Nurse v. United States*, 226 F.3d 996, 1001–02 (9th Cir. 2000) (dismissing a FTCA claim against law enforcement supervisors for negligent training and crafting of apprehension policies but allowing suit to go forward against law enforcement agents who allegedly mistreated plaintiff).

away to Mar-a-Lago.¹³⁷ Such an administrative claim is required before filing an FTCA action.¹³⁸

The administrative claim disseminated focuses on “intrusion upon seclusion, malicious prosecution, and abuse of process” torts under Florida law resulting from the August 2022 Mar-a-Lago raid.¹³⁹ President Trump argued that, even though the tortious acts stemmed from decisions of top governmental officials, Attorney General Merrick Garland and FBI Director Christopher Wray, the decisions were neither discretionary nor “grounded in ‘social, economic, and political policy,’” but instead were “required as a matter of procedure and under the Constitution.”¹⁴⁰ Trump’s administrative claim attempts to thread the needle: Even the decisions of top governmental officials, no matter how strategic, can be contested as long as they do not stem from considerations of social, economic, and political policy.

President Trump’s abuse of process claim dovetailed with that of malicious prosecution, focusing on “[a]n ulterior motive or purpose in exercising the illegal, improper, or perverted process.”¹⁴¹ He added that “the process involved clear misuse: the lack of appropriations [for the special investigation], a lack of a constitutionally appropriate appointment [of the special counsel], and the unconstitutional nature of prosecuting an immune former President.”¹⁴² Thus, President Trump carefully characterized the prosecution as flowing from a narrow decision to seek vengeance against him, rather than a decision grounded in economic or social policy reflecting traditional prosecutorial priorities.¹⁴³ Decisions made by senior government officials are not always steeped in the discretion that the FTCA attempts to protect.¹⁴⁴ Courts grappling with President Trump’s tort claims under the FTCA would need to determine whether those high-level prosecutorial

¹³⁷ See Devlin Barrett & Tyler Paget, *Trump Said to Demand Justice Dept. Pay Him \$230 Million for Past Cases*, N.Y. TIMES (Oct. 21, 2025), <https://www.nytimes.com/2025/10/21/us/politics/trump-justice-department-compensation.html> [<https://perma.cc/Y4HW-F3TN>]; see also Claim for Damage, Injury, or Death (Standard Form 95) from President Donald Trump to Dep’t of Just. (Aug. 7, 2024), <https://static01.nyt.com/newsgraphics/documenttools/873052e810ffe3d8/eb43fcf4-full.pdf> [<https://perma.cc/4CTS-JPTP>].

¹³⁸ 28 U.S.C. § 2675(a).

¹³⁹ Claim from President Donald Trump to Dep’t of Just., *supra* note 137, at 1.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* As the prior section discussed, courts may have no option but to consider “motive” in tort cases against law enforcement officers.

¹⁴² *Id.*

¹⁴³ Cf. *Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985) (describing judicial reluctance to second-guess prosecutorial priorities).

¹⁴⁴ President Trump also sought punitive damages for those torts, but the FTCA precludes such an award. See Claim from President Donald Trump to Dep’t of Just., *supra* note 137, at 9; 28 U.S.C. § 2674.

decisions, however discretionary, stemmed from considerations of social, economic, and political policy.¹⁴⁵

President Trump's administrative claim, though no doubt unintentionally, encourages tort claims by those injured by immigration enforcement officials' excesses, no matter how high up those actions were encouraged. Unless the higher-ups' orders emerged from concern for public policy, the discretionary function exception should not apply.¹⁴⁶ The Supreme Court's logic in *Martin* opens the United States to liability for nondiscretionary decisions, whether made on the street or in the White House.

