DISCRETIONARY ACTIVITIES OF FEDERAL AGENTS VIS-À-VIS THE FEDERAL TORT CLAIMS ACT AND THE MILITARY CLAIMS ACT: ARE DISCRETIONARY ACTIVITIES PROTECTED AT THE ADMINISTRATIVE ADJUDICATION LEVEL, AND TO WHAT EXTENT SHOULD THEY BE PROTECTED?

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A prominent exception to the limited waiver of sovereign immunity contained in the Federal Tort Claims Act (FTCA)[2] is the discretionary function exception (DFE).[3] Although the U.S. Supreme Court repeatedly has emphasized the broad reach of the DFE in shielding the government from liability,[4] the exception has been applied inconsistently at the administrative adjudication level by operation of the Military Claims Act (MCA).[5] Unlike the FTCA, the MCA does not contain the DFE,[6] but still provides for compensation in many of the same situations as the

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[2] 28 U.S.C. §§ 1346(b), 2671-2680 (2000).

[3] *Id.* § 2680(a); Dalehite v. United States, 346 U.S. 15, 32 (1953) (recognizing in this seminal articulation of the DFE, that, so long as a governmental action falls within the purview of the exception, even explicitly negligent conduct is shielded from liability).

[4] *See, e.g.*, United States v. Gaubert, 499 U.S. 315, 319 (1991) (holding certain actions taken by federal banking authorities to be within the purview of the DFE); Berkovitz v. United States, 486 U.S. 531, 547 (1988) (finding that the DFE does not protect all governmental actions, but only those which involve policy discretion); United States v. Varig Airlines, 467 U.S. 797, 815-16 (1984) (determining actions taken by Federal Aviation Administration agents in conducting aircraft safety certification spot-checks held to be within purview of the DFE).

[5] 10 U.S.C. § 2733 (2000).

[6] *See id.*

FTCA.[7] As a result, a claim that is expressly barred under the FTCA (based upon the premise that it stems from a discretionary governmental function) may be compensable under the MCA.[8] Given the reach of the DFE in shielding the government from liability in FTCA practice,[9] whether the exception should apply to the MCA should not be a matter of ad hoc speculation or agency discretion; rather, the MCA itself should contain specific guidance on the issue. This article demonstrates the thematic inconsistency between the MCA and the FTCA with respect to discretionary governmental activities, and offers a proposal for resolving this inconsistency.

The tragic shooting death of a teenager by a U.S. Marine Corps anti-drug patrol in Texas[10] is demonstrative of the need for legislative guidance concerning the applicability of the DFE to claims adjudicated at the agency level under the MCA. While the incident drew international attention to a number of issues, including the question of criminal responsibility for the mishap and the propriety of using military forces to assist the border patrol in drug interdiction operations,[11] it also raised

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[7] Within specific parameters, both the FTCA and MCA allow claims for property damage, personal injury, or death stemming from the negligent conduct of federal agents acting within the scope of their employment. *See, e.g.*, 10 U.S.C. § 2733(a), (b)(4) (2000); 28 U.S.C. § 2672 (2000).

[8] Similarly, this inconsistency is also evident upon examination of the Foreign Claims Act (FCA), 10 U.S.C. § 2734. The FCA is addressed in detail at sections I and IV, *infra*.

[9] *See infra* section II (demonstrating the reach of the DFE).

[10] *See* S.C. Gwynne, *Border Skirmish: A Teen's Death Forces the Military to Question its Role in Fighting Drugs*, TIME, Aug. 25, 1997, at 40. As reported in *Time Magazine*:

> On May 20, Marine Corporal Clemente Banuelos, 22, aimed his M-16 rifle at an 18 year-old goatherd named Esequiel Hernandez, Jr. and shot him to death. Banuelos was part of a military surveillance unit helping control drug traffic in the tiny West Texas border town of Redford. He had apparently mistaken Hernandez – who was carrying a rifle and had fired it in the direction of the Marines – for one of the armed scouts who typically act as advance guards for drug smugglers.

Id.

[11] *See id.*; *see also* Richard J. Newman, *A Timeout in the Military's War on Drugs*, U.S. NEWS & WORLD REP., Aug. 4, 1997, at 40 (examining whether the ground reconnaissance counter-drug strategy involving military interdiction teams is worth the risk it may pose to civilians); Sam Howe Verhovek, *After Marine on Patrol Kills a Teenager, A Texas Border Village Wonders Why*, N.Y. TIMES, June 29, 1997, at 16 (highlighting public outcry in response to the killing of a teenager by a Marine Corps counter-drug interdiction team).

issues concerning the settlement of claims under the MCA at the agency level.[12] The U.S. Navy and the Department of Justice (DOJ) settled claims submitted by the victim's family after the incident.[13] While the specific details of the settlement are protected by federal privacy laws, the government denied any wrongdoing or fault in causing the victim's death:

> Asked why federal officials agreed to a settlement . . . [DOJ] spokeswoman Chris Watney said Tuesday in a telephone interview from Washington, D.C., that federal privacy laws prevented her from commenting. However, Watney said the Military Claims Act allows federal military organizations to "settle claims caused by their activities, without showing the [sic] fault on the part of any person, so long as the injured person, or claimant, was not at fault." In the settlement, the Marine Corps, which is under the Department of the Navy, denied any liability in Hernandez's death.[14]

Addressing the implementation of the DFE at the administrative adjudication level, this paper will assess the putative resolution of the Hernandez claims had they been adjudicated under MCA implementing regulations of the other military departments.[15] Following this

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[12] *See* Richard Estrada, *Death Payoff Won't Fix Border Control Policy*, DALLAS MORNING NEWS, Aug. 14, 1998, at 27A. As reported in the *Dallas Morning News*:

> Nearly $2 million is a lot of money, but it won't bring back Esequiel Hernandez, Jr. . . . [a]ccording to attorneys for the family of the deceased, the United States has agreed to pay the hefty sum of $1.9 million dollars to the survivors of young Mr. Hernandez . . .
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> Under the Military Claims Act, the military components of the federal government are authorized to settle claims related to U.S. military activities without a showing of fault by U.S. military personnel.

Id.

[13] *See id.*

[14] Rene Romo, *Feds to Pay Family of Goatherder*, ALBUQUERQUE J., Aug. 12, 1998, at C3.

[15] *See infra* part IV (providing an analysis of the MCA implementing regulations for the different armed services and an assessment of how the Hernandez claims might have been resolved had they been adjudicated uner Army, Air Force, or Coast Guard MCA regulations instead of the Navy's MCA regulations); *see also infra* part VI (providing an assessment of how the Hernandez claims might have been resolved had they been

assessment is a proposed resolution that addresses the inconsistent application of the DFE to the MCA at the administrative level.[16]

I. The Statutory Framework of the FTCA and MCA

To fully understand how the DFE has been inconsistently applied at the administrative adjudication level, one must first examine the context of the principal provisions of the FTCA and MCA. The following sections provide a background and statutory framework for this analysis.

A. Basis for Governmental Liability Under the FTCA

The FTCA provides that a party may commence a private cause of action against the United States in district court for claims based on the negligent or wrongful conduct of a government agent acting within the scope and course of his employment.[17] Additionally, the FTCA provides for the administrative adjudication of claims brought against the United States, and requires that a claimant exhaust these administrative remedies before properly filing suit against the government:

> [a]n action shall not be instituted upon a claim against the United States for money 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

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adjudicated under Army, Air Force, or Coast Guard MCA regulations instead of the Navy's MCA regulations).

[16] *See infra* parts V and VI (providing a proposed solution for resolving the inconsistencies engendered by the implementation of the MCA at the administrative adjudication level).

