11-1988

Absolute Immunity for State-Law Torts Under Westfall v. Erwin: How Much Discretion Is Enough?

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Introduction

The plaintiff who seeks to maintain an action in tort against a federal employee has basically two choices. First, after complying with various procedural requirements, the plaintiff may initiate suit under the Federal Tort Claims Act (FTCA) against the United States.[2] The act is a waiver of sovereign immunity and, in spite of the existence of exceptions to its coverage,[3] has generally been interpreted broadly.

The other alternative available to the plaintiff is a suit against the employee in his individual capacity based upon either state-law[4] or constitutional[5] tort. One of the employee's first lines of defense against such actions is official immunity.[6] Fairly distinct bodies of law have developed for immunity in suits alleging constitutional torts[7] and those based in state-law. Courts generally recognize absolute immunity from tort actions for executive officials in quasi-judicial functions.[8]

A federal employee sued in state-law tort will seek the protection of absolute immunity. The leading Supreme Court case in the area is *Barr v. Matteo.*[9] The case had come to stand for the rule that a federal employee was entitled to absolute immunity against suit based in state-law tort when the actions giving rise to the suit were "within the outer perimeter of [the employee's] line of duty."[10] The courts of appeals split on whether immunity also required conduct that was "discretionary" in nature.[11] The Supreme Court resolved this conflict in *Westfall v. Erwin,*[12] by unanimously holding that discretion was indeed a prerequisite to absolute immunity. In spite of the Court's efforts to provide some guidance for a workable definition of "discretion," the case raises serious concerns over how federal officials should function and when they can be held individually responsible for damages resulting from the performance of their duties.

Westfall v. Erwin

William Erwin, Sr., a federal employee, was a warehouseman at an Army depot in Alabama, who sustained injuries due to exposure to toxic soda ash while at the workplace. He alleged that his supervisors, also federal employees, were negligent in causing, permitting, or allowing him to inhale the soda ash. Plaintiff alleged that the ash should not

*This article was originally submitted in partial satisfaction of the requirements of the 36th Judge Advocate Officer Graduate Course.

[1] 108 S. Ct. 580 (1988). The author uses the term "state-law tort" to refer to all tort actions brought under state codified or common law.

[2] 28 U.S.C. §§ 1346(b), 2671–80 (1982). Section 1346(b) provides that the United States may be sued in federal district court for damages for injuries or loss of property caused by the negligent or wrongful conduct of a federal employee acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable according to the law of the place where the tort occurred. Section 2401(b) requires the tort claim to be presented within two years after it accrues to the federal agency where the tortfeasor was employed when the tort occurred. The FTCA action must be filed within six months of the agency's denial of the claim. Section 1402(b) places venue in the district where plaintiff resides or where the tort occurred.

[3] 28 U.S.C. § 2680 lists areas where the United States has not waived sovereign immunity, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contractual relations. The only remedy for plaintiffs alleging these torts is to sue the tortfeasor directly in state court.

[4] Even if the action is not specifically precluded under an FTCA exception, *see supra* note 3, plaintiffs may choose suit under state law to avoid other provisions of the act, to avoid the requirement to prove the defendant acted within the scope of his employment to obtain trial by jury and the possibility of punitive damages, or simply to obtain representation by an attorney who would otherwise be limited to a statutory fee. *See* P. Schuck, Suing Government 41–43 (1983) [hereinafter *Suing Government*]. See generally Schuck, *Suing Our Servants; The Court, Congress, and the Liability of Public Officials for Damages,* 1980 Sup. Ct. Rev. 281 (1981) [hereinafter *Suing Our Servants*]; Woolhandler, *Patterns of Official Immunity and Accountability,* 37 Case W. Res. 396 (1987); Comment, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity,* 37 Okla. L. Rev. 285 (1984); Jaffe, *Suits Against Governments and Officers: Damages Actions,* 77 Harv. L. Rev. 209 (1963); Mayer, *Immunity Denied to Federal Officials Failing to Perform Discretionary Duties: Estrada v. Hills,* 401 F. Supp. 429 (N.D. Ill. 1975), 35 Fed. B.J. 206 (1976).

[5] *See generally Suing Government, supra* note 4; Woolhandler, *supra* note 4; Comment, *supra* note 4.

[6] Certain statutory provisions may immunize the employee and/or substitute the United States as the defendant. These statutory immunities can be categorized according to the way in which protection is afforded. *See, e.g.,* 21 U.S.C. § 885(d) (1982) (immunizing all officials engaged in enforcement of the Controlled Substances Act); 10 U.S.C. § 1089(a) (1982), 28 U.S.C. § 2679(b) (1982) (providing that exclusive remedy is suit against United States); 28 U.S.C. § 2676 (1982) (recovery against United States precludes subsequent suit against individual); 10 U.S.C. § 1089(f) (1982) (allowing indemnification by United States).

[7] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (immunity from constitutional torts granted where official is performing discretionary functions insofar as conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

[8] *See generally* Butz v. Economou, 438 U.S. 478, 508–17 (1978); Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987); Harper v. Jefferies, 808 F.2d 281 (3d Cir. 1986); Ryan v. Bilbey, 764 F.2d 1325, 1328 n.4 (9th Cir. 1985).

[9] 360 U.S. 564 (1959). The Court decided the companion case, Howard v. Lyons, 360 U.S. 593 (1959), at the same time. The two cases are referred to collectively as Barr v. Matteo.

[10] *Barr,* 360 U.S. at 575.

[11] *See* Doe v. McMillan, 412 U.S. 306, 322 (1973) (holding that scope element alone was not the rule and suggesting a requirement for discretion). *Compare* General Electric Co. v. United States, 812 F.2d 1273, 1276–77 (4th Cir. 1987) *and* Poolman v. Nelson, 802 F.2d 304, 307 (8th Cir. 1986) (immunity attaches for all acts performed within outer perimeters of scope of duties) *with* Johns v. Pettibone Corp., 769 F.2d 724, 728 (11th Cir. 1985) *and* Araujo v. Welch, 742 F.2d 802, 804 (3d Cir. 1984) (immunity requires scope of duties and discretionary function).