C. Do Law Enforcement Officials Have the Discretion to Act Unconstitutionally?

Should it matter whether the policy fashioned by the officials' superiors, no matter if susceptible to social, economic, and political policy, is challenged as violative of the Constitution? Indeed, many have argued that the policies implemented by senior immigration officials have crossed the constitutional line.¹⁴⁷

President Trump's administrative claim itself sharply highlights the dilemma. Trump filed the publicly disseminated administrative claim shortly after the Supreme Court's decision in *Trump v. United States*,¹⁴⁸ which held that presidents are largely immune from prosecution for acts in office.¹⁴⁹ Should a court in the FTCA context have had to resolve the highly controversial issue of deciding whether a *former* president is immune from criminal prosecution before deciding whether the tort claim had merit? Similarly, the court would have had to resolve President Trump's additional argument that President Biden unconstitutionally appointed Jack Smith as Special Counsel to investigate President Trump's actions and that the investigation that led to the Mar-a-Lago raid was therefore

¹⁴⁵ The courts would then need to determine whether, even if the prosecutorial decisions were discretionary, the unconstitutionality of the prosecution and appointment negated the discretionary function defense. *See infra* Section III.C.

¹⁴⁶ And, if President Trump's claims that a decision to prosecute, if based on spite, is not protected are valid, then so too would Border Patrol officers' malicious actions be subject to suit.

¹⁴⁷ E.g., Tom Jawetz, *The Trump Administration's Assault on Immigrants Degrades the Rule of Law*, CTR. AM. PROGRESS (May 28, 2026), <https://www.americanprogress.org/article/the-trump-administrations-assault-on-immigrants-degrades-the-rule-of-law/> [https://perma.cc/5LUA-4ZRG].

¹⁴⁸ 603 U.S. 593 (2024). The *Trump v. United States* decision was released on July 1, 2024, and President Trump filed his administrative claim just one month later on August 7, 2024. *See* Claim from President Donald Trump to Dep't of Just., *supra* note 137.

¹⁴⁹ *Trump*, 603 U.S. at 609, 615.

unconstitutional.¹⁵⁰ In other words, must courts resolve all constitutional claims, no matter how novel and complex, prior to deciding whether the tort claim itself has legs?

Most appellate courts and nearly every commentator to weigh in on this issue have found that government officials have no *discretion* to follow unconstitutional directives.¹⁵¹ Currently, there is a five-to-two (or six-to-two, depending on one's perspective) split in the courts of appeals, with the majority holding that, by definition, federal officials forfeit the discretionary function defense if their actions violate the Constitution.¹⁵² In other words, if the conduct challenged is unconstitutional, the discretionary function exception cannot provide shelter, irrespective of whether the conduct is susceptible to policy analysis. The argument boils down to the observation that government officials never have the discretion to violate the Constitution. As the Second Circuit explained, “[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally.”¹⁵³

In contrast, the two courts in the minority hold that, as long as the government employee's action was steeped in the social and economic policy protected by the discretionary function exception, the question of whether the action violates the Constitution is irrelevant.¹⁵⁴ According to these courts, Congress intended to protect discretionary decisions even if adverse to the Constitution.

¹⁵⁰ Claim from President Donald Trump to Dep't of Just., *supra* note 137, at 9.

¹⁵¹ With respect to commentators, see Sisk, *supra* note 54, at 1829–31; Patrick Jaicomo & Anya Bidwell, *Through the Federal Accountability Looking Glass*, CATO SUP. CT. REV. 135, 152–53 (2025); Olivia Goldberg, Note, *(Extra)ordinary Tort Law: Evaluating the Federal Tort Claims Act as a Constitutional Remedy*, 76 STAN. L. REV. 486, 505–06 (2024); Laney Ivey, Comment, *It's Time to Resolve the Circuit Split: Unconstitutional Actions by Federal Employees Should Not Fall Within the Discretionary Function Exception of the FTCA*, 73 MERCER L. REV. 1351, 1352–53 (2022); Note, *Recovering the Lost Meaning of the Federal Tort Claims Act's "Discretionary Function Exception"*, 138 HARV. L. REV. 654, 656–57 (2024); Daniel Raddenbach, Note, *Unconstitutional but Authorized: The Federal Tort Claims Act Should Not Immunize the United States When Federal Officers Violate the Constitution*, 106 MINN. L. REV. 1121, 1156–59 (2021). For an exception, see Liam Grah, Comment, *Adjusting Immunity for Unconstitutional Torts*, 2024 U. CHI. LEGAL F. 427, 444–45.