[17] *See* 28 U.S.C. § 1346(b) (2000). Specifically, the FTCA provides:

> . . . providing exclusive jurisdiction for "civil actions on claims against the United States, for money 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Id.

> office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.[18]

While the FTCA dictates "procedural and substantive differences between a suit against a private party and one against the United States,"[19] it is fundamentally a limited waiver of sovereign immunity providing for a cause of action against the United States sounding in tort:

> [s]ince no suit may be brought against the sovereign without its consent, a statutory waiver of immunity is a *sine qua non* to providing a judicial remedy for tort claims against the Government. The [Federal] Tort Claims Act is such a statutory waiver. "The very purpose of the [Federal] Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."[20]

FTCA practice is bound by a number of additional requirements and restrictions, some of which are statutory, while others are based upon court decisions. For instance, any claim arising in a foreign country is specifically excluded from the purview of the FTCA.[21] Further, the liability of the United States is determined "in accordance with the law of the place where the act or omission occurred."[22] The status of the claimant is also a factor in FTCA practice. For instance, federal civilian

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[18] *Id.* § 2675(a).

[19] LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 4, at 2 (1964). Among the procedural requirements, a claim must be presented to the agency within two years of accrual. *See* 28 U.S.C. § 2401(b). The date of accrual is the date on which a reasonable and prudent claimant knew or should have known of the injury and the cause of the injury. *See* United States v. Kubrick, 444 U.S. 111, 122-23 (1979) (holding that a claim accrues when the claimant knew, or should have known, about the injury and its cause).

[20] JAYSON, *supra* note 19, § 3, at 7 (citing Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957)).

[21] *See* 28 U.S.C. § 2680(k).

[22] *Id.* § 1346(b).

employees are limited to the benefits they receive under the under the Federal Employees' Compensation Act (FECA) for injuries incurred during the course of their employment.[23] Similarly, employees of Non-Appropriated Fund Instrumentalities are limited to the benefits they receive under the Longshore and Harbor Workers' Compensation Act for their employment-related injuries.[24] The most hotly contested liability exclusion in FTCA practice is the so-called *Feres* bar. Under the *Feres* doctrine, claims stemming from the injuries (or death) of service members are not compensable under the FTCA if the injury or death is deemed "incident to service."[25]

The status of a tortfeasor may also act as a bar to recovery under the FTCA. Liability of the government under the FTCA will only lie if the injury at issue is attributable to the tortious conduct of a governmental agent or employee acting within the scope and course of his employment.[26] With limited exception, the United States does not assume liability under the FTCA for the torts of its independent contractors.[27]

While the foregoing requirements and exclusions are the subject of exhaustive exceptions and judicial interpretation,[28] the FTCA is, in its most fundamental sense, a limited waiver of sovereign immunity that is "hedged with protections for the United States."[29]

B. Bases for Compensation under the MCA

Unlike the FTCA, the MCA does not provide for a private cause of action against the United States.[30] Thus, instead of creating federal

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[23] *See* 5 U.S.C. § 8116 (2000).
[24] *See id.* § 8173.
[25] *See* Feres v. United States, 340 U.S. 135, 146 (1950); *see also* JAYSON, *supra* note 19, ch. 5A (providing an in-depth discussion of the *Feres* bar to liability under the FTCA, including a review of the types of factors courts have considered in deeming an injury "incident to service").
[26] *See* 28 U.S.C. § 1346(b) (2000); *id.* § 2671.
[27] *See id.* § 2671.
[28] For a discussion of the exceptions and requirements of the FTCA, and particularly the DFE, *see generally* JAYSON, *supra* note 19, at 12-1 – 12-42.
[29] *See* Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring).
[30] *See* 10 U.S.C. § 2733; *see also* Collins v. United States, 67 F.3d 284, 286 (Fed. Cir. 1995) (finding that court does not have jurisdiction under the MCA to consider claim denied by an agency).

government "liability," the MCA compensates private parties in certain circumstances. Unlike the FTCA, the MCA applies worldwide, with the proviso that claims arising in the United States must first be considered under the FTCA.[31] Further, claims arising in foreign territories are first considered under the Foreign Claims Act (FCA) before they are adjudicated under the MCA.[32]

The most salient facet of the MCA impacting adjudication of claims involving discretionary governmental activities is the MCA's bifurcated compensation scheme. The MCA provides compensation for damages to (or loss of) property, personal injury, or death either (1) caused by an agent of the Army, Navy, Air Force, Marine Corps, or Coast Guard "acting within the scope of his employment," or (2) "incident to noncombat activities" of the U.S. Military Departments or Coast Guard.[33] The MCA thus delineates two distinctly different categories of claims for which the government will provide compensation: those claims stemming from injury or damage caused by a government agent acting within the scope of his employment and those claims stemming from noncombat activities. The ramifications of this bifurcated compensation scheme are significant:

> *If the claim is not incident to the noncombat activities of the military departments, the claimant must show the causative act or omission to be negligent, wrongful, or otherwise to involve fault.* Contrariwise, *if the claim is based upon a noncombat activity,* the claimant need not show negligence, wrong, or fault; a showing of causation and damages suffered is all that is needed…if the claim is based upon a noncombat activity of the armed forces, it is not necessary to establish scope of employment . . .[34]

While the "scope of employment" prong for recovery under the MCA is similar to the basis for recovery set forth in the FTCA,[35] the

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[31] *See* 10 U.S.C. § 2733(b)(2).

[32] *See id.* The Foreign Claims Act is addressed more fully in parts I.C and IV, *infra*.

[33] *See id.* § 2733.

[34] JAYSON, *supra* note 19, § 1, at 19.

[35] Although the respective theories of liability set forth in the FTCA and in the "scope of employment" prong of the MCA are not identical, the "scope of employment" prong of the MCA sets forth a compensation paradigm that is generally similar to the basis of governmental liability in the FTCA (requiring that the damage or injury in question

FTCA contains no basis of recovery similar to the "noncombat activities" prong of the MCA. Though each of the services provides guidance on the meaning of noncombat activities, they all define the term in a consistent fashion. Pursuant to Navy claims regulations, noncombat activities are defined as follows:

> activities essentially military in nature, having little parallel in civilian pursuits, and in which the U.S. Government has historically assumed a broad liability, even if not shown to have been caused by any particular act or omission by DON personnel while acting within the scope of their employment. Examples include practice firing of missiles and weapons, sonic booms, training and field exercises, and maneuvers that include operation of aircraft and vehicles designed especially for military use.[36]

Similarly, Air Force regulations define noncombat activities as those activities that are "particularly military in character" and have "little parallel in the civilian community."[37] Like the Navy, the Army also includes as specific examples of noncombat activities the firing of missiles and weapons, training and field exercises, and maneuvers that include the operation of aircraft and vehicles.[38]

While the MCA differs from the FTCA in several critical areas, such as the MCA's noncombat activities basis of compensation, its worldwide application, and its lack of a judicial remedy, many of the MCA's provisions are similar to the FTCA. As with the FTCA, claims submitted under the MCA must be presented to the agency within two years of accrual.[39] Although the MCA does not preclude service members from

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results from some type of negligent or wrongful act or omission by a government agent acting within the scope of his employment).

[36] GENERAL CLAIMS REGULATIONS—MILITARY CLAIMS ACT, 32 C.F.R. § 750.43(a)(2) (2002); *see also* U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5890.1, ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES encl. 2, at 1-2 (17 Jan. 1991) [hereinafter JAGINST 5890.1].

[37] ADMINISTRATIVE CLAIMS—MILITARY CLAIMS ACT, 32 C.F.R. § 842.41(c) (2002); *see also* U.S. DEP'T OF AIR FORCE, INSTR. 51-501, ADMINISTRATIVE CLAIMS FOR OR AGAINST THE AIR FORCE 45 (9 Aug 2002) [hereinafter AFI 51-501].

