

STATUTORY COPY-PASTING IN THE LAW OF SOVEREIGN IMMUNITY

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ABSTRACT

Congress sometimes copy-pastes language from one statute into another statute. While this can serve the goals of consistency and efficiency, copy-pasting can cause problems when done across disparate legal regimes, such as different sovereign immunity doctrines. When Congress enacted the Foreign Sovereign Immunities Act (FSIA) of 1976, it borrowed language from the Federal Tort Claims Act (FTCA) of 1946 that exempts the exercise of “discretionary functions” from tort jurisdiction. Both statutes allow private damages claims against governmental entities in defined circumstances. Despite this superficial similarity, the statutes were enacted in very different contexts and serve fundamentally different purposes. Nonetheless, courts have relied on FTCA decisions to define the contours of tort jurisdiction under the FSIA. The resulting jurisprudence has been conceptually incoherent and doctrinally unsound.

This Article seeks to put FSIA jurisprudence on a firmer footing by disentangling it from the FTCA. In so doing, it clarifies important—and often overlooked—distinctions between domestic sovereign immunity, on the one hand, and foreign sovereign immunity, on the other. Codifying the international law of foreign sovereign immunity should not involve replicating the U.S. law of domestic sovereign immunity. The temptation to conflate different types of immunities

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can be especially problematic in a common law system based on precedent. Fundamental differences between the jurisdictional immunities of foreign governments and the immunity of the United States warrant eliminating the FSIA's copy-pasted discretionary function exception. Meanwhile, courts interpreting the FSIA should consider principles of foreign sovereign immunity rather than the domestic separation of powers.

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“The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign’s own courts and the other to suits in the courts of another sovereign.”

—*Nevada v. Hall*, 440 U.S. 410, 414 (1979)

INTRODUCTION

Government officials can harm individuals when exercising their official functions. When a U.S. or foreign government official causes harm, the injured parties might seek redress by filing a tort claim against the responsible government. U.S. courts have grappled with defining the scope of available tort remedies for harmful conduct by government officials. Consider, for example, the case of Captain Ricky Rakowski, Jr., of the Federal Bureau of Prisons. Rakowski entered the COVID-19 quarantined unit of FCI Cumberland in Allegany County, Maryland, on February 3, 2022.¹ He wore only a “blue surgical mask,” even though prison regulations required him to wear “a gown, face shield, N-95 mask, and gloves.”² Rakowski made his way to Charles Head’s cell, where he allegedly removed his mask and swung at Head, “breaking items in the cell.”³ Then he pushed Head and pulled his hair, allegedly in retaliation for Head having filed complaints about the prison.⁴ The district court found that Head could pursue a claim against the United States for battery and rejected the United States’ argument that it was immune from suit because the captain had been exercising a “discretionary function.”⁵ However, if Head had violated prison rules before the altercation, then Rakowski would have had the discretion to respond by using force, and the United States would be immune from suit, even if Rakowski abused his discretion.⁶

Consider another example. Father Andrew Ronan was a parish priest who was known to have molested minors in Ireland and in

1. *Head v. Rakowski*, 695 F. Supp. 3d 663, 675 (D. Md. 2023). The court accepted these alleged facts as true for purposes of ruling on the defendant’s motion to dismiss.

2. *Id.* (citation omitted).

3. *Id.* (citation omitted).

4. *Id.* at 684.

5. *Id.* at 686.

6. *Id.* at 684-86 (distinguishing *Kaufman v. United States*, 84 F. Supp. 3d 519 (S.D. W. Va. 2015)).

Chicago.⁷ In 1965, the Holy See (a foreign government) placed Ronan in a parish priest position at St. Albert's Church in Portland, Oregon.⁸ There, Ronan allegedly used his position of trust and authority to molest minors.⁹ The Ninth Circuit held that the Holy See was not immune from suit for torts committed by its employee "acting within the scope of his employment" as a priest.¹⁰ However, the Holy See was immune from suit for alleged "negligent retention and supervision" of Ronan and "failure to warn" of his dangerousness.¹¹ The court reasoned that employee retention and supervision decisions, as well as decisions about whether to warn about the employee's "dangerous proclivities," are discretionary functions that could have been influenced by "social, economic, or political policy considerations."¹²

In these cases, a court's jurisdiction to adjudicate the plaintiff's claims turned on whether the official's conduct involved a "discretionary function."¹³ The common law of torts, which generally focuses on wrongdoing among private parties, does not include the concept of discretionary functions. When governmental agents cause injuries, however, different considerations may inform the relevant liability regime.¹⁴ Individual government officials, even if they are culpable, may lack the resources to make the injured party whole.¹⁵

7. *Doe v. Holy See*, 557 F.3d 1066, 1069 (9th Cir. 2009).

8. *Id.* at 1070. The United States maintains diplomatic relations with the Holy See and treats it as a "foreign state" for sovereign immunity purposes. *O'Bryan v. Holy See*, 556 F.3d 361, 372 & n.2 (6th Cir. 2009).

9. *Doe*, 557 F.3d at 1070.

10. *Id.* at 1081.

11. *Id.*

12. *Id.* at 1084-85.

13. *See id.* at 1083; *Head v. Rakowski*, 695 F. Supp. 3d 663, 683-84 (D. Md. 2023).

14. *See, e.g.*, Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1 (1924) ("[T]here is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts of officers, should be allowed to rest ... at the door of the unfortunate citizen alone.").

15. *See* George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1175 (1977). Imposing personal liability on officials has created a concern "that the threat of personal liability may make public officials unduly fearful in their exercise of authority and discourage them from taking prompt and decisive action." *Id.* at 1178. The pendulum has likely swung too far in shielding government officials from the consequences of their harmful actions. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (explaining that qualified immunity has failed to meet its intended policy goals).

Making the government itself liable allows the cost “to be borne indirectly by all who benefit from the services that government provides.”¹⁶ Yet governmental liability cannot be unlimited—the costs to the taxpayer of defending against suits can be substantial,¹⁷ and applying certain tort law concepts to government action could allow courts to “substitute [their] judgment for the policy choices made by the political branches.”¹⁸

Congress addressed these trade-offs for U.S. taxpayers by enacting the Federal Tort Claims Act of 1946 (FTCA).¹⁹ The Act makes the United States liable for tortious acts by federal officials and employees, unless those acts involve performing or failing to perform a “discretionary function.”²⁰ Congress did not define the concept of “discretionary function” in the text of the FTCA, leaving that task to the courts. Thirty years later, Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA).²¹ International law does not recognize a “discretionary function” exception to tort liability, and it is agnostic about the allocation of costs between injured parties and U.S. taxpayers. Nonetheless, Congress copied the FTCA’s discretionary function exception and pasted it into the FSIA’s provision governing foreign countries’ liability for certain noncommercial torts that cause injuries in the United States.²²

Scholars have critiqued the FTCA’s discretionary function exception and related jurisprudence.²³ They have also criticized the

16. Bermann, *supra* note 15, at 1176.

17. See Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 798 (2007) (“[T]he government passes its legal costs along to the taxpayers, who bear little meaningful culpability for the underlying tortious conduct, but who can be taxed to fund essentially unlimited liability far in excess of the exposure to liability faced, for example, by a shareholder in a private corporation.”).

18. Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 900 (2010).

19. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.

20. 28 U.S.C. § 2680(a).

21. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11.

22. Compare 28 U.S.C. § 1605(a)(5)(A), with 28 U.S.C. § 2680(a) (providing identical exceptions for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function,” even when the discretion is abused).

23. See generally Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275 (2002) (criticizing the current interpretation of the FTCA based in absolute formal sovereign immunity and advocating for a functional approach instead); Harold J. Krent, *Preserving Discretion Without Sacrificing*

FSIA's discretionary function exception, but they have not traced its lineage or explained the consequences of copy-pasting text from the FTCA into the FSIA.²⁴ The Supreme Court has not yet addressed the discretionary function exception in the FSIA. When it does, it should avoid replicating FTCA case law that does not further the FSIA's legislative purpose.

This Article offers guidance to Congress and the courts in cases against foreign countries for personal injuries inflicted in the United States. Part I introduces the problem of copy-pasting across superficially similar, but conceptually distinct, doctrinal regimes. Part II recounts the origins of the FTCA's discretionary function exception and the difficulties courts have faced interpreting and applying it. Part III discusses Congress's enactment of the FSIA and its codification of the international law exception to immunity for "territorial torts," as well as its decision to graft the FTCA's discretionary function language onto this provision. Part IV examines courts' attempts to apply the discretionary function exception under the

Deterrence: Federal Governmental Liability in Tort, 38 UCLA L. REV. 871 (1991) (proposing an approach to the discretionary function exception based on separation of powers and deterrence); Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (criticizing courts' broad application of the discretionary function exception); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968) (arguing that the discretionary function exception has overshadowed the purpose of the FTCA and proposing a test for discretionary functions); Fleming James, Jr., *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957). There have also been several more recent law review comments focused on the discretionary function exception. See, e.g., Laney Ivey, Comment, *It's Time to Resolve the Circuit Split: Unconstitutional Actions by Federal Employees Should Not Fall Within the Scope of the Discretionary Function Exception of the FTCA*, 73 MERCER L. REV. 1351 (2021); Tristen Rodgers, Comment, *Sovereign Immunity or: How the Federal Government Learned to Stop Worrying and Love the Discretionary Function Exception*, 63 B.C. L. REV. ELEC. SUPP. II-17 (2022), <https://bclawreview.edu/article/57> [<https://perma.cc/6NZQ-6TL7>]; Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 TEMP. L. REV. 91 (2015).

24. See, e.g., Scott A. Gilmore, *Suing the Surveillance States: The (Cyber) Tort Exception to the Foreign Sovereign Immunities Act*, 46 COLUM. HUM. RTS. L. REV. 227 (2015) (discussing how courts analyze the FSIA in light of FTCA jurisprudence and arguing that state surveillance falls outside the scope of the discretionary function exception); Sienho Yee, Note, *The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?*, 93 COLUM. L. REV. 744 (1993) (arguing for elimination of the FSIA's discretionary function exception).

FSIA and their understandable—but ultimately misplaced—reliance on FTCA jurisprudence.

While the law of foreign sovereign immunity might occasionally produce results that resemble those obtained under the law of domestic sovereign immunity, the rationales for each category of immunity are different and should not be conflated. Relevant distinctions between domestic and foreign sovereign immunity should be reflected in governing statutes and in judicial reasoning about whether U.S. courts have the authority to adjudicate claims brought against governmental actors. Copy-pasting the discretionary function exception and its related jurisprudence from the FTCA to the FSIA ignores these distinctions. The anomalous link between these statutes should be severed.

I. COPY-PASTING AND STATUTORY INTERPRETATION

Statutory copy-pasting does not simply involve using words from one statute in another statute—rather, its purported efficiencies come largely from subsequent judicial interpretations. The alchemy of statutory interpretation turns words used by Congress into prescriptions and prohibitions articulated by courts. Notwithstanding debates about the value and role of canons of construction,²⁵ courts often invoke canons to justify their conclusions about the meaning and application of statutes.²⁶ When courts see examples of copy-pasting, they presume that Congress’s use of “the same language in two statutes having similar purposes” means “that Congress intended that text to have the same meaning in both statutes.”²⁷ This presumption guides judicial interpretation unless there is a good reason—grounded in context, history, or legislative purpose—not to impute a shared meaning.²⁸

25. For a concise overview of some of the core aspects of these debates, see John F. Manning, *Legal Realism & the Canons’ Revival*, 5 GREEN BAG 2D 283, 283-98 (2002).

26. See, e.g., James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 4-5 (2005) (using an empirical analysis to criticize the idea that canons can serve as consistent or impartial guidelines to statutory meaning).

27. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

28. See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001).

The presumption of shared meaning also imports judicial interpretations of the original text into the meaning of the new text. Following the rule *in pari materia*, “when [judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well.”²⁹ As Justice Frankfurter put it, “[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings [its] old soil with it.”³⁰ Yet, even if a phrase (such as “discretionary function”) “brings [its] old soil with it” when first used in a later statute, it remains unclear whether the duplicate phrases remain tethered to each other indefinitely.³¹ For example, after the FSIA was enacted, courts continued to interpret the FTCA’s discretionary function exception in new cases, leaving open the question whether these subsequent interpretations of the FTCA automatically change the meaning of the FSIA, or vice versa.³²

The Ninth Circuit grappled with some of these questions in *Gregorian v. Izvestia*, a case against the Soviet Union and a Soviet government newspaper for libel and breach of contract.³³ Gregorian argued that two Soviet trading organizations had failed to pay him for medical and laboratory goods that he shipped to Soviet hospitals.³⁴ He alleged that the organizations “caus[ed] to be published” an article in the *Izvestia* paper titled “Duplicitous Negotiator: A Story About a U.S. Firm and an Abuse of Trust” in order to avoid paying him.³⁵ The article ruined Gregorian’s reputation and his ability to conduct business, and reduced his firm, the California International Trade Corporation (CIT), “to ‘a narrow, windowless

29. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 590 (2010) (alteration in original) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

30. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

31. *See id.*

32. *See* Joan E. Donoghue, *The Public Face of Private International Law: Prospects for a Convention on Foreign State Immunity*, 57 L. & CONTEMP. PROBS. 305, 312 (1994) (highlighting problems associated with changing interpretations of the FTCA for the FSIA and the resulting uncertainty).

33. *See* 871 F.2d 1515 (9th Cir. 1989).

34. *Id.* at 1517.

35. *Id.* at 1517-18.

basement office in Mr. Gregorian's home."³⁶ Gregorian alleged that *Izvestia* and the Soviet Union "published the article with malice either with knowledge of its falsity or with reckless disregard for whether it was true, motivated by a desire to embarrass plaintiffs and to harm them economically."³⁷

As explained in greater detail below, the FSIA provides federal courts with jurisdiction over certain claims against foreign states and their agencies and instrumentalities.³⁸ The district court in *Gregorian* ultimately found—and the appellate court agreed—that it lacked jurisdiction over Gregorian's claims for libel.³⁹ Although the text of the FSIA excludes claims for libel from its jurisdictional grant, Gregorian argued that his libel claim should instead be considered as a "commercial tort" because it was allegedly committed in conjunction with a commercial activity.⁴⁰ The appellate court followed the United States as amicus curiae in rejecting this characterization on the grounds "that *Izvestia's* 'writing and publishing of articles reporting or commenting on events' constitute[d] 'sovereign or governmental' activities."⁴¹ Consequently, Gregorian could not pursue his libel action in a U.S. court.⁴²

In reaching its decision, the *Gregorian* district court lamented having "to steer its way through a variety of complicated, confusing, seemingly self-contradictory, and yet reasonable interpretations of the FSIA."⁴³ It noted that "it remains a principal purpose of the FSIA to conform U.S. immunity practice to the practice in virtually every other country in the world, where sovereign immunity decisions are made exclusively by the courts and not by foreign affairs agencies."⁴⁴ Yet the court also observed that treating the alleged libel as a commercial activity under the FSIA "would expose foreign states to United States jurisdiction for actions on which the United States government itself is immune," because the FTCA

36. *Id.* at 1517 (quoting Opening Br. on Behalf of Appellant at 5).

37. *Id.* at 1520.

38. *See infra* Part III.A.

39. *Gregorian*, 871 F.2d at 1522.

40. *Id.* at 1521.

41. *Id.* at 1522.

42. *Id.* at 1521-22.

43. *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1230 (C.D. Cal. 1987), *aff'd in part, rev'd in part*, 871 F.2d 1515.