¹⁵² With respect to appellate courts, see *Loumiet v. United States*, 828 F.3d 935, 943–46 (D.C. Cir. 2016); *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009); *Nurse v. United States*, 226 F.3d 996, 999–1000 (9th Cir. 2000); *Raz v. United States*, 343 F.3d 945, 947 (8th Cir. 2002); *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986). In dicta, at least one other court of appeals has espoused the majority position. See *Myers & Myers, Inc. v. U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975).

¹⁵³ *Myers & Myers*, 527 F.2d at 1261.

¹⁵⁴ *Kiiskila v. United States*, 466 F.2d 626, 627–28 (7th Cir. 1972); *Shivers v. United States*, 1 F.4th 924, 930 (11th Cir. 2021).

But the question under the FTCA is whether Congress intended courts to initially determine whether the officials' actions were constitutional *before* deciding whether the discretionary function exception applies. Consideration of the statutory text and judicial restraint suggests that both sides of the debate are misguided and that the answer lies in between: The government should only lose the protection of the discretionary function defense when its employees violate a clear constitutional command. For starters, if the constitutional issue has not been previously decided, then it is hard to see why discretion no longer exists. The government officials retain "choice" because the Constitution (or statute) at the time the conduct occurred did not clearly delimit the official's conduct. For example, it is still not clear whether Jack Smith's appointment as special counsel comported with the Constitution.¹⁵⁵ Thus, before a court determines what an ambiguous constitutional or statutory provision means, government actors should be understood to retain their "choice" as to how to act. Such officials are not clairvoyant.

Additionally, judicial restraint considerations strongly support rejecting the discretionary function defense only when a constitutional or statutory command *clearly* removes discretion from the government employee involved.¹⁵⁶ If the government asserts the discretionary function exception as a defense in an FTCA case, the federal court must determine whether the challenged action is "susceptible to policy analysis" before reaching the merits of the tort suit.¹⁵⁷ Forcing a court to consider the constitutional question up front would reverse the general presumption that constitutional issues are to be avoided—courts would have to address constitutional questions even when not dispositive, given that the conduct might ultimately prove not to be tortious.¹⁵⁸ Congress simply did not intend for litigants to

¹⁵⁵ For one commentary, see Thomas Berry, *Analyzing Judge Cannon's Opinion: Was Jack Smith Legally Appointed?*, YALE J. ON REG.: NOTICE & COMMENT (July 24, 2024), <https://www.yalejreg.com/nc/analyzing-judge-cannons-opinion-was-jack-smith-legally-appointed-by-thomas-berry/> [<https://perma.cc/66VA-8978>].

¹⁵⁶ To be sure, tough calls arise as to how applicable existing precedent is, as reflected in qualified immunity cases. For instance, the Supreme Court has held that constitutional violations are clearly established if "existing precedent" has placed the "constitutional question beyond debate." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

¹⁵⁷ Congress thereby departed to some extent from the common law regime of suits against individual government defendants. Plaintiffs could recover from such defendants even if they acted pursuant to government instructions if the plaintiffs could demonstrate that the instructions were themselves unconstitutional. Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987).

¹⁵⁸ For a general discussion of the clear statement rule, see *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). In determining whether individual immunity attaches in a *Bivens* claim, the Supreme Court has relaxed the requirement that lower courts should determine first

challenge the constitutionality of government policy through the FTCA, but rather to challenge the application of that policy in discrete contexts when it resulted in tortious conduct.

Indeed, consider the recent news that the Department of Homeland Security authorized Immigration and Customs Enforcement (“ICE”) agents to break into houses without a judicial warrant.¹⁵⁹ The Department’s memo reflects purposeful policy, one that is likely a clear violation of the Fourth Amendment. Based on prior decisions, the Fourth Amendment arguably leaves ICE agents no discretion to carry out such warrantless home intrusion. Thus, if courts determine that the relevant constitutional principles are firmly established, that determination would leave the federal employees no choice but to deviate, and the discretionary function exception would be inapplicable.