[38] CLAIMS AGAINST THE UNITED STATES, 32 C.F.R.§ 536.3 (2002); *see also* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS 92 (1 July 2003) [hereinafter AR 27-20].

[39] *See* 10 U.S.C. § 2733(b)(1) (2000).

receiving compensation for property damage incurred incident to service, it does have a service-connection limitation that is similar to the FTCA's *Feres* bar: claims stemming from the personal injury or death of a service member are precluded if the injury is deemed incident to service.[40] Finally, while there is no judicial remedy under the MCA, the MCA does give claimants the right to appeal decisions that claimants consider unfavorable to higher levels of adjudication authority within the agency.[41]

C. Contrasting the FTCA and MCA with the FCA

As its name implies, the FCA applies only to claims that arise outside the jurisdiction of the United States.[42] When foreign claims cannot be resolved under the FCA, they are generally adjudicated under the MCA.[43] The purpose of the FCA is to "promote and maintain friendly relations through the prompt settlement of meritorious claims" for property damage or loss, personal injury, or death.[44] FCA claims are properly payable "to any foreign country" or "any political subdivision or inhabitant of a foreign country."[45]

Because the FCA is limited to territories outside of the United States, and the FTCA has application within United States only, there is no jurisdictional overlap between the two statutes. In contrast, because the MCA has worldwide application, its territorial jurisdiction does overlap with that of the FTCA. Given that the DFE is a specific statutory liability exclusion that is intended to apply to FTCA claims, and the FTCA expressly applies to claims arising within the United States,[46] by analogy one could argue that the DFE should also apply to MCA claims arising within the United States. In contrast, given the jurisdictional distinctions between the FCA and the FTCA, the application by analogy of the DFE to the FCA does not hold as it does with the MCA. This

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[40] *See id.* § 2733(b)(3). Note, however, that property damage claims are not similarly barred. *See id.*
[41] *See id.* § 2733(g).
[42] *See id.* § 2734.
[43] *See id.* § 2733(b)(2); § 2734. By operation of these provisions, claims of foreign nationals arising in a foreign country are adjudicated under the FCA, while claims of U.S. nationals arising in foreign countries are normally adjudicated under the MCA.
[44] *Id.* § 2734(a).
[45] *Id.*
[46] *See* 28 U.S.C. § 1346(b) (2000); *id.* § 2680(a).

significant distinction notwithstanding, the FCA is relevant to the present analysis insofar as its bases for compensation are similar to those set forth in the MCA.

The FCA establishes a two-pronged compensation scheme that has been further narrowed by service regulations. Under the FCA, claims for property damage, injury, or death are payable if they (1) stem from "noncombat activities" of the armed forces, or (2) if they are "caused by" a member or civilian employee of one of the services.[47] Thus, on the face of the statute, payment is not predicated upon a negligence-scope of employment analysis. Each service, however, has further clarified this second prong by regulation.[48] These regulations narrow the causality prong of recovery under the FCA by distinguishing between (1) instances where scope of employment and negligence is required for recovery and (2) instances where mere causality is all that is required for recovery. As a general rule, if a U.S. employee causes damage or injury in a foreign country, and that employee was initially brought to the foreign country through his employment with the United States, then it is not necessary for compensation under the FCA that the employee was acting within the scope of his employment at the time of the damage or injury.[49] Conversely, if the DOD civilian employee causing the damage or injury is indigenous to the country at issue, then scope of employment is a prerequisite to FCA recovery.[50]

Unlike the FTCA, the FCA and MCA provide compensation for damage or injuries caused by noncombat activities of the armed forces, without regard to a scope of employment analysis. While the FCA never applies in the same jurisdiction that the FTCA applies, the jurisdiction of the MCA, as stated, may overlap that of the FTCA. This jurisdictional overlap forms the critical backdrop for an analysis of the DFE at the administrative adjudication level.

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[47] 10 U.S.C. § 2734.

[48] *See* ADMINISTRATIVE CLAIMS—FOREIGN CLAIMS, 32 C.F.R. § 842.64 (2002); AFI 51-501, *supra* note 37, pt. 4(c); AR 27-20, *supra* note 38, para. 10-3; U.S. DEP'T OF THE NAVY, MANUAL OF THE JUDGE ADVOCATE GEN. para. 0810(d) (2004) [hereinafter JAGMAN]; FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002).

[49] *See generally* AR 27-20, *supra* note 38, para. 10-3; AFI 51-501, *supra* note 37, pt. 4(c); JAGMAN, *supra* note 48, para. 0810(d); FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002).

[50] *See generally* AR 27-20, *supra* note 38, para. 10-3; AFI 51-501, *supra* note 37, pt. 4(c); JAGMAN, *supra* note 48, para. 0810(d); FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002).

II. The Legislative and Judicial Parameters of the DFE

The DFE is an express exception to governmental liability under the FTCA:

> the provisions of this chapter and section 1346(b) of this title [collectively comprising the FTCA] shall not apply to . . . [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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 employee of the Government, whether or not the discretion involved be abused.[51]

The DFE thus sets out a two-pronged liability exclusion. The first prong shields the government from liability for the acts or omissions of its agents exercising due care in executing a statute or regulation, irrespective of the statute's or regulation's validity. Indeed, the DFE "bars tests by tort action of the legality of statutes and regulations."[52] Thus, the government exempts itself from liability for injuries and damage that stem from a government employee executing an *invalid* regulation.

The DFE's second prong "excepts acts of discretion in the performance of governmental functions," irrespective of whether this involves an abuse of discretion.[53] This prong shields the government from liability for negligent and wrongful acts involving the performance of discretionary functions: the abuse of discretion alluded to in the DFE "connotes both negligence and wrongful acts in the exercise of the discretion . . . [t]he exercise of discretion could not be abused without negligence or a wrongful act."[54] Accordingly, pursuant to the second prong of the DFE, the government is exempt from liability for the negligent conduct of a government agent acting within the course and scope of his employment, as long as that agent is performing a

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[51] 28 U.S.C. § 2680(a) (2000).
[52] Dalehite v. United States, 346 U.S. 15, 33 (1953).
[53] *Id.*
[54] *Id.*

discretionary function. While the same statutory provision contains both prongs of the DFE,[55] the two prongs have manifestly distinct applications.[56] The legislative history of the FTCA and Supreme Court cases interpreting the Act substantiate the central role that both prongs of the DFE play in assessing federal tort liability.

A. The Legislative History of the DFE

As stated in congressional committee reports from the 77th Congress highlighting key provisions of the FTCA, the legislative rationale for the DFE liability exclusion was as follows:

> This [the DFE] is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that

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[55] *See* 28 U.S.C. § 2680(a).