[12] 108 S. Ct. 580 (1988).

have been stored in his warehouse, and that he should have been warned of the presence and danger of the ash. Defendants removed the state court action to the United States District Court for the Northern District of Alabama.[13]

The district court granted summary judgment to the defendants on the ground that they were immune from suit as a matter of law because they were acting within the scope of their duties when the alleged negligence occurred.[14] On appeal, the Court of Appeals, 11th Circuit, held that although the district court had been correct in its interpretation of the law at the time of the decision, an intervening decision in another case placed the 11th Circuit with those circuits requiring that the complained-of acts also be discretionary in nature.[15] Because a genuine dispute over a material issue of fact existed as to the discretion issue, summary judgment was inappropriate and the 11th Circuit reversed the district court.[16] The Supreme Court granted certiorari to resolve the dispute among the circuits on the need for discretion[17] and affirmed.[18]

The Supreme Court began its analysis by returning to its decisions in *Barr v. Matteo*[19] and *Doe v. McMillan,*[20] the only precedent cited in the entire opinion. In those cases, the Court explicated the original rationale for absolute immunity for government officials against suits for state-law tort. The Court recognized that immunity grew from a balancing of the values of insulating the decision-making process from the harassment of prospective litigation against those of providing injured parties with remedies and allocating accountability of tortfeasors. In addition to the "outer perimeter" test of *Barr,*[21] the Court recognized a discretionary function requirement. Next, the Court rejected a mechanical test for the application of the discretionary function requirement, and placed the burden for establishing entitlement to immunity squarely on the party seeking to invoke its protection. The posture of the case,[22] however, prevented any precise definitions of the boundaries of official immunity or the level of discretion necessary to obtain absolute immunity. The Court recommended that Congress establish standards governing the area. Finally, the Court held that future cases must balance the competing factors to ensure the proper extension of the protections of immunity.

The purpose of official immunity is to insulate the decision-making process from the harassment of prospective litigation.[23] The underlying assumption is that federal officials who fear litigation and personal liability will be unduly timid in the execution of their duties.[24] The most eloquent statement of this principle appears in the opinion of Judge Learned Hand in *Gregoire v. Biddle*:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[25]

However meritorious the protections afforded by absolute official immunity, the injured party is denied recovery on an otherwise valid claim simply because his tortfeasor is a federal official, and the federal official avoids judicial accountability for misconduct. In striking a balance between these competing concerns, the Supreme Court held that absolute immunity is justified only when the benefits of immunity outweigh the "perhaps recurring harm to individuals."[26]

It is intuitively obvious that effective government and fearless performance of duties by officials would be enhanced only when immunity attaches to acts within the scope of the official's duties. This concept is best interpreted broadly, so as to encompass the implicit as well as explicit responsibilities of office.[27] Logic also dictates that the most apparent socially negative effect of potential liability will be in areas where a decision must be made and where that liability is not a desired element of the decision matrix.[28] The premise of the Supreme Court's resolution of the conflict over the need for a discretionary function requirement is that potential liability only has an effect on conduct that is

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[13] *Id.* at 582.

[14] Erwin v. Westfall, 785 F.2d 1551, 1552 (11th Cir. 1987).

[15] Johns v. Pettibone Corp., 769 F.2d 724, 728 (11th Cir. 1985).

[16] Erwin v. Westfall, 785 F.2d at 1552–53.

[17] Westfall v. Erwin, 107 S. Ct. 1346 (1987).

[18] The precise holding of the Court was that "absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." Westfall v. Erwin, 108 S. Ct. 580, 585 (1988).

[19] Barr v. Matteo, 360 U.S. 564 (1959).

[20] Doe v. McMillan, 412 U.S. 306 (1973).

[21] *Barr,* 360 U.S. at 575.

[22] *Westfall,* 108 S. Ct. at 585; *see also supra* text accompanying note 16.

[23] *Westfall,* 108 S. Ct. at 583. *See generally Suing Government, supra* note 4; *Suing Our Servants, supra* note 4 (offering empirical justifications for immunity based upon the calculus of official decision making). *Cf.* Woolhandler, *supra* note 4 at 400–06 (suggesting that liability for executive acts serves a parallel purpose to requirements of judicial process for judicial behavior).

[24] *Westfall,* 108 S. Ct. at 583.

[25] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), *cert. denied,* 339 U.S. 949 (1950) (quoted at length in Barr v. Matteo, 360 U.S. 564, 51–72 (1959)).

[26] *Westfall,* 108 S. Ct. 583 (quoting Doe v. McMillan, 412 U.S. 306, 320 (1973)).

[27] *See* Barr v. Matteo, 360 U.S. at 575.

[28] In fact, whether or not officials are empowered to make choices, they can respond to fear or threat of litigation and liability through delay, inaction, building records, or substituting riskless behavior wherever possible. *See Suing Our Servants, supra* note 4 at 305–15. Logically, that society would benefit by "free-market government" where, as in general tort law, liability served to conform conduct to social norms. Such effects, however, would only be noticed at a level of decision making where immunity would clearly attach to an official's choices.

a product of judgment or discretion, and that some tortious, in-scope conduct will involve neither.[29]

As an alternative to the argument that there should be no discretionary function element, defendants-petitioners argued that immunity should attach as long as there was present "minimal discretion." Under this model, petitioners suggested that if the precise conduct were not mandated by law, courts should regard the act as discretionary. The Court reasoned that because virtually all official acts involve some choice, this approach would render the discretionary function requirement meaningless, and, more importantly, ignore the balance of benefits against costs essential to ensuring that immunity attach only where its purposes were served.[30] Conduct not entitled to absolute immunity, then, is that "involv[ing] the exercise of a modicum of choice and yet . . . largely unaffected by the prospect of tort liability, making the provision of absolute immunity unnecessary and unwise."[31]

As a part of a judicial doctrine, *Westfall* represents the essential third leg of a trilogy of absolute official immunity cases. Until or unless Congress acts to establish standards of its own,[32] case law will have to build upon what could now be termed the *Barr, Doe,* and *Westfall*[33] doctrine. For this reason, a brief review of the decisions in *Barr* and *Doe* is appropriate.