44. *Id.* at 1231.

categorically bars libel suits against the United States.⁴⁵ The court sought to reconcile the FSIA and the FTCA by viewing the FTCA as “a codification of the principle of restrictive immunity with regard to the U.S. Government on a domestic level.”⁴⁶

Ultimately, and in an apparent quest for uniformity, the district court favored an interpretation of the FSIA that followed the FTCA’s categorical approach.⁴⁷ Even though the appellate court endorsed this result, the district court’s reasoning is problematic. Codifying the international law of foreign sovereign immunity should not involve replicating the U.S. law of domestic sovereign immunity. Unlike the restrictive theory of foreign sovereign immunity under international law, the “restrictive immunity” of the U.S. government (as the district court called it) does not turn on the distinction between commercial and sovereign activities. The idea that the United States and foreign states should have the same immunity in U.S. courts fails to account for the different functions that sovereign immunity plays in delineating the scope of U.S. judicial authority over domestic and foreign governments, respectively.⁴⁸

The phenomenon of copy-pasting is not unique to legislative drafting and interpretation.⁴⁹ Nor are the problems associated with

45. *Id.* at 1233.

46. *Id.* The court reasoned further:

Despite the jumbled draftsmanship of § 1605(a)—or perhaps because of it—the Court holds that Congress, in tracking the language of § 2680(h) of the FTCA in § 1605(a)(5)(B) of the FSIA, intended that foreign governments remain immune from libel and other claims *to the same extent* that the United States itself is immune under the FTCA.

Id. at 1234 (emphasis added).

47. *See id.* at 1233-34.

48. Curtis Bradley and Jack Goldsmith made a similar observation in the context of foreign and domestic official immunity, although their definition of the scope of foreign official immunity is broader than mine. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2D 137, 141 (2010) (noting that, under *Ex parte Young*, 209 U.S. 123 (1908), “plaintiffs can plead around state sovereign immunity by suing state officials rather than the state itself”); *see also id.* at 148 (“In the domestic context, there is a debate about whether the judiciary should be attempting to balance the complicated domestic social tradeoffs necessary to develop an optimal liability/immunity regime. Regardless of how that debate is resolved, U.S. courts face substantially greater challenges in identifying and resolving these social tradeoffs for other countries.” (footnote omitted)).

49. *See, e.g.*, Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 153 (2012) (noting that portions of unpublished opinions that are not intended to have

tethering legal doctrine in one area to jurisprudential developments in another area. For example, in *Jam v. International Finance Corp.*, the U.S. Supreme Court found that the International Organizations Immunities Act (IOIA) confers the same immunity on international organizations (IOs) that foreign states have today under the FSIA.⁵⁰ David Stewart opined that, with this decision, the Court “thr[ew] the field [of international organization immunities] into some conceptual turmoil—unnecessarily (in this author’s view) since it was based upon an inapt analogy equating international organizations to foreign States and governments.”⁵¹ The “inapt analogy” underlying the Court’s reasoning was based on two sources: first, Congress’s word choice in the IOIA; and second, the Court’s assumptions about the intended effect of that word choice, which led the Court to cleave the IOIA from its international law foundations.

Congress enacted the IOIA in 1945 so that international organizations, including the United Nations, could perform their functions unmolested by capricious local officials, not so that IOs could inflict injuries without legal accountability.⁵² The text Congress adopted, however, did not reference the functional justification for IO immunity, and instead accorded IOs “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.”⁵³ In *Jam*, seven justices read the term “the same” to incorporate by reference U.S. law on foreign state immunity “as it exists whenever a question under the statute arises.”⁵⁴ Consequently, they held that the restrictive theory of immunity codified by the FSIA of 1976 applies to both foreign states and to IOs under

precedential value are nonetheless “repeatedly copied and pasted into other unpublished opinions”).

50. 586 U.S. 199, 212-13, 215 (2019).

51. David P. Stewart, *Holding International Organizations Accountable: Recent Developments in U.S. Immunities Law*, 34 KING’S L.J. 443, 444 (2023).

52. See *id.* at 446-48; International Organizations Immunities Act, ch. 652, 59 Stat. 669 (1945) (codified as amended at 22 U.S.C. §§ 288-288f).

53. International Organizations Immunities Act § 288a(b). The United States as amicus curiae in *Jam* argued in favor of restrictive immunity for IOs in the absence of an applicable international agreement or IO-specific statute, as did scholars including Lori Damrosch. See Brief for the United States as Amicus Curiae Supporting Reversal, *Jam v. IFC*, 586 U.S. 199 (2019) (No. 17-1011); Brief of Amici Curiae Professors of International Organization and International Law in Support of Petitioners, *Jam v. IFC*, 586 U.S. 199 (No. 17-1011).

54. *Jam*, 586 U.S. at 209.

the 1945 IOIA, thereby rendering IOs subject to suit in U.S. courts for certain commercial activities with a U.S. nexus.⁵⁵ In Stewart's view, "the task of establishing a new and coherent framework for dealing with [IO immunity] is for the legislature, not the courts."⁵⁶ The IOIA's tethering of IO immunity to that of foreign states and the Supreme Court's decision in *Jam* mean that the default jurisdictional regime for IOs in U.S. courts does not take into account the distinctive characteristics and functions of international organizations.

The problems associated with transposing or copy-pasting interpretations from one context to another apply even within international law itself, not just between domestic and international law. As Philippa Webb has cautioned, "[t]he complex relationship between the immunities of states, diplomats, and state officials suggests a careful approach to borrowing, translating, or adapting rules from one regime to the other."⁵⁷ Once again, potential gains in efficiency and systemic coherence may come at the expense of realizing the goals of each separate regime and remaining faithful to each regime's historical origins and animating purpose. Automatic recourse to the *in pari materia* canon can exacerbate problems associated with mismatched borrowing, as illustrated by judicial interpretations of the discretionary function exception in the FTCA and FSIA.

55. *Id.* at 204-05, 215. Justice Breyer, in dissent, would have found that the IOIA froze IO immunity in 1945, and that foreign states at that time enjoyed immunity from lawsuits arising from their commercial activities. *Id.* at 216 (Breyer, J., dissenting). As I have detailed in other work, the historical record regarding foreign state immunity in U.S. courts does not support the common wisdom that courts and the executive branch consistently recognized claims to "absolute" immunity in the pre-war period. See generally Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common Law Immunity*, 54 GA. L. REV. 217 (2019).

56. Stewart, *supra* note 51, at 459. The *Jam* decision has led courts to apply the FSIA to international organizations. See, e.g., *Kling v. World Health Org.*, 532 F. Supp. 3d 141, 149-52 (S.D.N.Y. 2021) (finding that the FSIA's noncommercial tort exception did not confer jurisdiction over allegations that WHO negligently failed to prevent the COVID-19 pandemic).

57. Philippa Webb, *How Far Does the Systemic Approach to Immunities Take Us?*, 112 AJIL UNBOUND 16, 17 (2018).

II. THE FEDERAL TORT CLAIMS ACT (FTCA)

The FTCA predates the FSIA by three decades.⁵⁸ Part II.A sets out the legislative history of the FTCA in general, and the discretionary function exception in particular. Part II.B explores how courts have defined “discretionary functions” under the FTCA and how judicial definitions have changed over time. The reasoning in FTCA cases has, appropriately, been confined to considerations of legislative intent and domestic separation of powers. It has not involved any consideration of foreign state immunity, or the potential repercussions of definitions elaborated in the FTCA context for the scope of foreign state immunity under the FSIA.

A. *The FTCA’s Evolution and Enactment*

The idea of suing government agents for injuries caused by their actions is of perhaps surprisingly recent vintage. In the early years of the Republic, claimants generally did not seek redress from courts for injuries inflicted by government agents.⁵⁹ Rather, they turned to Congress to provide relief in the form of private legislation.⁶⁰ The first private bill enacted to adjust an individual contract-based claim became law on June 14, 1790.⁶¹ Congress subsequently enacted a private bill on April 13, 1792, recognizing a tort claim against the United States for damage done to a school by U.S. troops.⁶² Although the Constitution envisions that Article III courts will have jurisdiction over “[c]ontroversies to which the United States shall be a [p]arty”⁶³ as a plaintiff, Congress did not create a

58. See *supra* text accompanying notes 19, 21.

59. See Alexander Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 L. & CONTEMP. PROBS. 311, 311 (1942).

60. See *id.*

61. *Id.*; see Act of June 14, 1790, ch. 20, 6 Stat. 2 (providing relief to Thomas Jenkins and Company for goods lost by fire).

62. Holtzoff, *supra* note 59, at 311; see Act of Apr. 13, 1792, ch. 21, 6 Stat. 8 (providing compensation to the Corporation of Trustees of the Public Grammar School and Academy of Wilmington, in the state of Delaware, for damages to the school, as well as its use and occupation by U.S. troops).

63. U.S. CONST. art. III, § 2, cl. 1. For a succinct overview, see *Jurisdiction: Civil, United States as a Party*, FED. JUD. CTR., <https://www.fjc.gov/history/work-courts/jurisdiction-civil->

court “for the [i]nvestigation of [c]laims against the United States” until 1855.⁶⁴ That tribunal could only recommend the adoption of special bills, and it excluded tort claims.⁶⁵

The recourse to private bills rather than courts reflected early understandings of the separation of powers. By some accounts, the practice of looking to Congress for redress against the government stemmed from “an unquestioned rule since the establishment of the Republic that no suit may be maintained against the United States unless the Congress consents that the Government be sued and waives the sovereign immunity.”⁶⁶ Congress holds the power of the purse, and damages awards against the government are claims against the public fisc. Sovereign immunity, in turn, has been justified on the grounds that “it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen.”⁶⁷ Allowing suits against the government would “submit to the judicial tribunals the control and disposition of [the sovereign’s] public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.”⁶⁸ The doctrine of

united-states-party [https://perma.cc/AP3X-FJAP].

64. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (establishing “a [c]ourt for the [i]nvestigation of [c]laims against the United States”).

65. George A. King, *Claims Against Governments*, 44 AM. L. REG. & REV. 290, 291 (1896). Congress abolished the Court of Claims in 1982. Jurisdiction over claims seeking money judgments from the United States was moved to a new U.S. Claims Court (now the U.S. Court of Federal Claims), and appellate jurisdiction was moved to the U.S. Court of Appeals for the Federal Circuit. See *Court of Claims, 1855-1982*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/court-claims-1855-1982> [https://perma.cc/9PTD-78YU].

66. Holtzoff, *supra* note 59, at 311; see also *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (“As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it.”).

67. *United States v. Lee*, 106 U.S. 196, 206 (1882) (quoting *Briggs v. Light-Boat Upper Cedar Point*, 93 Mass. (11 Allen) 157, 162-63 (1865)).

68. *Id.* (quoting *Briggs*, 93 Mass. (11 Allen) at 163); see also *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) (“Th[is] doctrine rests upon reasons of public policy ... [because] the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.”).

sovereign immunity has thus been justified as protecting sovereign power and taxpayer dollars from judicial reach.⁶⁹

The principle that “the sovereign cannot be sued in its own courts, or in any other, without its consent and permission” has been firmly established in U.S. jurisprudence.⁷⁰ In addition, because waiver of sovereign immunity “is altogether voluntary on the part of the sovereignty, it follows that [the sovereign] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.”⁷¹ For example, when Congress established the Court of Claims in 1855, it excluded tort claims from the court’s jurisdiction.⁷² In 1920, Congress allowed the United States to be sued in the federal district courts for admiralty and maritime torts involving merchant ships owned or operated by the United States.⁷³ Five years later, Congress expanded this jurisdiction to encompass admiralty and maritime torts involving public vessels.⁷⁴

69. The proffered justifications for sovereign immunity have not necessarily been consistent with one another. *See, e.g.*, George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 487 (1953) (“In the years following the Civil War, the court suddenly made an ex post facto consideration of its adoption of the doctrine [of sovereign immunity], and the rationalizations that resulted were conflicting and confused—agreeing only in their conclusion that the federal government is immune from suit, unless it has given its express consent by congressional act.”) (emphasis omitted). In addition, although courts dismissed suits against the government on sovereign immunity grounds, this did not prevent suits against individual government officers. As Jim Pfander and Jonathan Hunt have documented, “[i]f the officer acted within the scope of employment, Congress enacted indemnifying legislation to make good the loss.” James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1918 (2010). Moreover, “Congress frequently indemnified the victims of government wrongdoing [if] the officer in question became judgment proof.” *Id.* at 1919 (emphasis omitted).

70. *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); *see also* Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 722 (1947) (“[T]he United States courts so consistently and insistently held that ‘the government is not liable to be sued, except with its own consent, given by law,’ that citation of supporting authorities soon became unnecessary.” (quoting *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846))).

71. *Beers*, 61 U.S. (20 How.) at 529 (indicating further that the sovereign “may withdraw its consent whenever it may suppose that justice to the public requires it”); *see also* *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868) (“Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute.”).

72. *See* FED. JUD. CTR., *supra* note 65.

73. Act of Mar. 9, 1920, ch. 95, § 2, 41 Stat. 525.

74. Act of Mar. 3, 1925, ch. 428, § 1, 43 Stat. 1112 (current version at 46 U.S.C. § 31102).

In light of these waivers of immunity, as one author observed in 1942, “it is a strange anomaly and peculiar incongruity that in respect to common-law torts the United States still maintains its sovereign immunity practically undiminished.”⁷⁵ The House Committee on the Judiciary likewise observed in 1942 that “[t]he existing exemption in respect to common law torts appears incongruous.”⁷⁶ Sovereign immunity protects taxpayer dollars, but it can also deprive worthy claimants of access to a remedy, which is another important feature of a responsible and responsive government.

The perceived importance of judicial, rather than purely legislative, remedies against the United States provided an impetus for legal reform. Former Attorney General Robert Jackson opined in 1940 that “[t]he continued immunity of the Government to suit on common law torts does not seem to be warranted either as a matter of principle or as a matter of justice.”⁷⁷ In January 1942, President Franklin D. Roosevelt sent a message to Congress endorsing then-pending legislation and noting that “[d]uring the past 20 years, Members of the Congress have frequently pointed out that the procedure for relief of tort claims by special act is slow, expensive, and

75. Holtzoff, *supra* note 59, at 315. That said, judicial remedies were available for tort claims arising out of the activities of government-owned or government-controlled corporations, even though in Holtzoff’s view “from the standpoint of the public their status appears to be that of governmental agencies.” *Id.* at 316. Holtzoff also notes numerous private acts “disposing of individual claims against the Government,” including acts conferring upon the named claimant “the privilege of suing the Government for damages in respect to a specified claim.” *Id.* at 322. Some such acts “affirmatively provide[] that the United States shall be liable as a private individual under like circumstances.” *Id.*

76. H.R. REP. NO. 77-2245, at 7 (1942); *see also* H.R. REP. NO. 79-1287, at 3 (1945) (noting the same thing). Both reports indicated that the “only justification [for the exemption] seems to be historical,” and that especially given “the expansion of governmental activities in recent years,” individuals should be able “to sue the Government in respect to such torts as negligence in the operation of vehicles.” H.R. REP. NO. 77-2245, at 7; H.R. REP. NO. 79-1287, at 3.