[56] *See* Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988). Illustrating the first prong of the DFE, in *Doe*, the Veterans Administration released the plaintiff's private medical records in response to a grand jury subpoena and pursuant to agency regulations that were later held invalid. *See id.* at 1459-60. The court held that the plaintiff's claim was barred by the first prong of the DFE, which shields the government from attacks on the validity or legitimacy of statutes and regulations. *Id.* at 1461. Demonstrating the second prong, in *Flammia v. United States,* the INS made the decision to admit into the United States (and later release from federal custody) a Cuban refugee with a felony record. 739 F.2d 202, 203-04 (5th Cir. 1984). The plaintiff, a city police officer, was later injured by the refugee during a shoot out at a crime scene. *See id.* at 204. The court held that the decision by the INS to release the refugee was a protected discretionary act that did not violate any affirmative duty owed by the agency. *Id.* Thus, the police officer's claim was barred by the second prong of the DFE, which protects acts of discretion on the part of federal agents so long as the discretionary activity takes place within the parameters of mandatory statutes and directives. *See id.* at 204-05. It should be noted that, as a fundamental premise, the violation of mandatory statutes or directives removes a federal agent's conduct from the ambit of protected discretionary conduct, precluding the United States from successfully exerting a DFE defense to an FTCA action based upon the employees conduct. *See, e.g.*, Berkovitz v. United States, 486 U.S. 531, 536 (1988) (finding the DFE would not apply when a governmental employee's conduct violates a federal statute, regulation, or policy); Greenhalgh v. United States, 82 F.3d 422, 1996 U.S. App. LEXIS 8956, at 9-10 (9th Cir. 1996) (holding that supersonic flight by an Air Force jet below a federally regulated minimum altitude is not protected under the DFE, as it countenances a regulatory violation rather than a protected discretionary act).

> the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the 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.[57]

As the foregoing language indicates, the second prong of the DFE (that is, the clause protecting discretionary activities, even if negligently performed) initially focused on the conduct of only those federal agencies that are intrinsically regulatory in nature. In *United States v. Varig Airlines*,[58] one of the seminal Supreme Court cases addressing this clause of the DFE, the Court explained this language in reference to the broader legislative history of the FTCA.[59] In *Varig*, the Court noted that during the years of extensive debate and discussion that preceded the passage of the FTCA, "Congress considered a number of tort claims bills including exceptions from the waiver of sovereign immunity for claims based upon the activities of *specific* federal agencies, *notably the Federal Trade Commission and the Securities and Exchange Commission."*[60] The *Varig* Court went on to explain the reasons why Congress did not limit the language of the statute itself, 28 U.S.C. § 2680(a), to regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission: "the 77th Congress eliminated the references to these particular agencies and *broadened the exception to cover all claims based upon the execution of a statute or regulation or the performance of a discretionary function."*[61]

B. The Parameters of the DFE as Interpreted by Case Precedent

The first clause of the DFE, which exempts the United States from liability for the execution of statutes or regulations by government

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[57] JAYSON, *supra* note 19, § 12, at 11 (citing S. REP. NO. 77-1196, at 7; H.R. REP. NO. 77-2245, at 10; H.R. REP. NO. 1287, at 5-6; Hearings Before the House Judiciary Committee on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess.).
[58] 467 U.S. 797 (1984).
[59] *See id.* at 809-10.
[60] *Id.* at 808-09 (emphasis added).
[61] *Id.* at 809 (emphasis added).

employees exercising due care, "precludes suits for damages growing out of authorized governmental activity in which no negligence is involved, and bars the use of a FTCA suit to challenge the constitutionality or validity of statutes or regulations."[62] This prong is thus predicated upon a government agent actually following the mandates of a statute or regulation. The Supreme Court highlighted this requirement in *United States v. Gaubert*, noting that "if a regulation mandates particular conduct, and the employee obeys the direction, the government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."[63] On the other hand, "[i]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."[64] Thus, the ultimate effect of the first clause of the DFE is that it protects the government from liability in tort suits that allege or are premised upon the invalidity of a statute or regulation.[65]

The second prong of the DFE (*i.e.*, the prong that shields the government from liability for the performance or failure to perform a discretionary function) has been subject to a higher degree of judicial scrutiny than the first clause. While "[p]robably no other provision of the Federal Tort Claims Act has been regarded as more difficult to understand or to apply," the Supreme Court decision in *Dalehite v. United States* "unquestionably is the leading case on the subject."[66] The *Dalehite* Court interpreted the "discretion" alluded to in the second prong of the DFE as follows:

> We know that it ["discretion" as used in 28 U.S.C. § 2680(a)] was intended to cover more than the administration of a statute or regulation because it appears disjunctively in the second phrase of the section. The "discretion" protected by the section is not that of the judge – a power to decide within the limits of

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[62] JAYSON, *supra* note 19, § 12, at 12.
[63] 499 U.S. 315, 324 (1991).
[64] *Id.*
[65] *See id.* at 323; *see also* Doe v. Stephens, 851 F.2d 1457, 1462 (D.C. Cir. 1988) (stating DFE acts as bar to claim alleging invalidity of a statute or regulation when claimant fails to allege a violation of statute or regulation); Moody v. United States, 774 F.2d 150, 156-57 (6th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986) (providing federal housing inspection regulations, and the actions of federal agents performing their functions within the parameters of those regulations, cannot form the basis of liability under the FTCA).
[66] JAYSON, *supra* note 19, § 12, at 18 (referencing Dalehite v. United States, 346 U.S. 15 (1953)).

> positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act *according to one's judgment of the best course.*[67]

An important proviso in assessing this "judgment of the best course"[68] is that the discretion "applies only to conduct that involves the permissible exercise of policy judgment."[69] Further, it is the "nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."[70] Noting that these concepts may be fraught with vagaries, the Supreme Court in *Varig Airlines* observed that it is "impossible . . . to define with precision every contour of the discretionary function exception."[71] The Court in *Varig Airlines* did, however, establish a baseline for the discretionary function inquiry, noting that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."[72] If they are, even negligent conduct of a governmental employee in the performance of the discretionary function is shielded from liability.[73]

The foregoing framework for governmental liability vis-à-vis the exclusions found in the DFE frames an important question for purposes of the present inquiry: to what extent do the activities and functions coming within the purview of the MCA fall within the umbrella of protection created by the DFE? This question is not avoided simply because the MCA does not create a right to sue the United States—payment at the administrative level for conduct that is considered protected is no less errant than payment at the district court level. This conclusion is reinforced by an analysis of the various service regulations implementing the MCA: only one of the armed services does

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[67] *Dalehite*, 346 U.S. at 34 (emphasis added).
[68] *Id.*
[69] Berkovitz v. United States, 486 U.S. 531, 539 (1988).
[70] United States v. Varig Airlines, 467 U.S. 797, 813 (1984).
[71] *Id.*
[72] *Id.*
[73] *See Dalehite,* 346 U.S. at 33; *see also* Allen v. United States, 816 F.2d 1417, 1421-22 (1987), *cert. denied*, 484 U.S. 1004 (1988) (applying the DFE to the actions of atomic energy officials, even if such actions were negligent, so long as they were carried out within the parameters of applicable agency regulations).

not directly incorporate the full protections of the DFE into its regulations implementing the MCA.[74]

III. The Interface between the MCA and Protected Discretionary Functions

The MCA does not authorize claims which are "covered by section 2734 of this title [the Foreign Claims Act] or section 2672 of title 28 [the Federal Tort Claims Act]."[75] Insofar as the first prong of the MCA provides compensation for the negligent or wrongful conduct of government agents acting within the scope of their employment, the grounds for providing compensation under the MCA directly intersect with the basis for payment under the FTCA. Moreover, the "noncombat activities" prong of recovery under the MCA, which does not hinge upon a showing of negligence or scope of employment, may also intersect with the FTCA *if* those noncombat activities happened to be conducted negligently by a government agent acting within the scope of his employment. Thus, certain claims cognizable under the MCA may also be cognizable under the FTCA, and vice-versa. As has been observed, for claims presented under the FTCA, "it should be remembered that if representatives of the military department deny that negligence was involved (as presumably they would in all but the clearest of cases), the claim would, in many instances, be eligible for processing under the Military Claims Act, if submitted."[76] For a full understanding of the implications of this interplay, one must examine the legislative history of the MCA, as well as case law dealing with the types of activities envisioned by the MCA.