The *Barr* decision allowed absolute immunity based upon an explicit finding that the defendant had acted within the outer scope of his official duties as a government employee.[34] Defendant Barr was sued in tort for an alleged defamation resulting from the issuance of a press release concerning the imminent suspension of the plaintiffs, his subordinates.[35] The Court recognized that executive official immunity could not serve its basic purposes if it was limited only to cabinet-rank officials. The scope of immunity is determined not only by the function of the government official, but also by the nature of the acts involved. Of course, the facts of the individual case would be determinative and senior officials would receive immunity more often than lower ranking employees.[36] The *Barr* Court did not specifically require that the conduct complained of must be discretionary. The *Westfall* Court, though, construes *Barr* as turning on the discretionary nature of the defendant's acts.

In *Doe*, the Court applied *Barr* to a case where two of the defendants, federal officials, were acting within the outer perimeters of their duties, but did not appear to exercise any discretion in performing the act allegedly causing the plaintiff's injuries.[37] Plaintiffs sued a number of legislators, federal employees, and District of Columbia officials for invasion of privacy resulting from the publication and dissemination of a congressional report. All the defendants except the Public Printer and Superintendent of Documents received immunity. As to those officials, though the Court found them to be acting within the scope of their duties, it also found that they exercised no discretion with regard to the offending report. The Court remanded the case to determine other issues.[38] First, the Court explained that *Barr* did not establish a fixed, mechanical rule for immunity, but rather recognized the guiding principles that must be weighed in each case. Under *Doe*, the defendant must act within the outer perimeter of his duties, but the inquiry must continue. The official must also demonstrate that the function which gave rise to the allegedly tortious acts embodied a legitimate and desired exercise of discretion. Like the *Barr* case, however, the *Doe* decision did not explicitly require discretion as an element. Again, the *Westfall* Court found that discretion in the particular function giving rise to the lawsuit was crucial to the result.[39]

As a result of this incomplete model for decision, the conflict among the circuits arose. On one hand, some courts adopted the view that the *Barr* decision required a discretionary function element.[40] In opposition were cases holding that the test lay in defining the outer limits of the official's duties, though admitting that the discretionary nature of the act complained of would affect the definition of those limits.[41] Moreover, some courts saw *Barr* as applying only to defamation suits,[42] while some cited it as controlling in all state-law actions.[43]

The decision in *Westfall* is consistent with *Barr* and *Doe* in recognizing the essential conflict between the protection of the individual citizen against tortious injury, and the protection of the public interest through immunity for government agents.[44] The balancing of these factors is the consistent methodology for resolution of the three cases. The *Westfall* decision puts to rest any suggestion that *Barr* and *Doe* are to be confined to the governmental speech area.[45] The *Westfall* decision also connects the *Barr* and

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[29] *Westfall,* 108 S. Ct. at 583–84.

[30] *Id.* at 584–85.

[31] *Id.*

[32] *See infra* text accompanying notes 66–75.

[33] Barr v. Matteo, 360 U.S. 564 (1959); Doe v. McMillian, 412 U.S. 306 (1973); Westfall v. Erwin, 108 S. Ct. 580 (1988).

[34] *Barr,* 360 U.S. at 575.

[35] *Id.* at 568.

[36] *Id.* at 573.

[37] Doe v. McMillan, 412 U.S. 306, 322–23 (1973).

[38] *Id.* at 307–10, 324–25.

[39] *Id.* at 322–23.

[40] *See, e.g.,* Johns v. Pettibone, 769 F.2d 724, 727 (11th Cir. 1985).

[41] *See, e.g.,* Poolman v. Nelson, 802 F.2d 304, 308 (8th Cir. 1986).

[42] *See* Comment, *supra* note 4 at 295 n.72.

[43] *Id.* at 295 n.73.

[44] Barr v. Matteo, 360 U.S. 564, 565 (1959).

[45] *See supra* text accompanying note 13.

Doe cases with an independent discretionary function element and a cost-benefit analysis. If an official establishes that the tort-producing conduct was within the outer perimeter of the scope of duties, and that the conduct was discretionary in nature, it must then be shown that the situation is one where the public benefit of a grant of immunity outweighs the loss occasioned by denying relief to the plaintiff.

Federal officials, or their federal attorneys, can be expected to argue that *Westfall* creates more problems than it resolves. Perhaps the most serious of these is uncertainty in the performance of duties occasioned by inability to define "discretionary." Most officials can easily determine, in advance, when their conduct is within the outer perimeters of their duties. Because virtually all official conduct involves some choice, the lack of certainty about whether acts are discretionary could produce exactly the timidity that absolute immunity was created to prevent. Some of these problems can be addressed and some of the effects of the decision anticipated. Ultimately, the question is how to interpret and apply the decision until, by legislation or through the development of a body of case law, some measure of predictability returns to the area.

Problems with the *Westfall* Decision

An overview of the language of the *Westfall* decision raises a number of serious questions about how it is to be applied by the lower federal courts. Obviously, the most significant problems will be with attempts to define the term "discretionary in nature."[46] A section of the discussion below is dedicated to that problem. First, however, an examination of other problems is appropriate.