77. H.R. REP. NO. 77-2245, at 12 (quoting Letter from Robert H. Jackson, former Attorney General, to the Chairman of the House Judiciary Committee (Feb. 14, 1940)). As Jackson noted, the proposed legislation was “drafted by representatives of the Department of Justice in collaboration with representatives of other governmental agencies.” *Id.* Jackson was appointed to the Supreme Court in 1941. *Justices 1789 to Present*, SUP. CT., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/J7NZ-NUH3>]. His successor, Attorney General Francis Biddle, also supported adoption of the legislation that became the FTCA. H.R. REP. NO. 77-2245, at 12 (presenting a letter from Francis Biddle, Attorney General, to Rep. Hatton W. Sumners (Jan., 1942)).

unfair both to the Congress and to the claimant.”⁷⁸ This changed on August 2, 1946, when Congress finally enacted the Federal Tort Claims Act.⁷⁹ Multiple legislative proposals culminated in the passage of this legislation, which “gave to the citizen, for the first time in United States history, a remedy against the Government for its negligent torts.”⁸⁰

The FTCA put an end to the practice of introducing private bills to authorize or direct “the payment of money for property damages or for personal injuries or death” within the scope of the statute.⁸¹ It authorized suits against the United States for damages “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”⁸² The FTCA governs suits against federal agencies and corporations, but not suits against independent contractors for tortious acts committed while performing work for the government.⁸³ Because the FTCA is a jurisdictional statute, it does not create a cause of action; instead, it provides the district courts with jurisdiction over tort claims against the United States “under circumstances where the United States, if a private person, would be liable to the claimant in

78. Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 1 n.2 (1946) (quoting H.R. DOC. NO. 77-562, at 2 (1942)).

79. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680).

80. Gottlieb, *supra* note 78, at 3; *see also id.* at 49-50 (referencing “the intent of Congress to exclude cases involving malicious and wilful torts from the pattern of this remedial legislation”).

81. Gottlieb, *supra* note 78, at 4-5. Prior to the enactment of the FTCA, an injured claimant would sue “the driver of the Government vehicle causing the injury,” and then “take the judgment to the Claims Committee” to request a private bill providing for payment of the judgment by the United States “as an act of grace.” *Id.* at 9.

82. 28 U.S.C. § 1346(b)(1). Interestingly, an earlier draft approved by the Senate during the 77th Congress covered only claims arising out of “negligence,” whereas the House version—and the version that ultimately passed—used the phrase “negligent or wrongful act or omission.” H.R. REP. NO. 77-2245, at 11 (1942). The House Committee preferred the latter formulation because “it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent.” *Id.*

83. Gottlieb, *supra* note 78, at 10; 28 U.S.C. § 2671 (excluding “any contractor with the United States” from the definition of “Federal Agency” under the FTCA); *see* United States v. Orleans, 425 U.S. 807, 814 (1976) (indicating that the United States is not liable for the torts of its contractors); *see also* Logue v. United States, 412 U.S. 521, 526-28 (1973) (discussing the distinction between employees and “persons acting on behalf of a federal agency in an official capacity,” on the one hand, and contractors on the other).

accordance with the law of the place where the act or omission occurred.”⁸⁴ The Act specifies that the United States will be liable “in the same manner and to the same extent as a private individual under like circumstances,” except that the United States is not liable for pre-judgment interest or for punitive damages.⁸⁵ Common law tort claims against the United States are tried without a jury.⁸⁶

The FTCA also carves out exceptions to the waiver of sovereign immunity. Notably, the FTCA does not create jurisdiction over “[a]ny claim arising in a foreign country.”⁸⁷ It also does not create jurisdiction over “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”⁸⁸ Finally, it does not create jurisdiction over claims against government employees “exercising due care, in the execution of a statute or regulation,” or 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.”⁸⁹

The rationales for these exceptions vary. The House Committee Report accompanying the bill highlights the statutory execution and discretionary function provision as

a highly important exception ... designed to preclude application of the bill to a claim against a regulatory agency, such as the

84. 28 U.S.C. § 1346(b)(1).

85. 28 U.S.C. § 2674.

86. *See* 28 U.S.C. § 2402.

87. 28 U.S.C. § 2680(k); *see* *United States v. Spelar*, 338 U.S. 217, 218-19 (1949) (indicating that “the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States,” thereby excluding a claim for an allegedly wrongful death at a Newfoundland air base under long-term lease to the United States). The Supreme Court cited legislative history suggesting that the motivation behind this exception was the difficulty in applying foreign law to claims against the United States. *See id.* at 221 (observing that Congress “was unwilling to subject the United States to liabilities depending upon the laws of a foreign power”).

88. 28 U.S.C. § 2680(h). Congress later enacted an exception to this exception for claims arising “out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution” with regard to “acts or omissions of investigative or law enforcement officers.” Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680(h)).

89. 28 U.S.C. § 2680(a).

Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved.⁹⁰

The concepts of executing a statute or regulation and exercising a discretionary function appear to have been closely linked. Congress (and the legislation's drafters in the executive branch) did not want to enable a claimant to challenge the "validity" of a statute or to argue that a government employee abused his or her discretion in executing a statute or regulation.⁹¹ That said, the preservation of immunity from claims for administering governmental regulations was not "intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency" charged with administering those regulations.⁹² Moreover, the exclusion of deliberate torts by individuals from the government's waiver of immunity was based, in part, on the assumption that claimants could already seek redress directly against such individuals.⁹³

The FTCA allows claimants to sue the government directly, rather than suing individual government employees and then asking the United States to pay the resulting judgment by enacting a private bill.⁹⁴ Under the Act, as described by Department of Justice Civil Division attorney Irvin Gottlieb, the United States "assumed legal responsibility for the acts of its officers, employees and

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

91. *Id.* at 6 ("The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts [as the exercise of the Treasury Department's blacklisting or freezing powers] even though negligently performed and involving an abuse of discretion.").

92. *Id.* The Report also references "certain governmental activities which should be free from the threat of damage suits" (such as the operation of the postal service and "the assessment or collection of taxes"), as well as activities "for which adequate remedies are already available" against the individual ("such as assault and battery"). *Id.* The exclusion of assault and battery is consistent with the distinction between "deliberate torts," for which the United States did not waive immunity in the FTCA, and "negligent assaults," which have been deemed within the scope of the Act. See Alfred Blessing, Note, *Torts—Federal Tort Claims Act—Exception as to Assault and Battery*, 34 NEB. L. REV. 567, 568 (1955).

93. See Blessing, *supra* note 92, at 570. However, the idea that there is an adequate remedy against individual perpetrators of deliberate assaults neglects that individuals are often judgment-proof. See *id.* (criticizing the FTCA's exclusion of deliberate torts).

94. On the pre-FTCA practice, see Gottlieb, *supra* note 78, at 9.

agents, acting within the scope of their employment, insofar as they constituted actionable invasions of the rights of private individuals.”⁹⁵ The judgment in an FTCA action thus “constitute[s] a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.”⁹⁶ This accomplishes the purpose, as described in an important pre-FTCA article, of “placing the risk of honest official mistakes upon the community where it properly belongs.”⁹⁷

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (“The Westfall Act”) in response to the Supreme Court’s decision in *Westfall v. Erwin*.⁹⁸ In that case, the Supreme Court held that federal officials were not absolutely immune from suits for damages under state tort law for conduct within the scope of their employment unless the challenged conduct was “discretionary in nature.”⁹⁹ This left individual officials exposed to tort liability for nondiscretionary conduct performed on behalf of the government. The defendants in *Westfall v. Erwin* were responsible for supervising the storage of toxic soda ash at an army depot, and they were allegedly negligent in allowing a warehouse worker to come into contact with soda ash dust.¹⁰⁰ The Court emphasized that the purpose of official immunity “is not to protect an erring official, but to insulate the decision-making process from the harassment of prospective litigation.”¹⁰¹ If an official could be liable for performing a discretionary function—that is, conduct that is “the product of independent judgment”—then the official’s conduct could be “detrimentally inhibit[ed]” by the threat of liability.¹⁰²

95. Irvin M. Gottlieb, *The Tort Claims Act Revisited*, 49 GEO. L.J. 539, 539 (1961).

96. Gottlieb, *supra* note 78, at 23. Gottlieb further noted that the Act does not provide for “recovery by the United States against its employee whose wrongful act or omission gave rise to the claim causing the liability to the Government,” although the government could institute disciplinary action against the employee. *Id.* at 23, 23 n.69; cf. Gottlieb, *supra* note 95, at 545-53 (discussing case law on indemnification).

97. Gellhorn & Schenck, *supra* note 70, at 725 (quoting E. M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 8 (1924)).

98. *United States v. Smith*, 499 U.S. 160, 163 (1991).

99. *Westfall v. Erwin*, 484 U.S. 292, 300 (1988).

100. *Id.* at 293-94.

101. *Id.* at 295 (acknowledging further that “absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct”).

102. *Id.* at 296-97.

However, the Court reasoned that nondiscretionary functions are not susceptible to being inhibited by the threat of liability; consequently, shielding nondiscretionary functions from liability “would not further effective governance.”¹⁰³ The Court instructed lower courts to “consider whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens” to determine whether a defendant official should benefit from immunity for acts performed within the scope of the official’s employment.¹⁰⁴ This left federal employees who perform nondiscretionary functions (the rank and file) exposed to personal liability for common law torts committed in the performance of their official functions.¹⁰⁵

Congress responded to the Supreme Court’s decision by passing the Westfall Act. The Act provides absolute immunity for federal employees from personal liability for common law torts by substituting the United States as the defendant in any action against a federal employee acting within the scope of their employment.¹⁰⁶ Congress emphasized in its legislative findings that “the Federal Tort Claims Act [is] the proper remedy for Federal employee torts,” rather than recourse to state tort law.¹⁰⁷ Given the high barriers to suing government officials for constitutional (as opposed to common law) torts, one commentator has observed “it is now the FTCA or nothing.”¹⁰⁸

B. Defining Discretionary Functions Under the FTCA

Congress’s waiver of U.S. sovereign immunity under the FTCA—including the FTCA’s categorical exclusion of claims arising in a foreign country, and its exclusion of claims for assault and battery

103. *Id.* at 297.

104. *Id.* at 299.

105. One contemporary observer wrote: “Although the Act is a knight in shining armor to the federal work force, the federal government may now continue to escape liability from its own negligence through the discretionary function loophole in the FTCA.” William T. Cornell, Note, *An Evaluation of the Federal Employees Liability Reform and Tort Compensation Act: Congress’ Response to Westfall v. Erwin*, 26 S.D. L. REV. 137, 138 (1989).

106. Westfall Act, Pub. L. No. 100-694, § 2, 102 Stat. 4563, 4563 (1988).

107. § 2(a)(6), 102 Stat. at 4563. The Westfall Act does not extend to constitutional torts or violations of federal statutes. *See* 28 U.S.C. § 2679(b)(2).

108. Olivia Goldberg, Note, *(Extra)ordinary Tort Law: Evaluating the Federal Tort Claims Act as a Constitutional Remedy*, 76 STAN. L. REV. 481, 486 (2024).

except when committed by law enforcement—turns on Congress’s assessment of the desirability of judicial remedies for various injuries caused by U.S. government officials.¹⁰⁹ This assessment also informs the FTCA’s exclusion of injuries caused by the exercise of discretionary functions from the waiver of sovereign immunity. The Supreme Court in *Westfall v. Erwin* assumed that Congress wanted “to insulate the decisionmaking process from the harassment of prospective litigation.”¹¹⁰ That said, the text of the FTCA does not define the term “discretionary function,” and the legislative history is thin.¹¹¹ Perhaps not surprisingly, in the decade following the FTCA’s enactment, the discretionary function exception “g[ave] rise to considerable confusion and litigation.”¹¹² One author speculated that this exception “has probably received the greatest consideration of the courts due to the paucity of legislative observation of the exception’s purpose.”¹¹³

In the pre-FTCA era, courts were called upon to distinguish between “ministerial” and “discretionary” official acts to determine whether government officers could be held personally liable for resulting injuries.¹¹⁴ Under pre-FTCA case law, “[a]n official [could] be held responsible for an injurious act which was merely ministerial; but [was] immune if the injury arose from an act which was discretionary in nature.”¹¹⁵ The FTCA preserves the common law immunity associated with exercises of judgment by U.S. government officers. However, it waives the United States’s immunity for injuries caused by nondiscretionary acts committed within the scope of an official’s employment. Following the enactment of the Westfall

109. See *Westfall v. Erwin*, 484 U.S. 292, 299-300 (1988).

110. *Id.* at 295.

111. See H.R. REP. NO. 79-1287, at 5-6 (1945) (providing little explanation of Congress’s rationale for this exception).

112. Cornelius J. Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. & STATE BAR J. 207, 208 (1956).

113. Ronald E. Kay, Note, *Discretionary Function Exception of Federal Tort Claims Act*, 12 U. MIA. L. REV. 247, 248 (1958).

114. See, e.g., Gellhorn & Schenck, *supra* note 70, at 729 (“The same policy considerations which argue against imposing personal liability upon an officer were apparently persuasive that the Government should also be free from liability for mistaken or even abusive exercises of judgment.”).

115. Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 27 IND. L.J. 121, 124 (1951).

Act, claims against individual officials for such acts are converted into FTCA claims against the U.S. government.¹¹⁶

The Supreme Court considered the scope of the FTCA's discretionary function exception in *Dalehite v. United States*, which was decided by a 4-3 majority (two of the justices did not participate in the decision).¹¹⁷ That case arose from the April 1947 explosion of ammonium nitrate fertilizer on board the S.S. Grandcamp, which was docked in Texas City, and the ignition and explosion of fertilizer on a nearby ship, the S.S. High Flyer.¹¹⁸ The combined explosions killed over 500 people and injured thousands.¹¹⁹ A group of plaintiffs filed test cases under the FTCA and alleged negligence by federal officials and employees involved in a program to produce and ship fertilizer grade ammonium nitrate (FGAN) to U.S.-occupied countries to help feed the populations there.¹²⁰ In particular, they alleged that "the United States, without definitive investigation of FGAN properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions."¹²¹

The Court began by describing the FTCA as "the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."¹²² It characterized the exception to the waiver of sovereign immunity at issue as "the governmental regulatory function exception from suits,"¹²³ and quoted legislative history describing the exception as covering "discretionary administrative action" that Congress deemed inappropriate for a tort suit.¹²⁴ In the Court's

116. The Department of Justice may certify that an employee was acting within the scope of employment, subject to judicial review of that determination. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-20 (1995).

117. See 346 U.S. 15, 17, 47 (1953).

118. See *1947 Texas City Disaster—First Explosion*, TEX. CITY: MOORE MEM'L PUB. LIBR., <https://texascitytx.gov/464/First-Explosion> [<https://perma.cc/6UE5-LJD6>]; *Texas City Disaster—Second Explosion*, TEX. CITY: MOORE MEM'L PUB. LIBR., <https://texascitytx.gov/470/Second-Explosion> [<https://perma.cc/5TZU-WQQH>].

119. See *1947 Texas City Disaster—Aftermath*, TEX. CITY: MOORE MEM'L PUB. LIBR., <https://texascitytx.gov/460/Aftermath> [<https://perma.cc/E4TA-C8ND>].

120. See *Dalehite*, 346 U.S. at 19-20.

121. *Id.* at 23.

122. *Id.* at 24.

123. *Id.* at 26.

124. *Id.* at 27 (quoting *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H.*

words, Congress did not contemplate “that the Government should be subject to liability arising from acts of a governmental nature or function.”¹²⁵ While the Court declined “to define, apart from this case, precisely where discretion ends,”¹²⁶ it held that “[w]here there is room for policy judgment and decision there is discretion.”¹²⁷ In *Dalehite*, the Court assessed that “[t]he decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government’s fertilizer program.”¹²⁸ In addition, with respect to the alleged failures in fighting the fire, “if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.”¹²⁹ The majority thus found that the claimants could not sue the government for their injuries.