A. Legislative History of the MCA

A review of the legislative history of the MCA reveals that, during the MCA's formulation, Congress never considered discretionary functions and their impact on governmental liability as it did during

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[74] Each of the service regulations is analyzed in detail in section IV, *infra*. As demonstrated later, only the Navy does not make direct reference to the DFE liability exclusion in its regulation implementing the MCA. *See* 32 C.F.R. § 750.44 (2002); JAGINST 5890.1, *supra* note 36, encl. 2, at 3-4.

[75] 10 U.S.C. § 2733(b)(2) (2000).

[76] JAYSON, *supra* note 19, § 1, at 23.

formulation of the FTCA. First approved in 1943,[77] the MCA preceded the FTCA by several years.[78] While this is not, ipso facto, dispositive of whether Congress considered discretionary function issues when drafting the MCA, an examination of the Senate Report from the 79th Congress entitled "Military Claims Act Made Permanent" discloses that the MCA was drafted without reference to discretionary functions and their potential impact on governmental liability.[79] That report contains the following guidance as to the rationale behind the MCA:

> The purpose of the proposed legislation [amending the original MCA of July 3, 1943] is to authorize the War Department to settle and pay claims for property damage and for medical, hospital, and burial expenses, in amounts not exceeding $1,000 in time of peace, as it is now authorized to do in time of war. The act of July 3, 1943 (57 Stat. 372; 31 U.S.C. 223(b), authorizes the War Department to . . .settle . . . in an amount not in excess of $500, or in time of war not in excess of $1,000 . . . any claim…for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel or civilian employees of the War Department . . .while acting in the scope of their employment or otherwise incident to noncombat activities of the War Department…it is the view of the committee that a continuance in time of peace of the wartime authority . . . to settle and pay claims under the Act of July 3, 1943, in amounts not exceeding $1,000, will result in a more expeditious settlement of such claims and will relieve Congress of the necessity of considering a very large number of claims and private relief bills where the amount involved does not exceed $1,000.[80]

This language indicates that Congress intended the MCA to be a small claims act, and that claims exceeding $1,000 were to be referred to Congress from the military departments. The initial objective of the

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[77] *See* 31 U.S.C. § 223(b) (1943).
[78] The FTCA became law in 1946 as Public Law 79-601. Pub. L. No. 79-601, § 401-24, 60 Stat. 812, 842-47 (1946).
[79] S. REP. NO. 1410, at 1-2, 79th Cong., 2d Sess. (1943).
[80] *Id*.

MCA was to facilitate the settlement "in a uniform manner of all *small claims* and to remove certain of the inequities which had sprung from the disconnected passage of prior measures."[81] Thus, at its core, the MCA was conceived with an entirely different emphasis than the FTCA. The complex issues relating to discretionary functions and governmental liability were not the focus of the MCA as it was initially promulgated (that is, as a small claims statute whose emphasis was on handling a large number of claims quickly and efficiently). Since the MCA no longer contains a monetary limitation on the value of claim settlements, it cannot now be considered a small claims act. Given that the MCA is no longer a small claims act,[82] an analysis of the statute's impact on the operation of the DFE at the administrative level is long overdue.

B. The Interface Between the MCA and Discretionary Functions in Case Law

The MCA provides compensation for property damage or loss and personal injury or death (1) caused by agents of the armed services acting within the scope of employment or (2) incident to noncombat activities of the armed services.[83] The FTCA, on the other hand, is a waiver of sovereign immunity that provides for a private cause of action against the federal government for property damage or loss and personal injury or death resulting from the negligent or wrongful conduct of a government agent acting within the scope of his employment.[84] The DFE expressly exempts the government from liability under the FTCA for any claim based on (1) an act or omission of a federal employee or agent exercising due care in the execution of a statute or regulation or (2) the performance of a discretionary function by a federal employee or agent, regardless of whether that performance was carried out in a negligent fashion.[85]

Service regulations specifically include the following activities as falling within the meaning of "noncombat activities" pursuant to the MCA: (1) sonic booms, (2) practice firing of missiles and weapons, (3) training and field exercises, (4) maneuvers that include operation of aircraft and vehicles, (5) use and occupancy of real estate, and (6)

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[81] JAYSON, *supra* note 19, § 2, at 42 (emphasis added).
[82] 10 U.S.C. § 2733(d) (2000).
[83] *See id.* § 2733(a).
[84] *See* 28 U.S.C. § 1346(b); *id.* §§ 2671-72.
[85] *Id.* § 2680(a).

movement of combat or other vehicles designed especially for military use.[86] Some case law addressing the nature of noncombat activities in relation to discretionary governmental functions is inconsistent with the stated purpose of the MCA. The following cases deal with two of the specific regulatory examples of noncombat activities (sonic booms and test firing of weapons) within the context of actions brought against the United States under the FTCA. When viewed in conjunction with the MCA (and the service regulations implementing the MCA), they reveal some of the problems inherent with the operation of the DFE at the administrative adjudication level.

1. Sonic Boom Cases

To differing degrees, many cases hold that military supersonic flight falls within the category of a protected governmental activity under the DFE. Before exploring these cases, however, it is necessary to provide further background on some of the factors that courts have historically considered when applying the DFE to a given set of facts. As these factors have changed over time, a brief overview of the law in this area provides a more complete understanding of the legal context within which the cases were decided.

The second clause of the DFE protects the government from liability for discretionary acts, whether or not that discretion is abused.[87] Accordingly, if supersonic flight falls within this category of the DFE, then negligence would not affect the government's immunity. While this underlying principle is codified in the provisions of the FTCA itself,[88] it can easily be confused (when reading the following cases) with the operation of two different tests formulated by the Supreme Court to determine whether an act involves an element of judgment or choice sufficient to bring it within the purview of a discretionary function in the

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[86] These examples are taken from the Navy regulation implementing the MCA. *See* 32 C.F.R. § 750.43(a)(2) (2002); JAGINST 5890.1, *supra* note 36, encl. 2, at 1-2. The Army definition of noncombat activities (*see* 32 C.F.R. § 536.3 (2002); AR 27-20, *supra* note 38, at 92) is almost identical to the Navy's definition. The Air Force defines noncombat activity more broadly than the Army and the Navy as "[a]ctivity, other than combat, war or armed conflict that is particularly military in character and has little parallel in the civilian community." 32 C.F.R. § 842.41 (2002); *see also* AFI 51-501, *supra* note 37, at 45.

[87] 28 U.S.C. § 2680(a).

[88] *Id.*

first place. In 1953, the Supreme Court established the first such test in *Dalehite v. United States.*[89] Under *Dalehite*, activities at the operational level did not fall within the ambit of discretionary functions, while those at the planning level did:

> [T]he "discretionary function or duty" that cannot form a basis for suit under the [Federal] Tort Claims Act includes more than the initiation of programs or activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.[90]

In 1991, the Supreme Court in *United States v. Gaubert*[91] discarded this "operational vs. planning level" distinction, noting that "the distinction in *Dalehite* was merely [a] description of the level at which the challenged conduct occurred. *There was no suggestion that decisions made at an operational level could not also be based on public policy.*"[92] In discarding this distinction, the *Gaubert* Court drew on its earlier decision in *Varig Airlines*, noting that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."[93] As one post-*Gaubert* decision noted:

> The plaintiffs' efforts to distinguish between "operational" decisions and "planning" decisions are also not useful to them because the Supreme Court has rejected making a distinction on this basis. In *Gaubert,* the Court explained that "a discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions. *Gaubert,* 499 U.S. at 325. Rather, decisions that take place in the administration of a policy decision are also protected – even if an abuse of

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[89] 346 U.S. 15 (1953).
[90] *Id.* at 35-36.
[91] 499 U.S. 315 (1991).
[92] *Id.* at 326 (emphasis added).
[93] *Id.* at 322 (citing United States v. Varig Airlines, 467 U.S. 797, 813 (1984)).