A more subtle, and yet potentially far-reaching issue raised by the *Westfall* decision is whether it had any effect on the *Barr* doctrine other than to clarify the existence of the discretionary function element. The primary question is whether the case modifies *Barr's* reliance on *Gregoire v. Biddle.*[47]

Although the decision states that the purpose of immunity is to protect officials from the harrassment of litigation, the Court uses language that suggests that the only way that effective government could be furthered by immunity is by shielding officials from liability. In the course of three sentences explaining why a discretionary function element is required, the Court refers only to the threat of potential liability.[48] One of the premises of the *Barr* doctrine was that mere involvement in litigation is sufficiently debilitating to effective government to justify the existence of official immunity.[49]

The Court justifies its decision to impose a discretionary function element as consistent with the functional analysis in *Doe* and other immunity cases.[50] Functional analysis as a methodology for determining whether absolute immunity is available requires the defendant to leap two hurdles. First, the defendant's position must encompass official duties of a kind that warrants the protection of immunity. Second, the act that gave rise to alleged liability must have been the result of the performance of a protected function.[51] It is with this analysis that the Court limited absolute immunity for Presidential aides in *Harlow v. Fitzgerald.*[52] Likewise, in *Forrester v. White,* the Court denied absolute immunity from damages under 42 U.S.C. § 1983 to a state court judge, whose decision to fire a court employee was deemed to be administrative as opposed to judicial.[53] While there is an attractive symmetry to using the substantially identical two-step analysis of *Westfall* for officials sued for state-law torts, it is in application that the theory breaks down.

Under *Harlow,* a safety net against frivolous suits and the vexation of litigation is created by the objective test for qualified immunity from constitutional torts. Under *Harlow,* officials are shielded from liability only insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[54] Likewise, under *Forrester,* judges still enjoy absolute immunity from damages for judicial acts.[55] In their respective spheres, both tests provide reasonably objective, workable criteria suitable for application at summary judgment.[56]

Unlike qualified immunity for constitutional torts and absolute immunity for judicial acts, the *Westfall* standard does not provide a safety net to protect against frivolous

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[46] Westfall v. Erwin, 108 S. Ct. 580, 585 (1988).

[47] *See* Barr, 360 U.S. at 571–72.

[48] Westfall v. Erwin, 108 S. Ct. 580 (1988).

> The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decision-making discretion that potential liability may shackle the fearless, vigorous, and effective administration of policies of government.

Westfall, 108 S. Ct. at 584 (citations omitted) (emphasis added).

[49] *See* Barr, 360 U.S. at 571. *See also* Mitchell v. Forsyth, 472 U.S. 511, 525–30 (1985) (holding that a district court's denial of a claim of immunity is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment); Martin v. D.C. Metropolitan Police, 812 F.2d 1425, 1430 (D.C. Cir. 1987) (discovery sufficient to contest a motion for summary judgment is one of the burdens that immunity was designed to protect against).

[50] *Westfall,* 108 S. Ct. at 583 n.3.

[51] Harlow v. Fitzgerald, 457 U.S. 800, 812–13 (1981).

[52] *Id.*

[53] 108 S. Ct. 538 (1988).

[54] *Harlow,* 457 U.S. at 818.

[55] *Forrester,* 108 S. Ct. at 543–44.

[56] In *Harlow,* the Court devoted an extensive portion of the opinion to its explication of the test for qualified immunity and the importance of resolving immunity issues at summary judgment. *457 U.S. at 413–20.* While the ultimate holding of the Court was a limitation on the immunity of Presidential aides, the objective test represents a practical approach to the resolution of competing interests conspicuously absent in *Westfall.*

lawsuits, artful pleading, or protracted discovery[57] to establish facts. The official sued under state-tort law is effectively thrown out with the immunity bath water. The Court makes no effort to establish the kind of objective criteria found in *Harlow* and *Forrester,* and leaves a definition of discretionary function to the lower courts. As the lower courts wrestle with a definition of discretionary function, it is conceivable that the area will become so fact-specific and complex that the legal question of whether immunity is available must await retrospective explication of the facts of the individual case.

A shift in emphasis from prospective to retrospective analysis violates the underlying rationale for immunity. When the defendants argued that immunity should follow a finding of "minimal discretion," an objective analysis based upon whether or not conduct was expressly required by statute or regulation, the Court responded that such a rule would ignore the balancing test and the underlying purposes of the official immunity doctrine.[58] The *Barr* Court first recognized that immunity protects against the harassment of litigation, allowing federal officials to expect that they will not be sued for their official acts, and thereby enhancing efficient decision making.[59] Liability should also be viewed prospectively, with an emphasis on its deterrent effect upon conduct by officials. The *Westfall* decision will undoubtedly deter nondiscretionary actors. Due to the lack of clearly articulated standards, the decision can also be expected to deter discretionary actors who don't know how to define their conduct. The lower courts are left with the enormous task of creating a test that is clear and capable of application at summary judgment.

One district court recently indicated that analysis of the immunity defense requires no more than examination of plaintiff's allegations.[60] The Tenth Circuit, in a pre-*Westfall* decision, has stated that immunity is an issue that can be decided as a matter of law at summary judgment.[61] The threat of protracted litigation and resulting interference with government could become significant absent recommitment to disposition of cases at the earliest stage.

The Court made it clear that the government official has the burden of proving entitlement to immunity.[62] The question is how the official is expected to prove entitlement to immunity at summary judgment. Minimal discretion is insufficient.[63] Beyond that, officials and agency attorneys must await development of the definition of discretionary. Meanwhile, officials remain uncertain of whether they will be liable for the consequences of performing their assigned duties.

Another potentially troublesome phrase in the precise holding of *Westfall* is the reference to testing whether the "challenged" conduct of the official is within the outer perimeter of an official's duties and is discretionary in nature.[64] The question is whether such a term would allow the plaintiff to control the existence of immunity merely through a calculated focus on an insufficiently discretionary act. Sufficiently fine slicing could separate every allegedly tortious act from an official function. Alternatively, the plaintiff would only have to identify some employee or official in the casual chain who could not meet the discretionary function requirement. In the multilayered bureaucracy characteristic of the federal government, it is likely that such a person always exists. These possibilities suggest two additional problems potentially resulting from the *Westfall* decision. First, defendants can fairly be expected to advocate "derivative" immunity for nondiscretionary acts performed at the behest of superior officials performing discretionary functions. Derivative immunity was rejected by the Court in *Harlow* as inconsistent with the functional approach to immunity.[65] Where officials may operate under objective guidance and criteria concerning immunity, this rationale is sound. The undefinable nature of the discretionary function element in a state-law tort context may justify a revisiting of the derivative immunity concept in order to ensure that government is not unduly impinged by threats of protracted litigation and potential liability. Further, it would not be inconsistent with a functional analysis approach to view a particular discretionary function as extending vertically through several levels of responsibility, thus protecting both policy makers and policy implementers.