The three dissenters emphasized that “[t]his was a man-made disaster.”¹³⁰ In their view, “one function of civil liability for negligence is to supply a sanction to enforce the degree of care suitable to the conditions of contemporary society and appropriate to the circumstances of the case.”¹³¹ Because, according to the dissenters, “Congress has defined the tort liability of the Government as analogous to that of a private person,”¹³² the majority’s decision could “inaugurate an unfortunate trend toward relaxation of private as well as official responsibility in making, vending, or transporting inherently dangerous products.”¹³³ In their view, interpreting the FTCA’s discretionary function exception too broadly could

Comm. on the Judiciary, 77th Cong. 29 (1942) (statement of Francis M. Shea, Assistant Att’y Gen. of the U.S.)).

125. *Id.* at 28.

126. *Id.* at 35.

127. *Id.* at 36.

128. *Id.* at 42.

129. *Id.* at 44. The Court continued, “To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.” *Id.* Congress ultimately passed a bill allowing about “seventeen million dollars to be distributed to almost 1,400 claimants.” *1947 Texas City Disaster—Recovery*, TEX. CITY: MOORE MEM’L PUB. LIBR., <https://texascitytx.gov/469/Recovery> [https://perma.cc/8V9Q-N9HA].

130. *Dalehite*, 346 U.S. at 48 (Jackson, J., dissenting).

131. *Id.* at 49.

132. *Id.*

133. *Id.* at 50. The dissent opined, “Surely a statute so long debated was meant to embrace more than traffic accidents.” *Id.* at 60.

undermine tort law's ability to incentivize due care on the part of government officials.¹³⁴

The impact of *Dalehite* in barring FTCA claims was softened just two years later by the Supreme Court's decision in *Indian Towing Co. v. United States*.¹³⁵ There, the plaintiffs' damages were allegedly caused by the Coast Guard's negligent "operation of a lighthouse light."¹³⁶ The Court, in a 5-4 decision, framed the question as "one of liability for negligence at what this Court has characterized the 'operational level' of governmental activity."¹³⁷ The government argued that, although the operation of the lighthouse light did not involve an exercise of judgment, it nonetheless fell outside the scope of the FTCA because private persons are not authorized to operate lighthouses.¹³⁸ In the government's view, the allegedly injurious conduct thus entailed a "uniquely governmental function[]" not encompassed by the FTCA's waiver of sovereign immunity.¹³⁹ The Court viewed this suggestion with skepticism, observing that "it is hard to think of any governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed."¹⁴⁰ The *Indian Towing* majority affirmed that the FTCA could provide recourse for injuries caused by conduct at the "operational level" of government.¹⁴¹ The dissenters, by contrast, focused on whether a public body would have been liable for the challenged activity under pre-FTCA tort law.¹⁴² In

134. *Id.* at 59-60.

135. 350 U.S. 61 (1955).

136. *Id.* at 62.

137. *Id.* at 64 (quoting *Dalehite*, 346 U.S. at 42).

138. *Id.*

139. *Id.* The Court rejected this argument because, among other reasons, it would "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." *Id.* at 65.

140. *Id.* at 68.

141. *See id.*

142. *Id.* at 73 (Reed, J., dissenting). The dissent argued that this approach was required by the Court's decision in *Feres v. United States*, *see id.* at 72-73, which held that the government was not liable under the FTCA for injuries to servicemembers arising out of or in the course of activity incident to military service. *See* 340 U.S. 135, 141-42 (1950) (noting the absence of any basis for private liability in "all the circumstances" of service-connected injuries, because "no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command"). The Court in *Feres* also noted that the recoveries under the existing compensation system

their view, Congress did not intend all governmental activity at the “operational level” to be subject to suit.¹⁴³ Rather, they would have tied “discretionary functions” exempted from suit under the FTCA more closely to the idea of inherently public or governmental functions, including the operation of a lighthouse.¹⁴⁴

Against this doctrinal backdrop, two decisions from the 1980s emerged as key reference points for defining discretionary functions under the FTCA.¹⁴⁵ In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, the Supreme Court considered two consolidated cases involving tort claims based on the Federal Aviation Administration’s (FAA) alleged negligence in failing to check specific items when certifying certain aircraft for use in commercial aviation.¹⁴⁶ In one case, 124 passengers died from asphyxiation and the effects of toxic gases from a fire that broke out in a lavatory trash receptacle.¹⁴⁷ In the other, an improperly installed gasoline line leading to a gas-burning cabin heater caused a fire and plane crash that killed the pilot, copilot, and two passengers.¹⁴⁸ Both sets of claimants sued the United States under the FTCA.¹⁴⁹

The FAA promulgates safety rules and regulations and performs “spot-checks” to verify compliance by aircraft manufacturers and operators.¹⁵⁰ The *Varig Airlines* Court recalled its prior discussion in *Dalehite* and observed that “[t]he discretionary function exception ... marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private

“compare extremely favorably with those provided by most workmen’s compensation statutes.” *Id.* at 145.

143. *Indian Towing Co.*, 350 U.S. at 76 (Reed, J., dissenting).

144. *See id.* at 73-75.

145. Further clarification was arguably necessary; as Professor John Rogers—later a Sixth Circuit judge—opined, “Lawyers who represent or litigate against government agencies must wrestle so frequently with the concept of agency ‘discretion’ that they may be forgiven for believing that the term is devoid of intrinsic meaning—a chameleon deriving substance only from its particular context.” John M. Rogers, *A Fresh Look at Agency “Discretion,”* 57 TUL. L. REV. 776, 776 (1983).

146. 467 U.S. 797, 800-01 (1984).

147. *Id.* at 800.

148. *Id.* at 802-03.

149. *Id.* at 800, 803.

150. *Id.* at 815.

individuals.”¹⁵¹ The Court quoted the government’s explanation at the time of the FTCA’s enactment that the exception was “designed to preclude [the] application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency,” because “[i]t is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort.”¹⁵² The FTCA was adopted to provide redress for “the common law torts of employees of regulatory agencies, as well as of all other Federal agencies.”¹⁵³ The purpose of the discretionary function exception was to “make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action.”¹⁵⁴ The *Varig Airlines* Court held that both the adoption of the “spot-check” system and its application to the two aircraft fell within the scope of the exception, and that to hold otherwise would amount to impermissible “judicial intervention in policymaking.”¹⁵⁵

Importantly, the Supreme Court has never found that all governmental functions qualify as discretionary functions under the FTCA, even though the government has advocated for this expansive interpretation. In a case decided not long after *Varig Airlines*, the Supreme Court held that a claimant could pursue a tort action against the United States for a federal agency’s alleged failure to comply with its own mandatory policy.¹⁵⁶ Kevan Berkovitz contracted polio when he was given a polio vaccine that had been wrongfully licensed and approved for release to the public.¹⁵⁷ The United States argued that Berkovitz’s civil suit was barred by the discretionary function exception.¹⁵⁸ However, the Court found that “the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of

151. *Id.* at 808.

152. *Id.* at 809-10 (quoting *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 28, 33 (1942) (statement of Francis M. Shea, Assistant Att’y Gen. of the U.S.)).

153. *Id.* at 810 (statement of Francis M. Shea, Assistant Att’y Gen. of the U.S.).

154. *Id.*

155. *Id.* at 820.

156. *Berkovitz v. United States*, 486 U.S. 531, 544 (1988).

157. *Id.* at 533.

158. *See id.*

action for an employee to follow.”¹⁵⁹ Moreover, “[t]he exception, properly construed, ... protects only governmental actions and decisions based on considerations of public policy.”¹⁶⁰ The Court rejected the government’s argument that the exception “precludes liability for any and all acts arising out of the regulatory programs of federal agencies.”¹⁶¹

Conversely, the Supreme Court’s decision in *United States v. Gaubert* rejected a categorical approach that would have excluded all “operational level” decisions from the scope of the discretionary function exception.¹⁶² This case arose in the context of the savings and loan crisis of the 1980s and 1990s.¹⁶³ The Court held that the allegedly negligent supervision by federal regulators of a Texas-chartered and federally insured savings and loan association fell within the discretionary function exception.¹⁶⁴ It reasoned that the exception encompasses the “planning-level decisions establishing programs” under a regulatory statute, “the promulgation of regulations” to carry out those programs, and “the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the ... regulations.”¹⁶⁵ The Court emphasized that “the purpose of the [discretionary function] exception is to ‘prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.’”¹⁶⁶ Consequently, “when properly construed, the exception ‘protects only governmental actions and decisions based on considerations of public policy.’”¹⁶⁷ This rationale echoes the observation that “[t]he primary purpose of the exception appears to be simply a recognition of the long established doctrine that there should be preserved a reasonable independence in executive and legislative action in accordance with the spirit of the separation of powers system.”¹⁶⁸ The separation of

159. *Id.* at 536.

160. *Id.* at 537.

161. *Id.* at 538.

162. 499 U.S. 315, 326 (1991).

163. *Id.* at 317 n.1.

164. *See id.* at 326.

165. *Id.* at 323.

166. *Id.* (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

167. *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 537 (1988)).

168. Howard A. Cole, Comment, *Torts—The Discretionary Function Exception in the*

powers underpinning for the discretionary function exception operates internally to the structure of the U.S. federal government.¹⁶⁹ It does not carry over to tort actions against foreign governments in U.S. courts.

In sum, since the FTCA was enacted in 1946, courts have articulated certain core principles to delineate the scope of the discretionary function exception to the U.S. government's waiver of sovereign immunity. These include an understanding of the exception as designed "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of [a tort suit]."¹⁷⁰ Conduct is not beyond the scope of the FTCA's waiver simply because it involves a "uniquely governmental function[],"¹⁷¹ and it does not fall within the scope of the FTCA's waiver simply because it is performed by a lower-level government employee rather than a higher-level official.¹⁷² The exception protects discretionary decisions that implicate policy considerations, but not exercises of discretion that are "devoid of policy considerations."¹⁷³ Where policy considerations are involved, the discretionary function exception will apply "*unless* the government has restricted its own discretion by limiting itself through specific and mandatory rules or regulations governing the precise activity complained about."¹⁷⁴ While one could critique the

Federal Tort Claims Act, 52 MICH. L. REV. 733, 738 (1954). Cole argued in favor of a test for discretionary functions that would ask whether a particular decision was "essential to the successful execution of general executive or legislative policy." *Id.* at 739. In his view, this test would avoid judicially second-guessing policy decisions (including both "original" and "subsidiary" decisions), while ensuring that "any such project be undertaken in a manner which would cause the least possible wrongful injury to individuals." *Id.*

169. See *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989) ("The wellspring of the discretionary function exception is the doctrine of separation of powers."); see also Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 872 (1991) (noting that "[m]ost agree that separation of powers concerns furnish part of the justification for the government's retained immunity" under the discretionary function exception).

170. *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

171. See *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955).

172. See *Varig Airlines*, 467 U.S. at 813.

173. See David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 298-99 (1989).

174. *Id.*; see also *Berkovitz v. United States*, 486 U.S. 531, 544 (1988) ("When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply.").

resulting allocation of costs between the federal government and injured parties, it is clear that this framework has evolved with purely domestic considerations in mind.

Two attorneys in the Department of Justice’s Torts Division, writing in their personal capacities, observed that “the federal government is *sui generis* with regard to the impact the tort system should have.”¹⁷⁵ The Supreme Court has indicated that “it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception” under the FTCA.¹⁷⁶ Given that the federal government is “*sui generis* with regard to the impact the tort system should have” on its behavior and the availability of compensation for injuries caused by that behavior,¹⁷⁷ it makes little sense to use the same liability regime to determine a foreign state’s exposure to claims in U.S. courts. Yet, that is precisely what courts have been doing under the FSIA, as described below.

III. THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA)

This Part recounts the enactment of the FSIA in response to a very different set of problems than those animating the FTCA. Part III.A reconstructs the “copy-pasting” process that led to the inclusion of the FTCA’s discretionary function exception in the FSIA. Part III.B shows that this exception has no analog in the international law of foreign sovereign immunity, or in other countries’ statutes codifying foreign state immunity. The FSIA’s discretionary function exception provides foreign states with an additional defense to the exercise of U.S. adjudicatory jurisdiction that is not required by international law and does not have a compelling domestic legal justification.

A. *The FSIA’s Evolution and Enactment*

Congress enacted the Foreign Sovereign Immunities Act of 1976 to give courts the ability to decide when foreign states, including

175. Fishback & Killefer, *supra* note 173, at 328.

176. *Varig Airlines*, 467 U.S. at 813.

177. Fishback & Killefer, *supra* note 173, at 328.

their agencies and instrumentalities, could be subject to U.S. civil jurisdiction.¹⁷⁸ Historically, individuals could not seek judicial redress directly against foreign states; instead, injured parties petitioned their own countries to “espouse[]” their claims diplomatically.¹⁷⁹ The trend toward direct claims was accelerated by suits in admiralty, in which private claimants filed claims in rem against foreign ships in U.S. ports. The State Department adopted the view that “government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war.”¹⁸⁰ This presaged a general trend toward treating foreign states as if they were private parties when they engaged in commercial activities, rather than according them immunity from the jurisdiction of U.S. courts. As recounted by then-Professor Jack B. Tate in a 1954 speech to the Bar Association of the City of New York, “After the end of World War I, the courts of many countries abandoned the classical theory [of state immunity] and adopted the restricted theory, no doubt due to the entry into trade by so many states during and since that war.”¹⁸¹ The United States officially announced its adoption of the restrictive theory in a letter signed by Tate in his capacity as Acting Legal Adviser for the State Department in May 1952.¹⁸² Almost twenty-five years later, the State Department and the Justice Department urged Congress to codify the restrictive theory of foreign state immunity in a federal statute.¹⁸³

178. See 28 U.S.C. § 1602; see also 28 U.S.C. § 1603 (definitions). The FSIA does not govern the immunities of individual officials. See William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 *FORDHAM L. REV.* 677, 690-91 (2021). It also does not apply in criminal proceedings. See *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272 (2023).

179. See, e.g., Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 *U. CHI. L. REV.* 180, 180 (1946) (explaining that “the claim of a private person, normally without judicial standing as against a foreign state, is espoused by a state and thus converted into a government claim”).

180. *The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921) (quoting Letter from the Secretary of State (Aug. 2, 1921)). See Keitner, *supra* note 55, at 271-75.

181. Robert M. Jarvis, *The Tate Letter: Some Words Regarding Its Authorship*, 55 *AM. J. LEGAL HIST.* 465, 470 (2015).

182. See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Att’y Gen., U.S. Dep’t of Just. (May 19, 1952), reprinted in *DEPT STATE BULL.* June 1952, at 984, 984-85 (June 23, 1952).