> discretion – so long as they are judgments based on policy considerations.[94]

The decisions in this section analyzing military supersonic flight in the context of a discretionary function activity were decided under both the operational vs. planning context of *Dalehite,* as well as under the new standard established by *Gaubert.* While many of the cases discussed below were decided under the old *Dalehite* standard and deemed military supersonic flight to fall within the purview of the discretionary function, those that did not (that is, the cases that relied on a sharp division between planning negligence at the command level and operational negligence of the pilot in the field) might have been decided differently post-*Gaubert.* After *Gaubert,* these later cases could well have found that negligence on part of the pilot (as a government agent acting within the scope of his employment and not violating mandatory directives) is protected under the DFE. This line of inquiry notwithstanding, the most important fact, for purposes of the present analysis, is that many of the following cases hold that damage caused by sonic booms generated by military supersonic flight is not actionable under the FTCA due to the operation of the DFE. One can argue that those pre-*Gaubert* cases that did not find the DFE applicable may have yielded an entirely different result post-*Gaubert*.

Another important principle, for the purpose of providing a background for the sonic boom cases, is that availability of the DFE is predicated upon the government agent following all mandatory statutes and directives:

> [i]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation . . . If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation

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[94] *Id.* at 326 (citing Minns v. United States, 155 F.3d 445, 452 (4th Cir. 1998)).

> involves consideration of the same policies which led to the promulgation of the regulations.[95]

Accordingly, if a government agent violates mandatory directives in the performance of his duties, the DFE will not apply. If the government agent does abide by the applicable directives, the DFE will apply even if the agent's conduct was negligent.[96]

In *Huslander v. United States*,[97] the plaintiff, through an FTCA action, sought damages for personal injuries she sustained when a sonic boom from an Air Force jet shattered a nearby windowpane.[98] The plaintiff initially filed a claim under the MCA, which the agency denied.[99] The court held that the plaintiff was barred from recovering under the FTCA because her claim was based upon a discretionary function, that is, the authorization of supersonic flight.[100] In deciding the issue of whether supersonic flight should be a protected activity with respect to the DFE, the court stated:

> With respect to the application of this section [the second prong of the DFE], the following excerpts from the Supreme Court's opinion in *Dalehite v. United States,* should be noted: "one need only read 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions,". . . [I]t is clear that the just-quoted clause ["whether or not the discretion involved be abused" per 28 U.S.C. § 2680(a)] as to abuse connotes both negligence and wrongful acts in the exercise of discretion . . . [and] authorization of supersonic flights over the Continental United States was the exercise of a discretionary function.[101]

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[95] *Id.* at 324; *see also* Berkovitz v. United States, 486 U.S. 501 (1988).
[96] 28 U.S.C. § 2680(a) (2000); *see also* Allen v. United States, 816 F.2d 1417 (1987), *cert. denied*, 484 U.S. 1004 (1988).
[97] 234 F. Supp. 1004 (W.D.N.Y. 1964).
[98] *See id*.
[99] *See id.* at 1005.
[100] *See id.* at 1006.
[101] *Id.* at 1005-06 (internal citations omitted).

Focusing on the "authorization" of supersonic flight at the operational level, the *Huslander* court held that the government is not liable under the FTCA for these types of activities because of operation of the DFE. The result of this case is inconsistent with comparable claims brought under the MCA. Indeed, sonic booms generated by supersonic flights are specifically included by service regulations in the lists of noncombat activities compensable under the MCA. Accordingly, the same type of activity that is specifically listed as compensable under MCA is deemed noncompensable by judicial interpretation of the DFE under the FTCA.

Eight years after *Huslander*, the Fifth Circuit faced the same issue in *Abraham v. United States.*[102] In *Abraham*, the plaintiffs commenced a wrongful death action against the United States under the FTCA alleging that an Air Force jet caused a sonic boom, which, in turn, caused a fire that killed plaintiff's husband.[103] The Fifth Circuit held that "military supersonic flights constitute a discretionary function exception," and accordingly, the United States was protected by operation of the DFE.[104] In so holding, the court noted the distinction between planning level negligence and operational level negligence, in keeping with the old test set forth in *Dalehite.*[105] The court found that the evidence presented eliminated the possibility of operational negligence.[106] The *Abraham* result was the same as the *Huslander* result: the same activity falling under the regulatory definition of a noncombat activity compensable under the MCA was deemed noncompensable under the FTCA due to the operation of the DFE.

In yet another sonic boom FTCA case, the plaintiff claimed property damage caused over a three-month period by supersonic Air Force flights over her property.[107] Again, the court held that the flights fall within the purview of the DFE, and thus, plaintiff was not entitled to compensation under the FTCA: "Because it is found that the authorization of supersonic flights was a discretionary function, the exemption of section 2680(a) is applicable here to bar recovery for sonic boom damage claims . . ."[108] Similarly, in *Maynard v. United States*,[109] a Ninth Circuit case,

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[102] 465 F.2d 881 (5th Cir. 1972).
[103] *See id.* at 882.
[104] *Id.* at 883.
[105] *Id.*; Dalehite v. United States, 346 U.S. 15 (1953).
[106] Abraham v. United States, 465 F.2d 881 (5th Cir. 1972).
[107] McMurray v. United States, 286 F. Supp. 701, 701 (W.D. Mo. 1968).
[108] *Id.* at 702.
[109] 430 F.2d 1264 (9th Cir. 1970).

plaintiff sustained severe injuries when a horse she was riding threw her to the ground when it was startled by a sonic boom from an Air Force jet.[110] The court held that the supersonic flight was within the purview of the DFE, despite evidence that the flight path was negligently selected at the planning level.[111] Because mandatory directives were followed (the fact that the pilot "followed directives from superiors was not disputed"),[112] plaintiff's allegations of negligence were insufficient to overcome the government's assertion of immunity pursuant to the DFE.

In *Ward v. United States*,[113] the Third Circuit, following the lead of the Fifth Circuit in *Abraham* and the Ninth Circuit in *Maynard*, held that military supersonic flights fall within the DFE: "in view of the interpretation given § 2680(a) in *Dalehite* . . . and the legislative history therein discussed, we conclude that the uncontradicted affidavits . . . were sufficient to establish that the flights . . .fell within the discretionary function exception."[114] In *Schwartz v. United States*,[115] the plaintiff alleged that Air Force pilots flew aircraft in such a negligent manner as to cause a sonic boom which, in turn, damaged her property.[116] Noting that the pilots "operated in conformity with all existing regulations," the Court held that activity at issue in the case fell within the governmental liability exclusion of the DFE.[117]

While a number of cases, such as the foregoing ones, analyzed supersonic flight in the context of a discretionary function, courts have found reasons apart from the DFE for governmental immunity in sonic boom cases. In *Laird v. Nelms*,[118] for example, the Supreme Court held that damage from a supersonic overflight is not compensable under the

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[110] *See id.*
[111] *See id.*
[112] *Id.* at 1266.
[113] 471 F.2d 667 (3d Cir. 1973).
[114] *Id*. at 669. Although the court in this case found that the flights were a discretionary function, it concluded that the affidavits submitted were insufficient to rule out the possibility of operational negligence. As highlighted above, at the time that this case was decided, negligence at the operational level was not considered to be within the purview of a protected discretionary function—only negligence at the planning level was protected under the DFE. *See* Dalehite v. United States, 346 U.S. 15, 35-36 (1953).
[115] 38 F.R.D. 164 (N.W.N.D. 1965).
[116] *Id*. at 164.
[117] *Id.* at 166-67. The court in *Schwarz* focused on "conformity with all existing regulations" because this, as opposed to negligence, is the sine qua non for governmental protection under the DFE. *See id.*
[118] 406 U.S. 797 (1972).