Second, *Westfall* may encourage plaintiffs to focus their allegations on "ministerial" acts and actors. The decision may subvert a stated goal of the functional approach, providing recovery to injured parties, by directing law suits against officials who may well be judgment-proof due to their lower status in the bureaucracy. The courts could resolve these dilemmas through a careful analysis of the true nature and cause of the injury alleged, a broad interpretation of official "functions," and by refusing to be bound merely by the allegations of the complaint.

As part of the resolution of immunity issues, the Court requires a balancing of elements, and immunity is possible only where the benefits to effective government outweigh potential harm to plaintiffs. The overall posture of the balancing test required by the Court is unclear. The question is whether the test constitutes a separate third prong of the official immunity decision matrix, or whether it is inherent in examining for a discretionary function. Curiously, in some cases before *Westfall,* the need to balance benefits against costs was adopted as a "necessity test" and as a justification

[57] Insubstantial lawsuits should not be allowed to proceed to trial, as they undermine the effectiveness of government as contemplated by our constitutional structure. Firm application of the Federal Rules of Civil Procedure is fully warranted in such cases. *Harlow,* 457 U.S. at 819 n.35 (citing Butz v. Economou, 438 U.S. 478, 507–08 (1978)).

[58] Westfall v. Erwin, 108 S. Ct. 580, 584–85 (1988).

[59] Barr v. Matteo, 360 U.S. 564, 571 (1959).

[60] Owens v. Turnage, 681 F. Supp. 1095, 1097 n.3 (D.N.J. 1988).

[61] *See* Chavez v. Singer, 698 F.2d 420, 421 (10th Cir. 1983).

[62] *Westfall,* 108 S. Ct. at 585.

[63] *Id.* at 584–85; *see also* text accompanying note 29.

[64] *Id.*

[65] Harlow v. Fitzgerald, 457 U.S. 800, 810–11 (1981).

for not applying a discretionary function test.[66] The opinion in *Westfall*, however, appears to conclude that the balancing test is a guiding principle best implemented by the discretionary function and outer-perimeter tests. In light of the difficulty inherent in a judicial approach to the social question of balancing public benefits against individual harms, the balancing test perhaps best remains an underlying consideration, used to validate the results of the two-prong test of scope and discretion.

The Court's holding requires that the challenged conduct be discretionary in nature. Aside from the creation of a "floor" level of discretion at some point more than "not specifically required by statute or regulation," the Court provides no definition of the requirement other than reference to the underlying balancing of competing interests.[67] The issue is of paramount importance to government employees because potential exposure to suit guides many acts of choice that rest in the broad gray area between acts that are purely ministerial and those that are totally discretionary in nature.[68] Unfortunately, courts have wrestled with the problem in the past and have been unable to develop a workable definition.

The problems associated with developing a definition from the *Westfall* opinion begin with deciding the operational phrase, whether it is "discretionary," "discretionary in nature," or "conduct [that] is discretionary in nature."[69] This dilemma is more than semantic because the courts ultimately will decide whether the particular act must be the product of discretion, or merely the product of generally discretionary conduct. Other questions in need of answers include whether inaction is conduct, and whether there can be non-conduct of a discretionary nature. One troubling indication of where the Court may be heading in this area appears in *Berkovitz* v. *United States*,[70] a case involving the discretionary function exception to the FTCA. The plaintiff, who contracted polio after ingesting an oral polio vaccine, alleged that the Department of Biologic Standards, then a part of the National Institute of Health, negligently failed to follow its own mandatory regulations in approving the manufacture and distribution of the vaccine. The Court held that the discretionary function exception to the FTCA[71] did not protect the United States from liability when federal employees deviate from mandatory procedures.[72] In discussing whether an employee is exercising discretion in implementing a regulatory procedure, the Court, citing *Westfall*, said "if the employee's conduct cannot appropriately be the product of judgement or choice, then there is no discretion in the conduct for the discretionary function exception to protect."[73] While on its face this may seem to be a rather straightforward approach to the problem, upon analysis, the implications for the federal employee are serious. Assume that the employees charged with certifying the safety and efficacy of the vaccine followed the regulations to the letter, but the regulatory scheme itself was deficient, and an unsafe vaccine was produced. The injured plaintiff would be barred from suing the United States because the discretionary function exception to the FTCA retains sovereign immunity for claims "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. . . ."[74] The individual employee may not be so fortunate. *Westfall* requires discretionary activity before immunity is appropriate and *Berkovitz* says that a federal employee following regulations is *not* exercising discretion. Thus, in the hypothetical mentioned above, the United States escapes liability while the employee following the mandatory regulations is not entitled to immunity because no discretionary conduct is involved.[75]

Obviously, no simple answer exists to the dilemma posed above. Because the issue is so value-laden, perhaps one simple answer cannot and should not exist. Nonetheless, the courts have attempted a definition; some of their efforts may be revealing.

The FTCA does not waive sovereign immunity for torts resulting from acts performed in the course of a discretionary function.[76] Some have suggested that the case law and standards developed under the FTCA should apply to absolute immunity. While a few courts have adopted the FTCA standard for official immunity,[77] the better reasoned opinions have rejected a wholesale merger on the basis of underlying policy.[78] The courts that have argued that official immunity doctrine and FTCA discretionary function

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[66] *See* Garner v. Rathburn, 346 F.2d 55, 57 (10th Cir. 1965); Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655 (2d Cir.), *cert. denied*, 374 U.S. 827 (1962).