183. See, e.g., Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of*

The drafters of the FSIA “believed that the jurisdiction of the United States courts for claims against foreign States should depend both on the character of the acts of the foreign State forming the basis of the claim and the connection between those acts and the territorial jurisdiction of the United States.”¹⁸⁴ Consequently, under the terms of the FSIA, the United States does not accord jurisdictional immunity to foreign states for their commercial activities when there is a sufficient U.S. nexus.¹⁸⁵ In addition, the separately enumerated exception to jurisdictional immunity for noncommercial torts provides that a foreign state shall not be immune from jurisdiction in any case

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.¹⁸⁶

This reflects a category of nonimmune conduct comprising “torts incidental to governmental activity, such as automobile accidents.”¹⁸⁷ Whereas the commercial activity exception “preserves immunity as necessary to protect a foreign state’s ‘sovereignty,’” the tort exception “is available even when the foreign state’s actions are quintessentially ‘sovereign,’ for example, when a foreign state assassinates an opponent.”¹⁸⁸

The noncommercial tort exception in the FSIA requires that the injury, death or damage occur in the United States.¹⁸⁹ As explained below, this reflects an acceptance in international law that foreign

1976 in Perspective: A Founder’s View, 35 INT’L & COMPAR. L.Q. 302, 304-05 (1986) (noting that a “principal objective[]” of the FSIA was to grant authority to courts to determine sovereign immunity); *see also, e.g.*, Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT’L L. 33, 65 (1978) (“The intent of the Immunities Act was to place in the courts the determination whether a foreign sovereign was entitled to immunity.”).

184. Feldman, *supra* note 183, at 305.

185. *See* 28 U.S.C. § 1605(a)(2).

186. 28 U.S.C. § 1605(a)(5).

187. Donoghue, *supra* note 32, at 310-11.

188. *Id.* at 311.

189. *See* 28 U.S.C. § 1605(a)(5).

states may be sued in each other's courts for certain acts committed on the forum state's territory.¹⁹⁰ The FSIA's language does not specify whether the wrongful act or omission must occur in the United States, or whether it suffices that the injury occur on U.S. soil.¹⁹¹ Absent clarification by Congress, U.S. courts have declined to apply the territorial tort exception when conduct in a foreign country causes an injury on U.S. soil,¹⁹² even though this "entire tort" approach has been criticized by experts and is not required by international law.¹⁹³ In a further limitation, the noncommercial tort exception to jurisdictional immunity excludes "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."¹⁹⁴ It also excludes "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused."¹⁹⁵ As Joan Donoghue notes,

190. See *infra* note 192.

191. See 28 U.S.C. § 1605(a)(5).

192. See *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7, 11 (D.C. Cir. 2017) ("Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439-40 (1989))). Article 11 of the European Convention on State Immunity of 1972 provides that a Contracting State cannot claim immunity from jurisdiction "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred." European Convention on State Immunity art. 11, *opened for signature* May 16, 1972, 1495 U.N.T.S. 181. In 2022, the High Court of England and Wales interpreted section 5 of the U.K. State Immunity Act of 1978, which provides that a foreign state is not immune from proceedings for death, personal injury, or damage to or loss of tangible property "caused by an act or omission in the United Kingdom." *Al-Masari v. Kingdom of Saudi Arabia* [2022] EWHC (QB) 2199 [7], [2023] QB 475 [486] (Eng.) (quoting State Immunity Act 1978, c. 33, § 5 (UK)). The claimant alleged that Saudi Arabia caused injury in England by infecting his iPhones with Pegasus spyware. See *id.* [14]. The court found that the manipulation of a computer device located in the U.K. fell within the scope of this exception and explicitly rejected the "entire tort" approach in *Kidane v. Ethiopia*. See *id.* [144], [151] ("English courts should be cautious before placing too much reliance on foreign decisions that are concerned with different legislation which has different wording and a different legislative history, as the FSIA does when compared with the SIA 1978.").

193. See, e.g., Working Grp. of the A.B.A., *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 566-67 (criticizing the "entire tort" case law and recommending that the FSIA be amended to require that "a substantial portion of the tortious acts or omissions occur in the United States" instead of requiring that the injury or damage occur in the United States (emphasis omitted)).

194. 28 U.S.C. § 1605(a)(5)(B).

195. 28 U.S.C. § 1605(a)(5)(A).

“These exclusions [from the jurisdiction of U.S. courts] were engrafted onto the FSIA from the Federal Tort Claims Act.”¹⁹⁶

In contrast to the extensive record explaining Congress’s codification of U.S. jurisdiction over a foreign state’s commercial activities, the legislative history of the noncommercial tort exception is thin. The commercial activity exception reflects the restrictive theory of foreign state immunity, under which “the immunity of a foreign state is ‘restricted’ to suits involving a foreign state’s public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*).”¹⁹⁷ The Departments of State and Justice reported in 1976 that “American citizens are increasingly coming into contact with foreign states and entities owned by foreign states.”¹⁹⁸ These interactions “call into question whether [U.S.] citizens will have access to the courts in order to resolve ordinary legal disputes”¹⁹⁹ with respect to their business dealings and in other contexts such as “when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.”²⁰⁰ At the time the FSIA was adopted, sovereign immunity from suit in other countries was “a question of international law to be determined by the courts.”²⁰¹ Since the mid-1950s, courts in Western Europe had been denying U.S. pleas of immunity “in tort and contract cases where the necessary contacts with the forum were present.”²⁰² By the time the FSIA was adopted, the United States had stopped pleading immunity when it was sued in foreign courts in these types of actions.²⁰³

The House Judiciary Committee’s report notes that section 1605(a)(5) of the FSIA, which provides jurisdiction over claims for

196. Donoghue, *supra* note 32, at 312. Donoghue (who later served as President of the International Court of Justice) criticized this approach for, among other things, leaving uncertain whether the scope of foreign state immunity automatically changes when the U.S. Supreme Court reinterprets the discretionary function exception of the FTCA. *See id.* (asking, in the wake of the *Gaubert* decision, (1) whether “this mean[s] that the FSIA has also changed, or that the two standards have now diverged,” and (2) whether “foreign states [can] reasonably be expected to know the answer to this question”).

197. H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605.

198. *Id.* at 6.

199. *Id.*

200. *Id.* at 6-7.

201. *Id.* at 9.

202. *Id.*

203. *See id.*

noncommercial torts, is “directed primarily at the problem of traffic accidents”;²⁰⁴ nonetheless, the section is framed “in general terms as applying to all tort actions for money damages” not otherwise encompassed by the commercial activity exception.²⁰⁵ This exception to jurisdictional immunity “is meant to include causes of action which are based on strict liability as well as on negligence.”²⁰⁶ Moreover, the carve-outs from this exception (including the carve-out for discretionary functions) “correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act.”²⁰⁷ A contemporary observer noted that while “[t]here is no precedent for [allowing claims against foreign states for noncommercial torts] in prior State Department or judicial policy,”²⁰⁸ “[i]nternational law does not prohibit such actions.”²⁰⁹ He opined that “international law in general has become increasingly concerned with the protection of human rights, a goal the newly enacted section would promote”²¹⁰—although such claims would, under the terms of the FSIA, be restricted to violations of

204. *Id.* at 20.

205. *Id.* at 20-21. The House Report describes the exception as applying to a foreign state’s officials or employees “acting within the scope of their authority,” *id.* at 21, rather than using the statute’s language, which refers to the “scope of his office or employment.” 28 U.S.C. § 1605(a)(5).

206. H.R. REP. NO. 94-1487 at 21. This part of the House Report is silent on whether the exception is meant to include intentional torts. *See id.* at 20-21.

207. *Id.* at 21. The House Report notes this similarity but does not explain the reasoning underlying it. *See id.*

208. Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 33 (1976).

209. *Id.* Weber further indicated that “[t]he principal object of newly enacted 28 U.S.C. § 1605(5) is to permit tort victims in automobile accidents with foreign state agents performing *acta jure imperii* to recover damages from the foreign state.” *Id.*

210. *Id.* at 34 (footnote omitted). To the extent that the FSIA’s carve-outs to the noncommercial tort exception were intended to “provide for immunity only in those cases in which the United States Government would itself be immune from suit under the Federal Tort Claims Act,” Weber noted in 1976 that a 1974 amendment to the FTCA “makes the United States liable for claims arising out of such [intentional torts] if they are committed by federal investigative or law enforcement officers.” *See id.* at 108 n.237. The FTCA does not make the U.S. government liable for either pre-judgment interest or punitive damages. 28 U.S.C. § 2674 (2018). The FSIA generally does not make foreign states liable for punitive damages, *see* 28 U.S.C. § 1606, but it does not exempt them from prejudgment interest. *See* H.R. REP. NO. 94-1487, at 10 (noting that the updated draft legislation eliminates the proposed exception for prejudgment interest because “[s]uch an exception is not supported by international practice” and “[i]f a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party”).

human rights with a sufficient territorial connection to the United States.²¹¹

During the FSIA's first decade or so, multiple reported decisions involved the discretionary function carve-out to the noncommercial tort exception.²¹² Around the ten-year mark, Congress held hearings on several proposed amendments to the FSIA.²¹³ Testimony offered during that hearing provides insight into the State Department's interpretation of the noncommercial tort exception, which disfavored allowing claims against foreign states for intentional torts.²¹⁴ State Department Deputy Legal Adviser Elizabeth Verville prefaced her testimony before the House Subcommittee on Administrative Law and Governmental Relations by affirming that "proper treatment of the United States by foreign courts and of foreign sovereigns by U.S. courts is vital to the conduct of United States foreign relations."²¹⁵ In the course of discussing a proposed amendment to immunity from execution, Verville noted that judgments against states for noncommercial torts could involve "such politically sensitive matters as intentional state wrongdoing."²¹⁶ She emphasized that, from the State Department's perspective, "it is not appropriate to subject foreign sovereigns fully to the jurisdiction of domestic courts for all the kinds of conduct inside the forum state which could be characterized as 'tortious.'"²¹⁷ For example, when

211. See 28 U.S.C. § 1605(a)(5).

212. See *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989) (alleged killing of plaintiff's husband was not a discretionary function); *Joseph v. Off. of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1026-27 (9th Cir. 1987) (destruction of property was not a discretionary function); *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 922-23 (D.C. Cir. 1987) (establishment of a chancery was a discretionary function); *Olson v. Republic of Singapore*, 636 F. Supp. 885, 886-87 (D.D.C. 1986) (exposing reception guests to dangerous conditions was not a discretionary function); *Sheldon ex rel Olsen v. Gov't of Mexico*, 729 F.2d 641, 646-48 (9th Cir. 1984) (conduct of Mexican personnel that allegedly caused a plane crash was not discretionary); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) ("[T]here is no discretion to commit, or to have one's officers or agents commit, an illegal act.").

213. See generally *Foreign Sovereign Immunities Act: Hearing on H.R. 1149, H.R. 1689, and H.R. 1888 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 100th Cong. 1 (1987) [hereinafter *Hearing*] (Congressional Hearings in 1987 on proposed FSIA amendments).

214. See *id.* at 21-40 (statement of Elizabeth G. Verville, Deputy Legal Adviser, U.S. Dep't of State).

215. *Id.* at 22.

216. *Id.* at 29.

217. *Id.* at 30.

personal injury and property damage arise from a foreign state's military actions, those states "are not generally held legally answerable in the domestic courts of the countries where the actions occur."²¹⁸ She added that the Department was "not aware of actual foreign cases involving non-garden variety tort actions,"²¹⁹ and that "sovereign states are unlikely to enter the Courts of the other countries to defend themselves against charges of intentional wrongdoing."²²⁰ For example, Chile did not appear in court to answer a high-profile lawsuit filed under the FSIA by family members of exiled Chilean diplomat Orlando Letelier and researcher Ronni Moffitt, who were assassinated in a 1976 car bombing in Washington, D.C.²²¹ In Verville's words, "Intentional wrongdoing by one state within the territory of another is a problem which the international community still deals with on the plane of international relations and public law, ... not private domestic legal remedies against the

218. *Id.* This understanding of the limits of the territorial tort exception has come under renewed pressure in the wake of Russia's full-scale invasion of Ukraine. See Bohdan Karnaukh, *Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with Regard to Tort Claims Brought by the Victims of the Russia-Ukraine War*, ACCESS TO JUST. E. EUR. Aug. 2022, at 165 (2022).

219. *Hearing*, *supra* note 213, at 31 (statement of Elizabeth G. Verville, Deputy Legal Adviser, U.S. Dep't of State).

220. *Id.* Verville surmised that the "dichotomy between the scope of the right to sue and the right to enforce the resulting judgment against commercial property of the foreign state" might be broader than Congress intended, and the extent of this dichotomy might be "because neither Congress nor the Administration contemplated that our courts would exercise jurisdiction over intentional state wrongdoing. Garden variety negligence was the target." *Id.* at 32-33; see also *id.* at 59 ("[W]e doubt that it was specifically contemplated at the time that the [FSIA] would be applied in the situation of intentional wrongs and intentional torts. That does not seem to have been the focus of the consideration of those who were putting together the FSIA either in the Executive Branch or in the Congress.").

221. See *Letelier v. Republic of Chile*, 502 F. Supp. 259, 261, 265-66 (D.D.C. 1980). Chile took the position that subjecting it to civil jurisdiction violated international law and proposed international adjudication to resolve the jurisdictional dispute. See Letter from Octavio Errázuriz, Ambassador of Chile, to the Editor of the American Journal of International Law, 84 AM. J. INT'L L. 233 (1990).

state itself.”²²² Nonetheless, she acknowledged that “the courts have applied the [FSIA] to intentional torts.”²²³

Deputy Assistant Attorney General Stuart Schiffer echoed Verville’s testimony.²²⁴ He recounted that the focus of the FSIA was on codifying the restrictive theory and that the drafters “took a progressive step in permitting tort remedies against foreign sovereigns.”²²⁵ He indicated that “[w]e largely had in mind concepts that had been embodied in our own Federal Tort Claims Act,”²²⁶ under which the government accepts responsibility for “certain conduct” without “always accepting responsibility for intentional torts.”²²⁷ However, whether the U.S. government should “accept[]

222. *Hearing, supra* note 213, at 33 (statement of Elizabeth G. Verville, Deputy Legal Adviser, U.S. Dep’t of State). The FSIA’s provisions on immunity from execution prevented the *Letelier* plaintiffs from executing upon Chilean assets to satisfy the default judgment they obtained. *See Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984). Chile ultimately agreed to make an *ex gratia* payment to the United States for the benefit of the victims’ families, without admitting liability. *See Dispute Concerning Responsibility for Deaths of Letelier and Moffitt (U.S./Chile)*, 25 R.I.A.A. 1, 4, 11 (1992) (determining, pursuant to a bilateral agreement, “the final amount of compensation to be paid by the State of Chile”).

223. *Hearing, supra* note 213, at 60 (statement of Elizabeth G. Verville, Deputy Legal Adviser, U.S. Dep’t of State); *see also id.* at 60-61 (“[W]hen we get into highly sensitive areas, such as deliberate wrong-doing by foreign states, as heinous as it is and as deplorable as it is, the remedy against foreign states ought to lie not with private parties to determine what the U.S. actions will be.”). Congress subsequently amended the FSIA to provide jurisdiction over claims against foreign states for acts of international terrorism in the United States. *See* 28 U.S.C. § 1605B. This provision excludes “any act of war.” 28 U.S.C. § 1605B(a)(2). It also excludes liability based on “an omission or a tortious act or acts that constitute mere negligence.” 28 U.S.C. § 1605B(d).

224. *Hearing, supra* note 213, at 61 (statement of Stuart E. Schiffer, Deputy Assistant Att’y Gen., U.S. Dep’t of Just.).

225. *Id.* at 44, 61.

226. *Id.* at 61.