FTCA because the FTCA does not authorize actions against the government on theories of strict or absolute liability for ultra hazardous activities.[119] The Court found no evidence of negligence or wrongful conduct involving the overflight.[120] Although this rationale for governmental immunity differs from the DFE rationale, the result of no liability remains inconsistent with the results of similar claims brought under the MCA. Since sonic booms are specifically included in the regulatory definition of noncombat activities, damages caused thereby are compensable under the MCA even without a showing of negligence or scope of employment determination. In the FTCA context, however the *Laird* Court held that, without a showing of negligence, the FTCA does not authorize compensation for these types of claims.[121] Noteworthy is the fact that the *Laird* Court declined to analyze the sonic boom issue under the DFE: as the cases in the preceding paragraphs demonstrate, supersonic flights fall within the purview discretionary activity and thus a showing of negligence, at least at the planning level, does not create liability under the second clause of the DFE.[122]

As stated, a violation of a mandatory statute or directive will take an employee's conduct out of the ambit of discretionary activity, and, accordingly, the DFE will not operate to shield the United States from liability from an FTCA action based upon the employee's conduct.[123] Thus, the Ninth Circuit in *Greenhalgh v. United States*,[124] a post-*Gaubert* case, held the United States liable under the FTCA for damages caused by a supersonic overflight conducted in violation of mandatory minimum altitude restrictions.[125]

As discussed above, prior to the Court in *Gaubert* discarding the operational versus planning level distinction, courts concentrated more on the separation between planning level activities, which were protected under the DFE, and operational activities, which were not protected

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[119] *See id*. at 798-99.

[120] *See id.* (citing *Dalehite* in support of its holding that the FTCA does not provide a cause of action based upon strict liability in those instances where there is no evidence of negligence).

[121] *Id*. at 798-99.

[122] 28 U.S.C. § 2680(a) (2000); *see also Dalehite,* 346 U.S. at 15.

[123] *See, e.g.*, Berkovitz v. United States, 486 U.S. 531, 547 (1988) (stating petitioners' claim that federal health agency officials violated agency policy is not subject to a motion to dismiss based upon the DFE).

[124] 82 F.3d 422 (9th Cir. 1996).

[125] *Id*.

under the DFE. Thus, in *Peterson v. United States*,[126] the Eighth Circuit drew a "bright line" between the planning level, during which flight paths were determined, and the operational level of flying the aircraft: activities at the planning level fell within the protection of the DFE, while negligence at the operational level did not.[127] Although case law on this point had been limited since *Gaubert*, arguably in the post-*Gaubert* context the protections of the DFE relating to supersonic flight are greater than pre-*Gaubert*—the protection of the DFE is not limited to the flight planning level, but may also extend to the operational level, as the planning-operational dichotomy has been discarded.

While the focus for assessing immunity under the DFE has changed (that is, the operational versus planning distinction has given way to a focus on the nature of the conduct), the foregoing cases nevertheless establish that the DFE often works to preclude recovery under the FTCA for damage caused by military supersonic flights. Although these cases were decided on differing facts and considerations, they reveal one important truism: federal courts frequently ascribe complete governmental FTCA immunity under the DFE to the same sort of conduct that service regulations classify as noncombat activities, damages for which are compensable under the MCA. This contradiction is also evident in cases involving practice firing of weapons.

2. Practice Firing of Weapons Cases

The plaintiff in *Barroll v. United States*[128] claimed that the test firing of cannons at Aberdeen Proving Ground damaged his residence.[129] The court held that the operations at Aberdeen that caused the alleged damage fell within the purview of activities protected under the DFE:

> The selection of a place where a proving ground should be located is clearly within the exceptions set out in [the DFE]. So are such matters as the size of the cannon, the amount and character of explosives to be included in the charge, conditions under which the tests should be made, and the location of the firing positions. These were all

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126 673 F.2d 237 (8th Cir. 1982).
127 *See id*.
128 135 F. Supp. 441 (D. Md. 1955).
129 *See id*.

> fixed by groups of specialists, in the exercise of their discretion . . . The decisions of the staff at Aberdeen . . . as well as the decisions of the staff in the Office of the Chief of Ordnance, under the Assistant Chief of Ordnance for Development and Research, come clearly within the discretionary exception . . .[130]

The outcome of *Barroll* was the same result as many of the foregoing sonic boom cases: similar claims are compensable under the MCA and not compensable under the FTCA by operation of the DFE. This result is not only inconsistent in theory, it is expressly inconsistent with most service regulations implementing the MCA.[131]

IV. The Effect of Implementing Regulations at the Administrative Adjudication Level

The confusion and lack of consistency engendered by the interface between the MCA and FTCA with respect to discretionary governmental activity is nowhere more evident than in the various service regulations implementing the MCA. In their respective regulations, the services treat activities otherwise protected by the DFE in an FTCA claim differently under the MCA.

A. Air Force Regulations Implementing the MCA

Under its regulatory guidance pertaining to claims payable under the MCA, Air Force regulations specifically include "[c]laims arising from the noncombat activities of the United States, whether or not such injuries [or] damages arose out of the negligent or wrongful acts or omissions by United States military or civilian employees acting within the scope of their employment."[132] Air Force MCA regulations do not, however, provide payment for scope of employment-related personal injury claims arising in the United States:

> The MCA allows the military services to settle claims . . . arising from the negligent or wrongful acts by members

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[130] *Id.* at 449.
[131] *See infra* section IV.
[132] 32 C.F.R. § 842.49(b) (2002).

> or employees of the armed forces acting within the scope of employment, and for losses sustained as a result of the noncombat activities of the military services. The MCA applies worldwide. However, for claims arising in the United States, the MCA only applies to noncombat activities and incident to service property damage claims of military members.[133]

The Air Force regulations apply the DFE exclusion to scope of employment claims, and expressly eliminate the DFE exclusion from noncombat activities claims.[134] Given the extent to which noncombat activities[135] have been linked to discretionary functions by numerous federal courts, the Air Force regulations would provide recourse for such noncombat activities claims outside the parameters of FTCA practice. The overall impact of the Air Force regulation is problematic, however: a scope of employment claim could easily be recast as a noncombat activities claim in instances where the noncombat activity was conducted by a government agent acting within the scope of his employment. The converse is also true (that is, a noncombat activities claims could likewise be cast as a scope of employment claim by the agency and summarily denied). The fact that the MCA does *not* require proof of scope of employment for claims to be payable under the noncombat activities prong[136] suggests that the purpose of the statute was to make the recovery of damages caused by noncombat activities subject to a *less stringent* standard. This is consistent with the *original* intent of the MCA as a functional small claims act.[137]

The MCA claims stemming from the Texas border-shooting incident[138] would likely have been settled had they been adjudicated by the Air Force. As indicated by the DOJ, the tragedy was not attributed to any wrongdoing or fault on the part of the government.[139] The claims were thus deemed appropriately settled under the MCA.[140] With no

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[133] AFI 51-501, *supra* note 37, at 20.
[134] AFI 51-501, *supra* note 37, at 23.
[135] *See supra* part III.
[136] *See* 10 U.S.C. § 2733 (2000).
[137] *See* JAYSON, *supra* note 19, § 2, at 42.
[138] *See supra* notes 10-14 and accompanying text (providing the details of the Texas border-shooting case).
[139] *See* Romo, *supra* note 14, at C3.
[140] *See id.*; *see also supra* text accompanying note 14 (providing the statement of the DOJ spokesperson).

showing of fault, the claims could only be settled under the noncombat activities prong of the MCA.[141] Even assuming a valid DFE defense,[142] Air Force regulations would likely have allowed settlement of the Hernandez MCA claims, so long as they were not cast as scope of employment claims.[143]

B. Navy Regulations Implementing the MCA

Unlike the Air Force regulation, the Navy regulation implementing the MCA does not include a specific DFE reference.[144] The Navy regulation merely lists that claims payable under the FTCA are among those that are not compensable under the MCA.[145] While claims submitted under the first prong of the MCA (requiring proof of scope of employment) may be cognizable under the FTCA within United States jurisdictions, claims under the second prong are theoretically not cognizable under the FTCA (under the MCA, claims stemming from noncombat activities are assessed without regard to scope of employment,[146] while scope of employment is the fulcrum upon which liability is predicated under the FTCA).[147] Thus, with respect to noncombat activities and the DFE, the Navy and Air Force regulations would appear to allow for adjudication of such claims apart from a DFE

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[141] *See supra* part I.B (providing a detailed discussion of the two prongs of recovery under the MCA). Only the noncombat activities prong of the MCA permits settlement of claims without proof of scope of employment and tortious conduct on the part of a government agent. *See* 10 U.S.C. § 2733.