[67] *Westfall*, 108 S. Ct. at 585; *see supra* text accompanying note 16.

[68] *See Suing Government*, *supra* note 4, at 68–81 ("[T]here are strong reasons to regard official self-protection as a significant and growing problem."). *See also* Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110 (1981) (concluding that individual response to liability, while not empirically verifiable, would likely be some kind of "shirking" action, and that enterprise liability is a better mechanism for securing appropriate official behavior); Shepsle, *Official Errors and Official Liability*, 42 Law & Contemp. Probs. 35 (1978) (suggesting, in the context of a decisional model, that civil liability of officials may have effects on decision-making more closely correlated to the types of errors inherent in particular decision processes as opposed to characteristics of governmental functions).

[69] The current edition of Words and Phrases contains nearly 50 pages of citations defining terms spanning from "discretion" through "discretionary power." Words and Phrases, "Discretion" (1954 & Supp. 1987).

[70] 108 S. Ct. 1954 (1988).

[71] 28 U.S.C. § 2680(a) (1982).

[72] 108 S. Ct. at 1959 (1988).

[73] *Id.*

[74] 28 U.S.C. § 2680(a) (1982).

[75] *See supra* note 65 and accompanying text for a discussion of the concept of "derivative" immunity and how it may protect the individual.

[76] 28 U.S.C. § 2680(a) (1982) (FTCA does not apply 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 be abused").

[77] *See, e.g.*, Jackson v. Kelly, 557 F.2d 735, 737–38 (10th Cir. 1977).

[78] *See* Sami v. United States, 617 F.2d 755, 770–73 (D.C. Cir. 1979); Estate of Burks v. Ross, 438 F.2d 230, 234 (6th Cir. 1971).

exception are quite different and should be treated so, maintain that the FTCA is designed to provide a remedy through a broad waiver of sovereign immunity, and that exceptions to that waiver be interpreted narrowly in order to give greatest effect to the intent of the FTCA. Absolute immunity is designed to effectuate good government while recognizing that some valid claims must go unremedied.[79] A crucial difference in focus is mandated under the FTCA, which is concerned first with providing the broadest removal of barriers to recovery, and the absolute immunity area of the law, which is designed to promote government by removing even the fear of suit and liability. Additionally, while the discretionary function exception of the FTCA has been limited to policy decisions at high levels, recent cases have suggested a broader reach.[80] The functional analysis approach, when adapted to the FTCA body of law, tends to expand the coverage of the discretionary function exception by embracing more than just top level policy makers. On the contrary, in the absolute immunity area, functional analysis seems to narrow the range of protected functions performed by lower level officials. The Supreme Court's decision in *United States v. VARIG Airlines* is an excellent example.[81] In that case, the Court reversed a lower court decision that had held the FTCA's discretionary function exception applicable only to policy-making discretion. In extending the application of the discretionary function exception, the Court noted that it is "the nature of the conduct, rather than the status of the actor, that governs."[82] The predictability offered as an advantage to aligning the two definitions may be illusory as well as inconsistent with policy. Without legislation to deal with the difficulties of the discretionary function test, courts will have to rely on the opinions of the courts of appeals that applied the test and presaged the *Westfall* decision.

The circuits that applied a discretionary function test agreed somewhat about a correct analysis. Not surprisingly, the cases reflect an awareness of the underlying policy conflict between officials and the individual, and reflect a functional analysis. The Tenth Circuit identified a range of functions that progressed from ministerial acts, through discretionary acts not entitled to immunity, to clearly discretionary acts at a planning or policy level. The conduct of the official was analyzed and a label applied. Only clearly discretionary conduct is entitled to immunity. This methodology is consistent with the circuit's interpretation of commonality between the FTCA and official immunity definitions of discretionary functions, and limits immunity primarily to highly placed officials,[83] but unduly narrows the availability of absolute immunity for others.

The Fifth Circuit used a necessity test that focused not on the conduct of the official, but on the need to free the official from fear or threat of suit and liability.[84] This was also the original Tenth Circuit rule.[85] Because the necessity test does not also address the potential harm to individual plaintiffs in a balancing test, the *Westfall* decision would seem to overrule this approach.[86]

In some circuits, "discretionary" is defined simply as "not ministerial."[87] Where those courts would grant immunity for what the *Westfall* Court termed minimally discretionary acts, the view may no longer represent good law.[88] A better view is that ministerial acts encompass not only conduct mandated by law or regulation, but some other lower level execution of duties as well. Somewhere between the Tenth Circuit's unduly narrow approach and the now partially invalid definitions of other courts lies the proper scope of the absolute immunity defense. It would be folly, though, to presume that *Westfall's* progeny in the lower courts will be uniform. At best, officials must hope that courts will recognize a few guiding principles.

Two recent cases from the Eleventh Circuit demonstrate the inconsistency that is likely to result as courts apply *Westfall's* discretionary function element. In *Scott v. DeMenna,*[89] the court found discretion in a Department of Agriculture employee's decision to report a police raid on a farm. The official's job description included a duty to report "unusual occurrences" that might affect farm prices in a newsletter published by the Department. Because the official's job description did not codify a definition of unusual occurrences, the court found the selection of reported topics to be a discretionary function and reversed the denial of defendant's motion for summary judgment.[90] This result resembles the minimal discretion position advanced by defendants in *Westfall.*

In *Johns v. Pettibone Corp.,*[91] the court held that a contract decision to delegate provision of safety measures at a TVA construction project to an independent contractor was an exercise of discretion entitled to immunity under *Westfall.* The court adhered to the Eleventh Circuit rule

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[79] *See* Barr v. Matteo, 360 U.S. 564 (1959).

[80] *See* Johns v. Pettibone Corp., 843 F.2d 464 (11th Cir. 1988) (holding that in Eleventh Circuit, where discretionary function is interpreted identically in both FTCA and official immunity areas, government employees exercised discretion in delegating provision of safety measures to independent contractor). *See also* United States v. VARIG Airlines, 467 U.S. 797 (1984).