227. *Id.* at 61-62. Schiffer recounted that most suits against the United States in foreign courts involved its commercial activities and that while he was “sure” that the United States had been sued for tort claims in other countries, “specific cases don’t come to my mind at the moment.” *Id.* Finally, Elizabeth Verville recounted concerns expressed by other countries that U.S. courts had entered large judgments “against foreign governments for, for example, torts committed wholly outside the United States, that don’t even come within the jurisdictional provisions of the [FSIA], and in other ways courts have gone beyond what it appears is even provided for under our law.” *Id.* at 63 (statement of Elizabeth G. Verville, Deputy Legal Adviser, U.S. Dep’t of State). Representative Howard L. Berman, who would have amended the Act to make it easier for judgment creditors to execute upon foreign state assets, asked what it meant about U.S. society and law “where you have a system which allows meaningful remedies against judgments in commercial disputes but not in the case of political murder and state-sponsored terrorism.” *Id.* at 64 (statement of Rep. Howard L. Berman, Member, Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary).

responsibility”²²⁸ for certain types of conduct by waiving its domestic sovereign immunity is different from whether an injured party should be able to pursue a claim against a foreign government in a U.S. court.

B. Jurisdiction over Territorial Torts

As indicated above, the FSIA was adopted largely to codify the restrictive theory of foreign state immunity and provide a clearer path for claimants to obtain jurisdiction over foreign states and foreign state-owned companies in U.S. courts.²²⁹ Congress stated at the time of the FSIA’s adoption that “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned.”²³⁰ Although Congress did not explicitly mention the international legal status of the other enumerated exceptions to immunity, such as the FSIA’s expropriation exception,²³¹ foreign states’ lack of jurisdictional immunity for noncommercial torts is generally accepted as a matter of international law.²³²

U.S. lawyers use the term “noncommercial” tort in the FSIA context to distinguish this provision from the commercial activities

228. *Id.* at 62 (statement of Stuart E. Schiffer, Deputy Assistant Att’y Gen., U.S. Dep’t of Just.).

229. *See supra* Part III.A.

230. 28 U.S.C. § 1602. Although not all states accepted the restrictive theory at the time of the FSIA’s enactment, it subsequently achieved near-universal recognition. *See* Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT’L STUD. Q. 209, 214 (2015).

231. *See* 28 U.S.C. § 1602.

232. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 454 (A.L.I. 1987). The American Law Institute’s Restatement (Third) of Foreign Relations Law section 454, which has been superseded by the Restatement (Fourth) section 457, *see* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 457 note 10 (A.L.I. 2018), indicates in the black-letter that “[u]nder international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims in tort for injury to persons or property in the state of the forum.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 454(1). The Restatement (Third) also restates the FSIA and indicates that

[c]ourts in the United States may exercise jurisdiction with respect to claims in tort against foreign states for injury to persons or property in the United States, other than claims based upon an exercise of a discretionary function or claims for malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Id. § 454(2).

exception in 28 U.S.C. § 1605.²³³ International lawyers more often use the term “territorial tort” to capture the idea that a foreign state’s conduct has a sufficient territorial connection to the forum state to warrant the exercise of adjudicatory authority over the foreign state. The International Court of Justice (ICJ) noted in its foundational 2012 opinion in *Germany v. Italy* that “the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other ‘insurable risks.’”²³⁴ The ICJ also observed in passing that the discretionary function exception to tort jurisdiction in the FSIA “has no counterpart in the legislation of other States.”²³⁵ Indeed, as recounted in a prior study, “[e]xcept for the United States, no country that has enacted a tort exception to immunity provides a discretionary function exception to that exception.”²³⁶

233. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 457 note 3 (A.L.I. 2018). Because these are two separate exceptions, courts have generally found that the carve-outs for libel, slander, and misrepresentation in the noncommercial tort exception do not apply under the commercial activities exception. See *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 35 (D.C. Cir. 2000); *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1219 (10th Cir. 1999); *Exp. Grp. v. Reef Indus.*, 54 F.3d 1466, 1473-77 (9th Cir. 1995); see also *Working Grp. of the A.B.A.*, *supra* note 193, at 572 (“Each exception to immunity contains its own requirements and limitations, and there is no significant justification for applying the limitations in the tort exception to the other exceptions.”).

234. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 64 (Feb. 3). In that case, Germany argued that Italy had violated customary international law by allowing civil claims to proceed against Germany for World War II-era atrocities in Italian courts. The ICJ confined itself to the narrow question of whether the “territorial tort” exception extends to “acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.” It answered that question in the negative. See *id.* ¶¶ 65, 139.

235. *Id.* ¶ 71.

236. Yee, *supra* note 24, at 778; see European Convention on State Immunity art. 11, opened for signature May 16, 1972, 1495 U.N.T.S. 181; see also State Immunity Act 1978, c. 33, § 5 (UK); State Immunity Act, R.S.C. 1985, c. S-18, § 6 (Can.); Foreign States Immunities Act 1985 (Cth) s 13 (Austl.); G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 12 (Dec. 2, 2004). For criticism of the discretionary function exception, see Yee, *supra* note 24, at 745, wherein Yee indicates that, under courts’ “expansive interpretation, the FSIA’s discretionary function exception engulfs the general rule denying immunity for noncommercial torts, and thus deprives too broad a class of victims of the opportunity to vindicate their rights”; see also *id.* at 782, wherein Yee argues that “[s]ince foreign sovereigns do not perform in the United States the functions that

The absence of a discretionary function exception to the territorial tort exception in other countries' legislation is not surprising, because the FSIA provision was modeled on a uniquely American statute: the FTCA.²³⁷ As Sally El Sawah suggests, the tort exception to jurisdictional immunity "reinforces the forum State's obligation to provide safety and security for persons and possessions within its territory."²³⁸ The International Law Commission (ILC) did not include a discretionary function exception to the tort exception in its 1991 Draft Articles on the Jurisdictional Immunities of States and Their Property.²³⁹ The Commission explained that the territorial tort exception is "designed to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State."²⁴⁰ The ILC's commentary on Draft Article 12 also provides a private law explanation for limiting the exception to torts occurring in the forum state's territory, noting that the applicable substantive law would be the forum state's law ("*lex loci delicti*") and that "[a] court foreign to the scene of the delict might be considered as a *forum non conveniens*."²⁴¹

The ILC Commission's Draft Article 12 became Article 12 of the U.N. Convention on Jurisdictional Immunities.²⁴² Article 12 specifies that the injurious act must be "attributable to the State" under international law.²⁴³ A claim brought under the tort exception must involve "pecuniary compensation for death or injury to the person,

the discretionary function exception under the FTCA was designed to protect, there is no need to engraft the discretionary function exception onto the FSIA."

237. See *supra* text accompanying notes 19-22.

238. Sally El Sawah, *Jurisdictional Immunity of States and Non-Commercial Torts*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 142, 143 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

239. See INTERNATIONAL LAW COMMISSION, *Draft Articles on Jurisdictional Immunities of States and Their Property*, in *Report of the International Law Commission on the Work of its Forty-Third Session*, 46 U.N. GAOR Supp. No. 10, at art. 12, U.N. Doc. A/46/10, reprinted in [1991] 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN.4/SER.A/1991.

240. *Id.* at art. 12 cmt. 3.

241. *Id.* The Commission further noted that, absent a territorial tort exception, "[t]he injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity." *Id.* While this observation is indisputable, it is also common to most situations in which a foreign state invokes its immunity from suit.

242. G.A. Res. 59/38, *supra* note 236, at art. 12.

243. *Id.*

or damage to or loss of tangible property” caused by an act or omission that “occurred in whole or in part in the territory” of the forum state and in which “the author of the act or omission was present in that territory at the time of the act or omission.”²⁴⁴ Article 12 does not specify further what types of acts or omissions are actionable under this provision. The ILC indicated in its commentary that “the scope of article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.”²⁴⁵ It does not encompass acts that do not cause physical damage, such as acts resulting in “[d]amage to reputation or defamation,” or “interference with contract rights or any rights, including economic or social rights.”²⁴⁶ Thus, although Article 12 is principally concerned with “insurable risks” such as death, physical injuries, or property damage arising from “accidents involved in the transport of goods and passengers by rail, road, air or waterways,”²⁴⁷ its application is not limited to those circumstances. Article 12 can be displaced by an agreement between “the States concerned” (such as a Status of Forces Agreement governing foreign troops stationed in the forum state);²⁴⁸ in addition, its territorial requirement would preclude claims in “cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict.”²⁴⁹ The commentary to Article 12 further indicates that it does not apply to “situations involving armed conflicts.”²⁵⁰

In sum, the territorial tort exception to a foreign state’s immunity from jurisdiction codified in the FSIA and applied by U.S. courts is narrower than the exception under international law. This disjunction arises in part from Congress’s decision to copy-paste language from the FTCA into the FSIA, and in part from courts’ subsequent resort to FTCA jurisprudence to define the scope of the discretionary function carve-out. The next section traces the origins and outcome of this path-dependent reasoning by the courts. As the Reporters’

244. *Id.*

245. INTERNATIONAL LAW COMMISSION, *supra* note 239, at art. 12 cmt. 4.

246. *Id.* at art. 12 cmt. 5.

247. *Id.* at art. 12 cmt. 4.

248. *Id.* at art. 12.

249. *Id.* at art. 12 cmt. 7.

250. *Id.* at art. 12 cmt. 10.

Note to the Restatement (Fourth) of Foreign Relations Law § 457 indicates, the “underlying rationale” for the discretionary function carve-out in the FSIA “(protecting the dignity of foreign states, respecting the sensitivity of foreign relations, and preserving the sovereign interests of the United States in reciprocal situations) is quite different from the separation-of-powers principle reflected in the FTCA.”²⁵¹ The potential risks of statutory copy-pasting from one legislative context to another are exacerbated when domestic separation-of-powers principles are transposed into the foreign relations realm.

IV. DISCRETIONARY FUNCTIONS UNDER THE FSIA

As suggested above, statutory copy-pasting does not end with the use of language from one statute in another statute; rather, because of applicable canons of construction, subsequent interpretations of the original language in the first statute carry over to the copied language in the second statute. If the statutes operate in similar contexts, this can promote stability and efficiency. If they operate in different contexts, however, it can lead to strained and incongruous interpretations. Part IV.A looks at how courts have imported FTCA jurisprudence into the FSIA notwithstanding the different considerations involved in each statutory scheme. Part IV.B highlights problems with the FTCA-FSIA analogy. The Conclusion offers possible solutions.

A. Importing the Discretionary Function Carve-Out into the FSIA

The FSIA’s incorporation of the FTCA’s discretionary function carve-out was put to the test not long after the statute’s adoption. In a high-profile and politically charged case, *Letelier v. Republic of Chile*, the plaintiffs sought damages for a 1976 car bomb explosion in Washington, D.C., that killed Orlando Letelier and Ronni

251. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 457 note 4 (A.L.I. 2018). The Reporters draw the logical conclusion that “[i]n consequence, decisions under the FTCA should not necessarily be taken as appropriate guides to interpretation of the FSIA.” *Id.* Note that the author of this Article is a member of the American Law Institute and has served as an Adviser on the Restatement (Fourth) of Foreign Relations project since its inception.

Moffit.²⁵² The district court in *Letelier* observed that it was “apparently ... the first instance in which redress for tortious injuries such as are alleged here has been sought under the Foreign Sovereign Immunities Act.”²⁵³ Moreover, it noted another court’s observation that the structure of the FSIA “effects an identity between substance and procedure in the Act which means that a court faced with a claim of immunity from jurisdiction must engage ultimately in a close examination of the underlying cause of action in order to decide whether the plaintiff may obtain jurisdiction over the defendant.”²⁵⁴ The availability of jurisdiction under the FSIA depends on the nature of the claim and its territorial connection to the United States.

In *Letelier*, Chile argued that the challenged acts were immune from jurisdiction under the FSIA because they were of a “public, governmental character.”²⁵⁵ Although the commercial activities exception in the FSIA requires determining the nature of the challenged act, the distinction between sovereign and non-sovereign acts is not relevant to the noncommercial tort exception.²⁵⁶ Accordingly, the district court found no requirement in § 1605(a)(5) to analyze “the character of a given tortious act ... to determine whether it was of the type heretofore denoted as *jure gestionis* or should be classified as *jure imperii*.”²⁵⁷ Because the act caused personal injury and occurred in the United States, it presumptively fell within the scope of § 1605(a)(5)’s exception to jurisdictional immunity.²⁵⁸

Turning to the discretionary function exception to jurisdiction, the court invoked the Supreme Court’s statement in a 1953 FTCA case that a discretionary act is “one in which ‘there is room for policy judgment and decision.’”²⁵⁹ The court held that “there is no discretion to commit, or to have one’s officers or agents commit, an illegal

252. 488 F. Supp. 665 (D.D.C. 1980).

253. *Id.* at 668.

254. *Id.* at 671 (quoting *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978)).

255. *Id.* Although Chile did not formally appear in the litigation, it submitted arguments via a diplomatic note conveyed by the State Department. *See id.* at 666-67. Chile did not argue that the acts came within the discretionary function exception, but the court considered both exceptions to § 1605(a)(5) in its analysis. *See id.* at 671-72.

256. *See* 28 U.S.C. § 1605.

257. *Letelier*, 488 F. Supp. at 671.

258. *See id.* at 673-74.

259. *Id.* at 673 (quoting *Dalehite v. United States*, 346 U.S. 15, 36 (1953)).

act,” even though “a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision.”²⁶⁰ The court concluded, “Whatever policy options may exist in a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.”²⁶¹

The *Letelier* court’s bizarre judicial inquiry into whether an assassination is “discretionary” highlights the mismatch between the FSIA and the discretionary function exception in the FTCA. If FTCA cases define “discretionary” actions as ones that involve policy judgment and decision, then the *Letelier* court’s observation that an assassination “most assuredly involv[es] policy judgment and decision” ought to preclude jurisdiction under the statute.²⁶² Yet it seems odd to suggest that Congress intended to shield an intentional killing by a foreign agent from U.S. jurisdiction, while allowing a claim for an unintentional killing (for example, one caused by a foreign agent’s reckless driving) to proceed. To be sure, countries generally do not want their covert operations litigated in each other’s courts. However, that is not because such operations are “discretionary.” The concept of “discretion” at the heart of domestic sovereign immunity law simply does not translate into the foreign relations context.

Despite this conceptual incongruity, the *Letelier* decision was followed by decades of decisions interpreting the discretionary function exception under the FSIA with reference to the FTCA.²⁶³ These

260. *Id.*

261. *Id.* This observation is different from the broader argument that an internationally unlawful act can never be shielded by sovereign immunity. *See, e.g.,* *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting) (taking the position that Germany’s violation of *jus cogens* norms should be treated as an implied waiver of immunity under the FSIA).

262. *Letelier*, 488 F. Supp. at 673.