But if the constitutional question is open, then courts should proceed without assessing the constitutionality of the challenged action as a matter of first impression. Rather, the courts should focus on whether the conduct stems from discretion steeped in economic, social, or political policy. *Berkovitz* held that a government employee would not be left with a permissible choice if the governing legal framework—including the Constitution—“specifically” prescribed a different course of action.¹⁶⁰ Thus, the constitutionality of federal employees’ actions can be relevant, but not if the constitutional arguments advanced—as with President Trump’s Article II arguments in his administrative claim—had not been previously determined with some degree of specificity.¹⁶¹

Consider the *Caban* decision again. The court there stressed that, if official administrative policy led to the mistaken deportation, a tort suit could not proceed.¹⁶² Such policies can be challenged through the APA or other means but should not be challenged via a tort suit. The pertinent regulation, which gave immigration officers the authority to detain Caban, has since been amended to require noncitizens to provide biometric information when

whether a constitutional right was violated and instead permits the courts to ascertain the potentially simpler issue of whether the right was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

¹⁵⁹ Rebecca Santana, *Immigration Officers Assert Sweeping Powers to Enter Homes Without a Judge’s Warrant, Memo Says*, AP (Jan. 21, 2026, at 21:27 ET), <https://apnews.com/article/ice-arrests-warrants-minneapolis-trump-00d0ab0338e82341fd91b160758aeb2d> [<https://perma.cc/GF9A-TP2C>].

¹⁶⁰ *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

¹⁶¹ The Third Circuit has rejected this approach squarely. *See Xi v. Haugen*, 68 F.4th 824, 834 (3d Cir. 2023); *Bryan v. United States*, 913 F.3d 356, 364 (3d Cir. 2019) (suggesting that the analogy to qualified immunity was unsound).

¹⁶² *Caban v. United States*, 671 F.2d 1230, 1233 (2d Cir. 1982).

requested.¹⁶³ This requirement is of uncertain constitutionality. If agents detain an individual for refusing to supply the biometric information that the regulation requires and the subsequent detention is challenged under the FTCA, the majority of courts would seemingly invite litigation of that potential constitutional issue even before the question of whether the detention implicates the public policy that is protected by the discretionary function exception.

Indeed, two aspects of the FTCA reinforce that courts should not, as a matter of first impression, assess the constitutionality of any policy challenged directly or indirectly in a tort action under the FTCA. First, as mentioned previously, Congress specifically refused to waive the government's immunity from *Bivens* claims.¹⁶⁴ That refusal logically reflects Congress's view that courts assessing tort suits should avoid engaging in constitutional decision-making and instead focus on whether the conduct challenged constitutes a tort under the relevant state law and whether the discretionary function exception provides a defense.¹⁶⁵ Indeed, it is hard to imagine that the Congress that refused to waive the federal government's immunity from *Bivens* claims against its employees would have exposed the federal government to liability for similar conduct if plaintiffs could convince a court, as a matter of first impression, that the conduct challenged violated a constitutional right.

Second, the first part of the discretionary function exception exempts "[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."¹⁶⁶ In other words, if the official's act is in the service of a regulation later found invalid, whether on constitutional, statutory, or procedural grounds, that invalidity does not give rise to a tort action. That subsection reinforces Congress's intent that the discretionary function exception applies even if the challenged conduct flowed from a rule later deemed unconstitutional. Only if constitutional provisions leave the government official little choice should the discretionary function defense be forfeited. Congress did not intend the FTCA to be the means by which new constitutional decisions are to be reached.

Perhaps commentators have argued that courts should reach every constitutional challenge to a government official's exercise of discretion in an FTCA suit because the courts have, by and large, expanded the

¹⁶³ 8 C.F.R. § 235.1(f)(1) (2025).

¹⁶⁴ See *supra* note 8.

¹⁶⁵ See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 471–72 (1994).

¹⁶⁶ 28 U.S.C. § 2680(a).

discretionary function exception in holding the government immune merely when an action *conceivably* could have arisen from social or economic concerns.¹⁶⁷ Under the current approach, as shown in *Hart* and *Gonzalez*, there need not be any evidence that deliberate consideration was given to the long-term impact of the course of action, let alone evidence that public policy was even considered.¹⁶⁸ In contrast, if the government is required to demonstrate that law enforcement officials' actions involved public policy considerations, then such observers would presumably be more comfortable that the exception applies only when the constitutional command is clear.