[81] United States v. VARIG Airlines, 467 U.S. 797 (1984).

[82] *Id.* at 813. *Cf.* Berkovitz v. United States, 108 S. Ct. 1954 (1988) (rejecting per se discretionary function status for all regulatory functions in favor of the functional analysis approach).

[83] *See* Nietert v. Overby, 816 F.2d 1464, 1467 (10th Cir. 1987); Jackson v. Kelly, 557 F.2d 735, 737–38 (10th Cir. 1977).

[84] *See* Williamson v. United States Dep't Agric., 815 F.2d 368, 378–80 (5th Cir. 1987).

[85] *See* Garner v. Rathburn, 346 F.2d 55, 57 (10th Cir. 1965).

[86] This is especially so in light of the way some courts used the necessity test to justify not applying a discretionary function test. *See supra* note 55 and accompanying text.

[87] *See* Johnson v. Alldredge, 488 F.2d 820, 824 (3d Cir. 1973), *cert. denied,* 419 U.S. 882 (1974); Estate of Burks v. Ross, 438 F.2d 230, 235 (6th Cir. 1971); David v. Cohen, 407 F.2d 1268, 1271 (D.C. Cir. 1969).

[88] *See supra* note 29 and accompanying text.

[89] 840 F.2d 8 (11th Cir. 1988).

[90] Scott v. DeMenna, 840 F.2d at 9.

[91] 843 F.2d 464 (11th Cir. 1988).

that the conditions under which absolute immunity is available are congruent with those justifying application of the discretionary function exception in FTCA actions,[92] but emphasized that determination of discretionary acts was not based on rigid distinction between planning and operational decisions.[93] Yet, the same authority cited for the FTCA/official immunity congruence rule has been cited by the Eleventh Circuit as establishing that the proper test is one based on a planning versus operational analysis.[94]

These cases demonstrate that even where courts purport to have established discretionary function definitions and analytical methodologies, uncertainty will result in official immunity cases. Likewise, courts that did not previously apply a discretionary function test cannot simply adopt existing methodologies.

However discretion is defined, the most common denominator is that a discretionary act involves the exercise of judgment. In fact, the variety of resolutions in the cases is made uniform through this concept.[95] Merely stating that discretion involves the exercise of judgment, like broad theoretical definitions advanced,[96] is of little benefit to the low or middle level official who, absent practical guidance, may be less than fearless in the execution of duties due to threatened liability. Likewise, describing conduct as planning or operational, ministerial or discretionary, provides little guidance because all employees plan their activities to some extent and exercise some discretion in the performance of their duties.

If any distinction between these terms exists, it is a matter of degree.[97] Perhaps the greatest difficulty lies not in denying recovery to injured plaintiffs, but in assessing liability against the lower level official who only tries to follow orders while those who make the decisions go free.[98] As long as the best judicial remedy is only to deny recovery, or impose liability upon those who merely execute the orders of decision makers, no precise definition should be given. Until Congress acts to remedy the situation as only that body can, the scope of immunity must remain subject to imprecise variables associated with social values. As one court stated:

> [O]bjective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicality, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions.[99]

The shading that courts give to acts at the cusp between ministerial and discretionary or mandatory and judgmental may, in the end, be a function of the desirability of the conduct involved. So even in the Tenth Circuit, where the rule is stated as limiting immunity to acts involving "judgment, planning, or policy" (a relatively narrow concept derived from the FTCA's discretionary function exception), the term "judgment" was expanded to immunize a clerk's decision to report alleged misconduct of a supervisor.[100] While this may seem as unprincipled as defining all conduct not specifically required by law as at least "minimally discretionary," such reasoning demonstrates that the desirability of the employee's conduct must be the touchstone, not the rigid categorization of behavior.

Legislative Response to *Westfall*

The Court in *Westfall* recognized the difficulties inherent in judicial attempts to define the scope of absolute immunity. Congress is best suited to gather the empirical data necessary and to assign weight to the relevant components of the decision process. Because of Congress' broad powers, it alone has the capability to immunize the official, provide recovery to the injured party, allocate the cost of immunity to the sector of society that benefits by it most, and prescribe provisions to ensure the existence of some kind of deterrence against repeated misconduct.

Congress is no stranger to statutory immunity, and in the past fifteen years has enacted several measures revealing its ability to assess and address the considerations mentioned above.[101] For example, when Congress determined that the impact of litigation would undermine the ability of the military to provide quality health care, Congress enacted the Gonzales Act.[102] Under that act, military doctors are immunized from malpractice suits, the United States is substituted as defendant, and actions must be prosecuted under FTCA procedures. Similar statutes exist immunizing Department of Defense attorneys[103] and government drivers.[104]

Congress can appropriately tailor its reponses to particular needs and degrees of need. For example, in the face of

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[92] *Id.* at 467 n.2.

[93] *Id.* at 466.

[94] Andrews v. Benson, 809 F.2d 1537, 1542 (11th Cir. 1987) (citing Franks v. Bolden, 774 F.2d 1552 (11th Cir. 1985)).

[95] *See, e.g.*, Nietert v. Overby, 816 F.2d 1464, 1467 (10th Cir. 1987) (even narrow view of Tenth Circuit rule expanded where low level conduct involves judgment).

[96] "Jurisdiction" may be defined as the right to
exercise government power over a defined class of persons or things in defined situations. "Authority" may be defined as the scope of governmental power that can be exercised over the persons or things over which the official has jurisdiction. "Discretion" could be defined as the right to decide whether jurisdiction exists and to determine the limit of authority.
Comment, *supra* note 4 at 290.

[97] *See* Westfall v. Erwin, 108 S. Ct. 580, 584 (1988); *Suing Our Servants, supra* note 4 at 303–04; Prosser, Handbook of the Law of Torts 990 (4th Ed. 1971).

[98] Prosser, *supra* note 97 at 990.

[99] Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978).

[100] *See* Nietert v. Overby, 816 F.2d 1464 (10th Cir. 1987).