263. For cases representative of this trend, see generally *Keenan v. Holy See*, 686 F. Supp. 3d 810 (D. Minn. 2023) (holding that allegations involving Holy See’s secrecy surrounding child sex abuse fall within discretionary function exception); *Broidy Cap. Mgmt., LLC v. State of Qatar*, 982 F.3d 582 (9th Cir. 2020) (holding that alleged hack-and-leak operation was based on considerations of public policy and was therefore a discretionary function); *Doe v. Federal Democratic Republic of Ethiopia*, 189 F. Supp. 3d 6 (D.D.C. 2016) (holding that damages claim for spying was not barred by discretionary function exception because a

cases entrenched the reflexive resort to FTCA jurisprudence to structure the applicable analysis. At the same time, FTCA jurisprudence was changing and evolving.²⁶⁴ One appellate judge lamented in 1989 that the FTCA was “largely a false promise in all but ‘fender benders’ and perhaps some cases involving medical malpractice by government doctors.”²⁶⁵ Courts imported new understandings of the FTCA into their FSIA analyses, even though Congress in 1976 could not have anticipated the direction FTCA case law would take. Although this might make sense if the FTCA and the FSIA governed similar substantive areas or were motivated by similar policies, the distinction between domestic sovereign immunity and foreign state immunity means that the rationales underlying FTCA jurisprudence do not necessarily apply in the FSIA context. Moreover, in 1974, Congress narrowed the FTCA’s discretionary function exception by adding a law enforcement proviso to the FTCA—a provision that has no analog in the FSIA, in part because foreign agents cannot exercise law enforcement powers within the United States.²⁶⁶

The biggest problem with the FSIA decisions regarding noncommercial torts is not necessarily the results they have reached, but the doctrinal gymnastics required by relying on FTCA case law that

government official has no discretion to violate binding laws); *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010) (holding that Kuwait’s alleged failure to institute procedures or a system to monitor employees implicates a discretionary function); *O’Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009) (holding that allegedly tortious acts by Holy See employees in the United States engaged in the supervision of abusive priests were not discretionary because they were mandated by the Holy See’s secrecy policy); *Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991) (holding that Norwegian consular officials were exercising discretion when they advised and assisted a Norwegian citizen and her children in leaving the United States); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (holding that the discretionary function exception is not applicable to alleged assassination order by Republic of China (ROC) official because ROC law prohibits murder, including by public officials); *MacArthur Area Citizens Ass’n v. Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987) (holding that purchasing and modifying a building in the District of Columbia to use as a chancery is a discretionary public policy decision); *Joseph v. Off. of the Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987) (holding that the alleged destruction of property rented by consular official was not a discretionary function).

264. See Fishback & Killefer, *supra* note 173, at 298-99.

265. *Allen v. United States*, 816 F.2d 1417, 1424-25 (10th Cir. 1987) (McKay, J., concurring).

266. See, e.g., *Nguyen v. United States*, 556 F.3d 1244, 1255 (11th Cir. 2009) (“Congress added the proviso to § 2680(h) to ensure that future victims of [intentional] torts inflicted by federal law enforcement officers or agents would have a damages remedy against the United States.”).

is not fit for purpose. For example, in *MacArthur Area Citizens Ass'n v. Republic of Peru*, a neighborhood association sued Peru for using a building as a chancery in alleged violation of local zoning laws.²⁶⁷ The D.C. Circuit Court of Appeals indicated that “[i]t is unclear precisely what must be alleged to bring a claim within [the noncommercial tort] exception and thereby confer jurisdiction.”²⁶⁸ Nevertheless, it acknowledged that “[w]hile the complaint is hardly a model of clarity, it does seem to us to constitute a sufficient invocation of the tort of nuisance.”²⁶⁹ The court’s analysis of Peru’s immunity centered on the Supreme Court’s analysis of the FAA’s decisions to certify particular aircraft in *Varig Airlines*. In the *MacArthur* court’s view, “establishing a chancery in the District of Columbia to conduct foreign relations is a discretionary public policy decision” that “undergirds the specific acts which the Association bewails,” such as “installing a burglar alarm and bricking up certain openings.”²⁷⁰ The doctrinal focus on “discretion” was compelled by the FSIA’s copy-pasted language.²⁷¹ Yet the central question should have been about the authority to enforce D.C. zoning laws.²⁷²

The Ninth Circuit’s decision in *Joseph v. Office of the Consulate General of Nigeria* similarly contains an incongruous discussion of the discretionary function exception.²⁷³ There, the court interpreted the FSIA’s waiver exception expansively to include any “agreement

267. 809 F.2d 918, 919 (D.C. Cir. 1987).

268. *Id.* at 921.

269. *Id.* A similar case arising today might avoid the immunity question altogether by finding that the alleged security measures do not state a plausible claim for nuisance.

270. *Id.* at 922; *cf.* *USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namibia*, 681 F.3d 103 (2d Cir. 2012) (holding that a Namibian mission was under a nondelegable duty to ensure that the structure of party wall was maintained during construction, and failing to do so was not a discretionary function involving judgment or policy analysis).

271. Likewise, an unreported opinion involving the decision to repaint a monument commissioned by the Hungarian Consulate determined that this decision amounted to a discretionary function. *Bogar v. Szeles*, No. 23-cv-09189-AB-SSC, 2024 WL 4406788, at *4-5 (C.D. Cal., May 6, 2024). However, the asserted claim was for infringement of the Visual Artists Rights Act, not a tortious injury to person or property, making the discretionary function analysis superfluous. *See id.* at *1.

272. The Foreign Missions Act of 1982 regulates the acquisition and use of property by foreign countries for diplomatic or related purposes. *See* Foreign Missions Act, 22 U.S.C. §§ 4301-4316; *see also* *Sheridan Kalorama Hist. Ass’n v. Christopher*, 49 F.3d 750, 752, 757, 759 (D.C. Cir. 1995) (holding that 22 U.S.C. § 4306 grants the District of Columbia’s Board of Zoning Adjustment (BZA) exclusive original jurisdiction over zoning determinations governing the location, replacement, or expansion of a foreign country’s chancery).

273. *See* 830 F.2d 1018, 1025, 1026-27 (9th Cir. 1987).

by the parties that the United States courts may become involved in disputes arising pursuant to the contract,” including the lease agreement between the landlord and Nigeria.²⁷⁴ The landlord claimed that the consulate’s employees and their family members “had removed property from the house and had left the premises severely damaged.”²⁷⁵ The court found that the consular officials were acting within the scope of their employment, as defined by California law.²⁷⁶ It then applied the *Varig Airlines* framework to determine that the governmental acts at issue, unlike those in *MacArthur*, did not involve “policy judgment.”²⁷⁷ It is unclear why this additional analysis was necessary given that the alleged intentional damage also presumably violated the lease agreement, thereby bringing it within the scope of the waiver exception.²⁷⁸ Here, consideration of the discretionary function exception was not required to protect any legitimate interest of Nigeria, or any reciprocal interest of the United States in not being sued for similar damages abroad.²⁷⁹

Other lawsuits implicating foreign consulates have involved claims that the United States would not want foreign courts to adjudicate if the tables were turned, because they involve consular functions such as issuing passports that fall within the exclusive authority of the issuing state. Those claims arguably do not come within the scope of the territorial tort exception as generally understood, even without a discretionary function carve-out.²⁸⁰ For

274. *Id.* at 1023.

275. *Id.* at 1020.

276. *Id.* at 1026.

277. *Id.* at 1026-27. Foreign states may concede that certain actions, including traffic accidents, fall within the tortious activity exception without raising a discretionary function argument. *See, e.g.,* *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 10, 14 (D.D.C. 2014) (noting that the Swiss Confederation “concedes that this court has jurisdiction over Switzerland pursuant to the tortious activity exception” to the FSIA for a pedestrian’s traffic death caused by one of its drivers in the course of delivering a package from the Swiss Embassy to the World Bank).

278. *See Joseph*, 830 F.2d at 1026-27. In a different case, two Costa Rican officials entered into a lease in their personal capacity and operated a consulate from their rental home without the landlord’s knowledge. *Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 3-4 (1st Cir. 2002). The First Circuit held that Costa Rica was immune from suit by the landlord for trespass under the noncommercial tort exception because the officials’ decision was discretionary. *See id.* at 9, 11.

279. *See Joseph*, 830 F.2d at 1026-27.

280. There are, of course, outlier cases. In 2024, the South Africa High Court found that

example, in *Risk v. Halvorsen*, a father alleged that Norway had unlawfully aided his wife in removing their children to Norway in violation of a state court order.²⁸¹ However, because the alleged aid involved advising a Norwegian citizen and providing travel documents, the Ninth Circuit held that the discretionary function exception barred the father's claim.²⁸² The court does not appear to have considered the possibility that the alleged conduct did not amount to an actionable tort in the first place, which would have avoided the need to engage in a discussion of the discretionary function carve-out altogether.²⁸³ In another case, a pro se plaintiff sued Germany for wrongfully refusing to issue her a German passport.²⁸⁴ The magistrate judge recommended dismissal for lack of subject-matter jurisdiction because "[a] foreign state's decision as to whether to issue a passport is a discretionary function."²⁸⁵ Again, it is difficult to imagine how a foreign government's failure to issue a passport to its own citizen could state a claim for an actionable tort under U.S. law in the first place.

the United Kingdom could be held liable for issuing, and then withdrawing, an extradition request for the claimant, who was detained for forty-six days. See Jamil Ddamulira Mujuzi, *Malone v. Government of the United Kingdom of Great Britain and Northern Ireland and Another* (2024) and *State Immunity in South Africa in Extradition Proceedings: Interpreting the Foreign States Immunities Act in Light of Its Drafting History and International Law*, 45 STATUTE L. REV., Dec. 7, 2024, at 1, 2-3, 13 (criticizing the decision as inconsistent with South Africa's Foreign States Immunities Act and international law because it involved a sovereign act by the United Kingdom).

281. 936 F.2d 393, 394 (9th Cir. 1991).

282. See *id.* at 395-97. Cases involving cross-border custody disputes are often emotionally fraught, but decisions to issue or deny travel documents are not territorial torts. Depending on the circumstances, other types of conduct by foreign officials on U.S. territory in the context of a cross-border custody dispute might properly be characterized as tortious.

283. The plaintiff argued that Norway and its officials had violated § 278.5 of the California Penal Code by intentionally violating a custody order, or the rights of a parent under such an order. *Id.* at 396 n.3. The judge in a different case, *Alicog v. Kingdom of Saudi Arabia*, disagreed with the Ninth Circuit's opinion in *Risk* on the grounds that "[k]idnapping ... [is] beyond the scope of legitimate diplomatic operations and [is] not protected by the discretionary function exception." 860 F. Supp. 379, 383 (S.D. Tex. 1994).

284. See *Lenhardt v. Federal Republic of Germany*, No. 21-4048-TC-ADM, 2021 WL 4170758, at *2 (D. Kan. Aug. 20, 2021).

285. *Id.* at *3; accord *Rosasen v. Kingdom of Norway*, No. 22-55980, 2024 WL 1612235, at *1 (9th Cir. Apr. 15, 2024) (affirming dismissal of pro se litigant's complaint against Norway for instigating and supporting his wife's custody petition on the grounds that, although the complaint alleged kidnapping and other torts, its "gravamen" was "abuse of process," which is excluded from the noncommercial tort exception).

Three additional categories of claims have engaged courts in analyses of the FSIA's discretionary function exception: sexual abuse claims, cyber torts, and claims involving COVID-19. The first category involves claims brought against the Holy See by victims of sexual abuse by Roman Catholic clergy.²⁸⁶ The Sixth Circuit found that alleged acts of sexual abuse were not within the scope of employment under Kentucky state law as required by the noncommercial tort exception, and that alleged negligent supervision abroad did not satisfy the "entire tort" requirement.²⁸⁷ By contrast, the Ninth Circuit found that alleged acts of sexual abuse by priests were within the course and scope of the priests' employment under Oregon law.²⁸⁸ Both circuits found that the discretionary function exception as defined in FTCA case law barred claims against the Holy See arising from alleged negligent hiring and supervision by archbishops and bishops within the United States.²⁸⁹ As discussed above, the FTCA's discretionary function exception allocates the costs of certain policy judgments by U.S. governmental actors between the injured party and taxpayers.²⁹⁰ Here, the discretionary function exception helped shield the Catholic Church from liability, with no corresponding benefit to the United States (because other countries do not have a reciprocal discretionary function carve-out).

286. See, e.g., *O'Bryan v. Holy See*, 556 F.3d 361, 369 (6th Cir. 2009).

287. *Id.* at 382, 385.

288. See *Doe v. Holy See*, 557 F.3d 1066, 1083 (9th Cir. 2009).

289. *O'Bryan*, 556 F.3d at 386-87; *Doe*, 557 F.3d at 1083; see also *Keenan v. Holy See*, 686 F. Supp. 3d 810, 841 (D. Minn. 2023) (finding that the Holy See's policy of secrecy surrounding priests' sexual abuse of children was a discretionary function); *Blecher v. Holy See*, 631 F. Supp. 3d 163, 173 (S.D.N.Y. 2022) (finding that the mandatory strict secrecy policy promulgated by Holy See fell within the discretionary function exception). The European Court of Human Rights found that a Belgian court's determination that the Vatican was immune from suit for sexual abuse by clergy members did not violate the applicants' right of access to a court. Cedric Ryngaert, *The Immunity of the Holy See in Sexual Abuse Cases: Reflections on the Judgment of the European Court of Human Rights in J.C. v. Belgium*, VÖLKERRECHTSBLOG (Nov. 24, 2021), [https://voelkerrechtsblog.org/the-immunity-of-the-holy-see-in-sexual-abuse-cases/#\[https://perma.cc/5RT6-9X8V\]](https://voelkerrechtsblog.org/the-immunity-of-the-holy-see-in-sexual-abuse-cases/#[https://perma.cc/5RT6-9X8V]). Cedric Ryngaert has criticized the Belgian decision for failing to engage sufficiently with the territorial tort exception, among other shortcomings. See *id.* For a case finding that a shooting rampage at Naval Air Station Pensacola did not fall within a Royal Saudi Air Force officer's scope of employment, and that claims for negligent supervision were barred by the discretionary function exception, see *Watson v. Kingdom of Saudi Arabia*, No. 21cv329-MCR-ZCB, 2024 WL 1344643, at *8, *12 (N.D. Fla. Mar. 30, 2024).

290. See *supra* text accompanying notes 17-22.

A second category of cases involves cyber torts. These cases recognize that there are outer limits to the discretionary function exception. However, claims have failed to satisfy the “entire tort” requirement that courts have read into the FSIA’s tort exception, as indicated above.²⁹¹ For example, the D.C. district court affirmed that Congress “did not mean to shield ‘discretionary’ acts by foreign states when those acts involve serious violations of U.S. criminal law.”²⁹² The Ninth Circuit has reasoned that “the *policy discretion* of a *foreign sovereign* is not evaluated by those same constraints [as those on the U.S. Government], but rather by the corresponding limitations that bind *that* sovereign, whether contained in its own domestic law or (we will assume) in applicable and established principles of international law.”²⁹³ Despite these courts’ observations

291. The first notable case was *Doe v. Federal Democratic Republic of Ethiopia*, which involved alleged infiltration by Ethiopia of the plaintiff’s computer located at his home in Maryland. 189 F. Supp. 3d 6, 17, 20 (D.D.C. 2016) (finding that the “entire tort” requirement barred the claim, but acknowledging that “the Internet breaks down traditional conceptions of physical presence”), *aff’d*, 851 F.3d 7 (D.C. Cir. 2017) (upholding district court’s dismissal based on the “entire tort” requirement) (emphasis omitted). As noted above, *supra* note 192, the English High Court reached a different result in *Al-Masari v. Kingdom of Saudi Arabia* [2022] EWHC 2199 and found it sufficient that spyware was received on the claimant’s phone in the U.K., it was installed on his phones in the U.K., the hardware on the phones were activated in the U.K., and his private data was transmitted from the U.K. See Philippa Webb, *English Court Finds No Sovereign Immunity in Spyware Case*, TRANSNAT’L LITIG. BLOG (Aug. 30, 2022), <https://tlblog.org/english-court-finds-no-sovereign-immunity-in-spyware-case/> [<https://perma.cc/3F29-3ELM>]. The author of this Article has advocated against a broad cybercrime exception to the FSIA. See Chimène Keitner & Allison Peters, *Private Lawsuits Against Nation-States Are Not the Way to Deal with America’s Cyber Threats*, LAWFARE (June 15, 2020), <https://www.lawfaremedia.org/article/private-lawsuits-against-nation-states-are-not-way-deal-americas-cyber-threats> [<https://perma.cc/5NZ3-3MX9>]. More narrowly tailored exceptions for targeted hacking of dissidents have also been proposed. See, e.g., Spencer Levitt & Andrea Cervantes, *THE FOREIGN SOVEREIGN IMMUNITIES ACT IN THE AGE OF TRANSNATIONAL SURVEILLANCE: JUDICIAL INTERPRETATION AND LEGISLATIVE SOLUTIONS* (Aug. 21, 2023), <https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/2/4290/files/2023/08/The-Foreign-Sovereign-Immunities-Act-in-the-Age-of-Transnational-Surveillance.pdf> [<https://perma.cc/TLL6-QZ2H>]; see also, e.g., Adam L. Silow, Note, *Bubbles over Barriers: Amending the Foreign Sovereign Immunities Act for Cyber Accountability*, 12 J. NAT’L SEC. L. & POL’Y 659, 677-78 (2022) (arguing for creating “protective bubbles” around human rights activists and trade secrets). Scott Gilmore has argued that a proper interpretation of the FSIA already permits suits against foreign governments for violations of electronic privacy. See Gilmore, *supra* note 24, at 232.