In essence, the approach sketched above mirrors the qualified immunity doctrine protecting individual government defendants in *Bivens* actions. The Supreme Court in *Harlow v. Fitzgerald*¹⁶⁹ held that a government defendant's immunity from suit attaches unless the officer's conduct violated a clearly established constitutional right that a reasonable person would have known.¹⁷⁰ Thus, if the individual governmental defendants can show that, whether or not the constitutional right exists, it was not firmly established, the case will be dismissed.¹⁷¹ Similarly, the discretionary acts of government employees should be protected from tort suit unless the conduct challenged violates clear constitutional or statutory commands.

Given the disparity between qualified immunity in the *Bivens* cases and how the majority of courts currently apply the discretionary function exception, plaintiffs are better off recasting any constitutional claims into a tort claim and suing under the FTCA. Challenges to law enforcement actions in particular can straddle the fence between tortious and constitutional violations. For instance, many, if not most, Fourth Amendment violations can also be viewed as torts.¹⁷² Determining whether the enforcement officials' conduct comported with the Constitution is not key to the statutory question of whether a tort arose under the relevant state law where the action occurred. Rather, the relevant question is whether the constitutional provision robbed the government official of the ability to make that discretionary judgment.

The facts in *Martin* illustrate the issue. FBI agents executed a search at the wrong house, used a flash grenade to gain entry, and then brandished a weapon against the frightened occupants.¹⁷³ The entry was intentional, and the district court proceeded to analyze the case in part as an intentional tort

¹⁶⁷ See *Gonzalez v. United States*, 814 F.3d 1022, 1032 (9th Cir. 2016).

¹⁶⁸ *Id.* at 1033; *Hart v. United States*, 630 F.3d 1085, 1090 (8th Cir. 2011).

¹⁶⁹ 457 U.S. 800 (1982).

¹⁷⁰ *Id.* at 818–19.

¹⁷¹ *Id.*

¹⁷² See *Goldberg*, *supra* note 151, at 507.

¹⁷³ *Martin v. United States*, 605 U.S. 395, 399 (2025).

under the FTCA’s law enforcement proviso.¹⁷⁴ But the mistake in the address was negligence of the most basic kind. The “warrantless” entry also likely violated the Martin family’s Fourth Amendment right to privacy in their home. The labels should not be dispositive. Instead, what is key in the *Martin* context is that the type of discretion exercised—which house to enter—is not the type of discretion protected by the discretionary function exception.¹⁷⁵ The constitutional issue is only relevant to the extent that it robs the government defendant of the discretion to act in a particular way. Thus, the discretionary function exception defense should only be blocked when the constitutional or statutory command violated is clearly established.

In keeping with the Supreme Court’s recent decision in *Martin*, those injured by the excesses of ICE and the Border Patrol can most certainly seek relief for both negligent and intentional torts under the FTCA. Assaults are actionable, as are false arrests. And that result largely would not change even if the conduct had been blessed or even originated by a higher-up. But the discretionary function exception should block suit if the government can show that the policy pursued arose out of *considered* public safety or other public policy, and that no clear constitutional or statutory provision prevents the government employee from exercising such discretion.

CONCLUSION

In short, victims of law enforcement authorities’ excesses should be able to seek relief under the FTCA. That is what Congress intended by enacting the law enforcement proviso. The discretionary function exception shields the government only when the conduct challenged is steeped in public policy, and law enforcement actors who single out bystanders to assault or who enter dwellings without a warrant rarely so qualify. Moreover, even when law enforcement authorities’ actions reflect public policy, the discretionary function exception should not apply if the policy flies in the face of existing constitutional or statutory precedent.

¹⁷⁴ *Martin v. United States*, 631 F. Supp. 3d 1281, 1295 (N.D. Ga. 2022).

¹⁷⁵ Nonetheless, the Eleventh Circuit on remand from the Supreme Court in *Martin v. United States* held the exception applicable, reasoning that the exception protects even “careless” conduct as long as a “modicum of discretion” exists. No. 23-10062, 2026 WL 3015490, at *5, *7 (11th Cir. Oct. 7, 2026) (per curiam). The panel evidently believed that prior Eleventh Circuit precedent permitted no other conclusion, but it called for a reexamination at a subsequent time. *Id.* at *19 (Jordan, J., concurring).