[101] *See supra* note 6.

[102] 10 U.S.C. § 1089 (1982). *See* Bass v. Parsons, 577 F. Supp. 944, 948 (S.D.W. Va. 1984).

[103] 10 U.S.C. § 1054 (1982).

[104] 28 U.S.C. § 2679 (1982).

the *Bivens* decision,[105] Congress liberalized the FTCA by allowing suit for the most numerous of the *Bivens*-type suits. The amendment broadened the FTCA waiver of sovereign immunity and allowed suits against the United States for certain intentional torts committed by federal law enforcement officers.[106] Although some saw the amendment as only a small first step in providing remedies for constitutional abuses,[107] Congress has not seen fit to expand the scope of the remedy.

A legislative response to the *Westfall* decision should satisfy certain criteria. First, officials should be protected not only from potential liability, but also from the harassment of litigation. The complexity inherent in attempting to define a discretionary function indicates that, especially for the lower level employee, the issue might not be capable of resolution by summary judgment.[108] Second, the cost of public official's misfeasance, if not borne by the official, must be placed on the element of society that profits most by the protection of officials. Because the general public is said to reap the benefit of the good government resulting from fearless execution of duties by officials, the public should bear the cost of immunity. Third, to satisfy expectations of fairness, the forum should be judicial, and the mechanism a lawsuit. Fourth, judicially-created immunities must play no part in the action. Fifth, otherwise valid principles of federal tort law, such as the *Feres* doctrine,[109] must be preserved. Finally, officials, no longer facing liability, must be deterred from negligent conduct through some system of accountability and discipline.[110]

A legislative remedy must, therefore, be responsive and predictable. It must be responsive to the competing interests inherent in a correct resolution of the immunity question. It must be predictable to guide or unencumber official conduct. Legislative changes like those proposed by former Attorney General Bell in 1979[111] generally serve these criteria.

Legislation should be in the form of amendments to the FTCA. Federal employees should receive immunity from suits alleging torts under state-law arising from acts performed within the employee's scope of duties. Second, the statute must substitute the United States as defendant in the action. Third, the action should be governed by the provisions of the FTCA. Fourth, the statute should not permit the United States to raise common law or judicially created official immunity as a defense, but it should allow the United States to raise defense otherwise valid under the FTCA.

Finally, Congress should enact provisions allowing for administrative hearings ultimately empowered to discipline officials. Plaintiffs who have obtained money judgments should be empowered to initiate administrative process. While some legitimate government functions may entail injuries to individuals, building an administrative record of review should encourage agencies to explore alternative courses of conduct. By allowing successful plaintiffs to initiate such process, the public may be confident that agencies do not blindly incorporate tortious conduct into standard operating procedures. Agencies should adopt some administrative procedure to receive such reports, investigate them, and ultimately impose necessary discipline. Additionally, disciplinary procedures should be sufficiently flexible to identify responsible officials even where actions are brought against the United States in the first instance. For example, the Army's litigation regulation requires reports to the Department of Army concerning all lawsuits against the Army or Army officials.[112] Such a centralized information-gathering system could be easily adapted to identify responsible parties. Errant officials should not escape responsibility merely because the United States was the named defendant. Further, Congress should make some provision for monetary recovery from former employees. This is not to suggest that administrative sanctions should be applied in every instance. Rather, such a system would allow agencies to identify, using their specialized knowledge of their functions, where injury-producing conduct warrants individual sanction. At the same time, such sanctions would be independent of any judicial remedy to injured plaintiffs.

This proposal addresses the key concerns that a legislative response to *Westfall* must contain. Although it could be argued that legislation is inappropriate until or unless the federal courts adopt an oppressive standard for the discretionary-function element, waiting for the development of judicial doctrine can be exasperating. Defendant *Barr* was a named defendant during six years of litigation before the Supreme Court's final opinion.[113] The resulting *Barr* doctrine was not finally clarified by *Westfall* for another twenty-eight years.

Conclusion

The decision in *Westfall* represents another attempt to fashion a legislative remedy in a judicial furnace. The results, though well-reasoned and well-founded, are not adaptable to their purpose. The Court itself recognizes its limited ability to respond to the needs of federal officials to remain free from the threat of litigation and liability, and at the same time, to the injured individual's need for compensation. The problem is made more complex by the recognition, but not definition, of a class of officials who exercise sufficient power to inflict injury, but insufficient discretion and authority to avoid the consequences of their tortious conduct. Because these individuals can be expected to in turn name their supervisors as defendants, thereby creating a conflict of interest within the agency, they may

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[105] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[106] 28 U.S.C. § 2680(h) (1982).

[107] *See* Bell, *Proposed Amendments to the Federal Torts Claims Act*, 16 Harv. J. on Legis. 1, 5 n.19 (1979).

[108] *See supra* text accompanying notes 44–48.

[109] Feres v. United States, 340 U.S. 135 (1950) (barring claims by servicemen arising out of or in the course of activity incident to service).

[110] *See Suing Our Servants, supra* note 4 at 361–67; Bell, *supra* note 107 at 12–15, 16.

[111] *See supra* note 107.

[112] Army Reg. 27–40, Legal Services: Litigation, para. 2–3 (4 Dec. 1985).

[113] *See Suing Government, supra* note 4 at 40–41.

face the difficulty of litigation and liability alone.[114] Even if discretion is ultimately defined very broadly, one of the principles of tort liability is to allow individuals to conform their behavior to social standards of care, and more importantly, to predict the results of their conduct. To require public servants to operate in the interim with no definable standards for potential liability is a burden they should not have to bear simply because they chose government employment.

[114] *See generally id.* at 82–89; 28 C.F.R. § 50.16(a).

Editor's Note—*At the time this article went to print, House Bill 4612 (Federal Employees Liability Reform and Tort Compensations Act) had passed the House of Representatives and the Senate. The bill amends Title 28, United States Code, and provides for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of U.S. employees committed within the scope of their employment.*