292. *Doe*, 189 F. Supp. 3d at 27.

293. *Broidy Cap. Mgmt. LLC v. State of Qatar*, 982 F.3d 582, 591 (9th Cir. 2020). In the *Broidy* case, the Ninth Circuit indicated that Qatar’s alleged actions “have not been shown to violate either Qatari law or applicable international law.” *Id.* at 592.

about the limits on foreign countries' policy discretion, the cases foundered on the entire tort requirement because the alleged misconduct occurred abroad, even though the injuries occurred in the United States.

Finally, plaintiffs filed a raft of cases against China related to injuries caused by the COVID-19 pandemic.²⁹⁴ The noncommercial tort exception did not provide a basis for these cases, in part because they failed to satisfy the entire tort requirement.²⁹⁵ In addition, as the Eighth Circuit explained, “[w]hatever the wisdom of China’s policy decisions, they were discretionary.”²⁹⁶ Applying FTCA case law, the Eighth Circuit observed that all of the challenged actions allegedly allowing the COVID-19 virus to spread “were the subject of a ‘judgment or choice’ by policymakers” because none of the actions “were mandatory or forbidden in China.”²⁹⁷ This illustrates another incongruity in the discretionary function exception. The *forum non conveniens* doctrine disfavors applying foreign law, yet to decide whether the discretionary function carve-out applies, a U.S. court is asked in the first instance to determine whether a foreign government’s actions violated its own laws.²⁹⁸ This analysis should not be necessary. If the foreign government’s action does not have a sufficient territorial connection to the United States, then it does not fall within the noncommercial tort exception to begin with. The primary reason that U.S. courts do not have subject-matter jurisdiction under the FSIA over China’s alleged actions, “from continuing to allow large gatherings in Wuhan to taking legal action

294. See generally Chimène I. Keitner, *To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities*, 19 CHINESE J. INT’L L. 229, 230 (2020) (detailing claims brought against China in U.S. courts and actions brought by state attorneys general).

295. See Haley Anderson, *Missouri’s COVID Suit Against China Revived*, TRANSNAT’L LITIG. BLOG (Jan. 17, 2024), <https://tlblog.org/missouris-covid-suit-against-china-revived/> [<https://perma.cc/VJ26-HRN7>] (noting that the entire tort requirement would preclude these lawsuits under the noncommercial tort exception, but that one claim was proceeding under the commercial activities exception); see also Chimène Keitner, *Missouri’s Lawsuit Doesn’t Abrogate China’s Sovereign Immunity*, JUST SEC. (Apr. 22, 2020), <https://www.justsecurity.org/69817/missouris-lawsuit-doesnt-abrogate-chinas-sovereign-immunity/> [<https://perma.cc/487T-HRGR>].

296. *Missouri ex rel. Bailey v. People’s Republic of China*, 90 F.4th 930, 936 (8th Cir. 2024).

297. *Id.*

298. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260-61 (1981) (noting that application of foreign law is a public interest factor weighing against adjudication in a U.S. forum).

against doctors who tried to share information about the virus,”²⁹⁹ is not because those actions were discretionary, but because they do not amount to territorial torts in the first place.³⁰⁰

B. Problems with the FTCA-FSIA Analogy

Congress enacted the FTCA for a specific purpose: to replace the need for private bills to compensate individuals harmed by U.S. governmental wrongdoing.³⁰¹ The parameters of the United States’ waiver of sovereign immunity in the FTCA reflect legislative choices about the allocation of costs between injured parties and taxpayers, and about the deterrent value of imposing liability for damages on the government.³⁰² As the Supreme Court indicated in *Varig Airlines*, the discretionary function carve-out in the FTCA “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.”³⁰³ Arguments about Congress’s intent in enacting the FTCA’s discretionary function carve-out and its law enforcement proviso turn on questions of domestic separation of powers and can involve associated doctrinal complications such as the role of the Supremacy Clause.³⁰⁴ These considerations are not relevant to the FSIA.³⁰⁵

The landscape for liability and jurisdiction is fundamentally different in the FSIA context. Although the FSIA’s drafters might have copy-pasted language from the FTCA into the FSIA to make aspects of domestic and foreign state immunity superficially congruent, the

299. *Missouri ex rel. Bailey*, 90 F.4th at 936.

300. Missouri did, however, win a default judgment against China for the commercial activity of personal protective equipment (PPE) hoarding—but the judgment’s enforceability seems doubtful for various reasons. See *Missouri ex rel. Bailey v. People’s Republic of China*, No. 20-cv-00099-SNLJ, 2025 WL 746202, at *11 (E.D. Mo. Mar. 7, 2025); see also William S. Dodge, *The \$24 Billion Judgment Against China in Missouri’s COVID Suit*, TRANSNAT’L LITIG. BLOG (Mar. 18, 2025)<https://tlblog.org/24-billion-judgment-against-china-in-missouri-covid-suit/> [<https://perma.cc/K72X-EDKL>].

301. See *supra* Part II.A.

302. See *supra* Part II.A.

303. *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984).

304. See, e.g., *Martin v. United States*, 145 S. Ct. 1689 (2025) (holding that the FTCA does not afford the United States a defense under the Supremacy Clause from liability under state tort principles).

305. See *supra* Part III.A.

underlying goals of each regime are incommensurable. As a general matter, foreign governments do not perform regulatory functions on U.S. soil, except for consular functions on behalf of their own states. The appropriate comparator for sovereign immunity protection for foreign governments on U.S. soil is the protection afforded to the U.S. government by other countries' state immunity regimes. That is why the "[f]indings and declaration of purpose" of the FSIA refer to international law, not the FTCA.³⁰⁶ As the district court in *Doe v. Ethiopia* recognized, Congress sought a balance "between the desire to afford members of the public a remedy for torts committed in the United States by foreign employees and officials and the interest in maintaining comity with foreign states."³⁰⁷ The FSIA was enacted to "bring U.S. rules of foreign sovereign immunity in line with the practices of other nations, and, in particular, to subject foreign states that commit torts in the United States to the same rules of immunity applied against the United States abroad."³⁰⁸ The discretionary function exception does not serve this goal, and it is not needed for the FSIA to serve its intended purpose.³⁰⁹

These observations are illustrated by the most recent high-profile case involving the discretionary function exception, *Usoyan v. Republic of Turkey*.³¹⁰ That case involved physical assaults on protesters in Washington, D.C., by members of Turkish President Erdoğan's security detail.³¹¹ Whether the injured protesters could sue Turkey turned on the interpretation and application of the discretionary function exception.³¹² The principal attack took place

306. 28 U.S.C. § 1602.

307. *Doe v. Federal Democratic Republic of Ethiopia*, 189 F. Supp. 3d 6, 23 (D.D.C. 2016).

308. *Id.* at 24.

309. By way of further example, Article 9 of China's recently enacted Foreign State Immunity Law creates an exception to immunity for claims "arising from personal injury or death or damage to movable or immovable property caused by the relevant act of the foreign state in PRC territory." See Bill Dodge, *China Adopts Restrictive Theory of Foreign State Immunity*, CONFLICT OF L. (Sep. 14, 2023), <https://conflictoflaws.net/2023/china-adopts-restrictive-theory-of-foreign-state-immunity/> [<https://perma.cc/8M8U-RWU9>]. Interestingly, one of China's preeminent international lawyers argued thirty years ago, when he was a law student at Columbia University, that the discretionary function exception should be eliminated from the FSIA. See Yee, *supra* note 24, at 751 n.41 ("International law, however, supports eliminating the discretionary function exception completely.").

310. 6 F.4th 31, 47, 49 (D.C. Cir. 2021).

311. See *id.* at 36-37.

312. See *id.* at 38-40.

while Erdoğan was sitting in his vehicle near the entrance to the Turkish Ambassador's residence.³¹³ While anti-Erdoğan protesters were standing on a sidewalk as instructed by the police department (to keep them separate from a group of pro-Erdoğan protesters), "Turkish security forces and other pro-Erdoğan individuals ... crossed [the] police line to attack the protesters."³¹⁴ The Turkish security forces continued to physically attack the protesters even as they fell on the ground or tried to run away.³¹⁵ Another plaintiff was physically attacked by members of the Turkish security detail later that day as she was walking toward the Turkish Embassy holding an anti-Erdoğan sign.³¹⁶

Turkey raised a defense of sovereign immunity from the protesters' civil claims.³¹⁷ The plaintiffs argued that their claims fell within the scope of the noncommercial tort exception, and Turkey countered that the claims were barred by the discretionary function exception.³¹⁸ One of the attorneys for the plaintiffs, Michael Tigar, had brought claims against Chile under the FSIA in the *Letelier* case over forty years earlier.³¹⁹ The *Usoyan* court, like other courts, relied on FTCA case law to interpret and apply the FSIA.³²⁰ Its analysis focused on the Supreme Court's 1988 decision in *Berkovitz v. United States*, which was intended to define the scope of the federal government's waiver of its own sovereign immunity, not the scope of foreign state immunity.³²¹

The *Usoyan* court began with the observation that Turkey's agents "do not have the authority to perform law enforcement functions inside the United States."³²² It follows that "[i]f a foreign government has no authority to take a certain type of action in the United States, its employee's action in that sphere cannot constitute

313. *Id.* at 36.

314. *Id.* at 37.

315. *See id.*

316. *See id.*

317. *Id.* at 36.

318. *Id.* at 38.

319. *See Letelier v. Republic of Chile*, 488 F. Supp. 665, 665 (D.D.C. 1980).

320. *Usoyan*, 6 F.4th at 38.

321. 486 U.S. 531, 535-39 (1988). In the *Usoyan* court's view, "[b]ecause the United States Supreme Court has not yet interpreted the FSIA's discretionary function exception, we look to what it has said about the FTCA's analogous provision." *Usoyan*, 6 F.4th at 38.

322. *Usoyan*, 6 F.4th at 39.

an exercise of discretion.”³²³ To the extent that the Turkish agents had any authority to act, their power was derived from the customary international law principle “that sending states are authorized to protect diplomats and officials traveling abroad.”³²⁴ However, that power is not free from the constraints of local law. Notably, the United States indicted “fifteen members of the Turkish security detail” on “criminal assault charges.”³²⁵ The fact that Turkish agents committed torts while acting within the scope of their employment and caused personal injuries in the United States should have been sufficient to bring the plaintiffs’ claims within the territorial tort exception to the FSIA.

Because of Congress’s copy-pasting, however, the *Usoyan* court felt compelled to engage in a detailed analysis of the discretionary function exception as applied to the conduct of U.S. officials under the FTCA.³²⁶ As the court observed, “the United States Constitution does not bind foreign states,” making case law on whether constitutional violations can amount to discretionary functions inapt.³²⁷ The court further noted that “blatantly careless or malicious conduct cannot be recast in the language of cost-benefit analysis” under FTCA case law.³²⁸ Unlike the U.S. government’s waiver of sovereign immunity, foreign state immunity is not grounded in a cost-benefit analysis—it is a requirement of customary international law, and a foundation stone of cross-border relations and transactions between countries.³²⁹ Whether the Turkish security detail’s actions were “plausibly grounded in considerations of security-related policy” might be a relevant consideration in allocating costs between a government and the governed, but it should not determine whether parties injured by Turkey’s actions in the United States can sue Turkey in a U.S. court.³³⁰

323. *Id.* at 40.

324. *Id.* (quoting Brief for the United States as Amicus Curiae in Support of Affirmance, *Usoyan v. Republic of Turkey*, 6 F.4th 31 (2021) (No. 20-7019)).

325. *Id.* at 43.

326. *Id.* at 38-42.

327. *Id.* at 44.

328. *Id.* at 45.

329. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99, ¶¶ 56-57 (Feb. 3).

330. *Usoyan*, 6 F.4th at 47.

FTCA jurisprudence delineating the scope of the discretionary function carve-out will continue to reverberate in FSIA cases until Congress amends the FSIA. Although it might have seemed logical to copy-paste language from the FTCA into the FSIA in 1976, the intervening decades have shown that this created an unnecessary limit on the territorial tort exception to foreign state immunity and a cumbersome doctrinal detour. When other countries adopted foreign state immunity statutes, they did not include a similar carve-out.³³¹ Until Congress amends the FSIA to eliminate this exception, courts should interpret the discretionary function provision in the FSIA by considering principles of foreign sovereign immunity rather than the domestic separation of powers.

CONCLUSION

The FTCA's discretionary function exception does not belong in a statute governing foreign state immunity. Although it is understandable for courts in FSIA cases to seek guidance from FTCA jurisprudence, they should wean themselves from this habit. Instead, they should consider whether the foreign state should be treated like a private party in the circumstances, even if foreign agents were exercising state authority. This is the underlying framework for the commercial activity exception to foreign state immunity, and it also animates the international law exception to immunity for territorial torts.

A foreign state's activities within U.S. territory clearly fall within the territorial jurisdiction of the United States. Although foreign governments must be able to perform certain functions, such as issuing passports, without scrutiny by U.S. courts, that protection does not extend to causing traffic accidents, nor does it extend to physical violence against peaceful protesters. These limitations on foreign state immunity do not turn on whether the challenged acts are "discretionary," but rather on how closely connected they are to the performance of core governmental functions. The territorial tort

331. See European Convention on State Immunity art. 11, *opened for signature* May 16, 1972, 1495 U.N.T.S. 181; see also State Immunity Act 1978, c. 33, § 5 (UK); State Immunity Act, R.S.C. 1985, c. S-18, § 6 (Can.); *Foreign States Immunity Act 1985* (Cth) s 13 (Austl.); G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property, at art. 12 (Dec. 2, 2004).

exception should be interpreted to help ensure that the *lex loci*—forum tort law—can fulfill its intended functions of allocating costs and deterring harmful behavior, even when the tortfeasor is a foreign government.

The FSIA’s discretionary function exception also offers a cautionary tale about statutory copy-pasting. Although using language from one statute in another statute often promotes efficiency and consistency, it can occasionally create problems. Discontinuities can arise if Congress amends one statute but not another, or if courts interpret language in the context of one statute and then graft that interpretation onto a different statute. “Discretion” remains a contested and evolving concept within the framework of the FTCA. The FSIA would be better off without it.