[142] *See supra* parts II, III (providing an in-depth analysis of the DFE). As the Hernandez claims were not litigated under the FTCA, the applicability of the DFE to this matter can only be a matter of legal speculation based upon the facts of the case. The facts, however, lend themselves to an almost "picture perfect" example of the DFE in action: all available facts indicate that the government agents were doing exactly what they were directed to do, *supra* note 122, and exercised discretion within the parameters of their directed mission. *See* United States v. Gaubert, 499 U.S. 315, 324 (1991); Berkovitz v. United States, 486 U.S. 531 (1988).

[143] AFI 51-501, *supra* note 37, at 23

[144] 32 C.F.R. § 750.44; JAGINST 5890.1, *supra* note 36, encl. 2, at 3-4.

[145] "Claims not payable . . .[a]ny claim cognizable under…[the] Federal Tort Claims Act, 28 U.S.C. 2671, 2672, and 2674-2680." 32 C.F.R. § 750.44(d); *see also* JAGINST 5890.1, *supra* note 36, encl. 2, at 3.

[146] 10 U.S.C. § 2733(a)(3).

[147] 28 U.S.C. § 1346(b) (2000).

analysis.[148] The Hernandez matter was settled under Navy claims regulations implementing the MCA.[149]

C. Coast Guard Regulations Implementing the MCA

While the Coast Guard regulations implementing the MCA do not expressly mention the DFE, they incorporate the DFE by reference. A claim is not payable under Coast Guard regulations if it falls within "one of the following exceptions to the Federal Tort Claims Act," including, by reference, the DFE.[150] Thus, this regulation would bar claims submitted under the MCA if they are susceptible to falling within the purview of the DFE. Again, there is an inconsistent result at the agency level: the same types of claims that are paid by one agency would be denied by another,[151] as the DFE exclusion would likely bar recovery in the Hernandez matter if it was adjudicated under Coast Guard regulations.

D. Army Regulations Implementing the MCA

Army regulations implementing the MCA would appear to have the identical effect as the Coast Guard regulations in applying the DFE to the MCA: claims not payable by the Army under the MCA include "[t]he types of claims not payable under the FTCA," including, by reference, claims which would be subject to the DFE.[152] However, *Army Regulation 27-20*, effective 1 July 2003, provides the following guidance on MCA claims: "the exclusions in paragraphs 2-39*d (1), (2)* [these listed exclusions incorporate, by reference, both prongs of the DFE] . . . *do not apply to a claim arising incident to noncombat activities."*[153] Thus, like the Air Force, the Army does not apply the DFE to MCA claims stemming from noncombat activities. The Hernandez claims

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[148] In addition to the above referenced regulation (*supra* notes 136 and 137) at subpart 32 C.F.R. § §750.41-750.46, general Navy regulatory guidance on handling MCA claims is also found at JAGINST 5890.1, *supra* note 36, at encl. 2.

[149] *See* Romo, *supra* note 14, at C3 ("The Navy and the Department of Justice have reached a $1 million settlement with the family of Esequiel Hernandez…").

[150] CLAIMS—MILITARY CLAIMS, 33 C.F.R. § 25.405(g) (2002).

[151] This would specifically include claims stemming from noncombat activities involving protected discretionary functions, such as the claims submitted in wake of the Hernandez matter.

[152] 32 C.F.R. § 536.24(k).

[153] AR 27-20, *supra* note 38, para. 3-4 (a)(9) (emphasis added).

would therefore be payable if adjudicated under the Army's regulations implementing the MCA.

E. Comparison of Service Regulations Implementing the MCA

The Army and Air Force guidance on MCA claims strikes a middle ground between the Coast Guard, on one hand, and the Navy on the other. Appreciating the tendency that noncombat activities have to fall within the purview of the DFE, the Army and Air Force specifically exempt MCA claims stemming from noncombat activities from the reach of the DFE.[154] It might be argued that the Coast Guard regulations paint with too broad a brush in applying the DFE to all MCA claims, including claims based both upon the scope of employment prong as well as those based upon the noncombat activities prong. On the other hand, it might be argued that the Navy regulations err in the opposite direction by applying the DFE to neither prong, irrespective of whether the MCA claim at issue is based upon scope of employment or the noncombat activities. The Army and Air Force appear to predicate their regulations on the rationale that, since the first prong of recovery under the MCA (the scope of employment prong) mimics the basis of recovery set forth in the FTCA (that is, the negligent or wrongful conduct of a government agent acting within the scope of his employment), then the DFE should apply. Because the noncombat activities prong is not based upon a scope of employment analysis evocative of FTCA practice, then the DFE, pursuant to their regulations, would be inapplicable to such claims. This approach, like that of the other services, is subject to legal criticism.

While the Army and Air Force regulations appear to be predicated upon an understanding of the difficulties in applying the DFE at the administrative adjudication level, the underlying premise is faulty. At first blush, it appears logical to apply the DFE to MCA claims arising under the scope of employment prong of recovery, and not the noncombat activities prong of recovery. This approach seeks, on one hand, to apply the DFE to those types of claims based upon a theory of recovery similar to that set forth under the FTCA (that is, scope of employment and negligence), and, on the other, to exclude application of

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[154] *Id.*; AFI 51-501, *supra* note 37, at 23. The Air Force regulation goes one step further than the Army by eliminating personal injury-based scope of employment claims arising in the Unites States from the purview of the MCA. This is likely based upon the rationale that such claims are more properly brought under the FTCA.

the DFE to those claims arising from noncombat activities (that is, those claims that do not require proof of scope of employment and negligence).

This intellectual construct collapses, however, when applied to claims arising from noncombat activities performed by government agents acting negligently within the scope of their employment. Which principle should control in these instances? Should the nature of the manner in which the activities were performed control such that the claim should be evaluated under the scope of employment prong of recovery under the MCA? If so, the DFE would apply and the claims often would be noncompensable. On the other hand, should the intrinsic nature of the activity (that is, noncombat activity) control to make such claims immune from the DFE and thus compensable under the MCA? As demonstrated, existing case law further compounds the quandary. The cases underscore the fact that noncombat activities often involve government agents acting within the scope of their employment (and, often negligently). Courts frequently have construed noncombat activities as falling within the purview of the DFE—a fact that presents a conundrum for the application of the DFE to the MCA, regardless of which service regulation is applied to a given set of facts. Indeed, none of the service regulations sufficiently resolve the problems associated with the application of the DFE to claims submitted under the MCA. The fact that the different services, by their respective regulations, apply the DFE differently to the same or similar MCA claims underscores the need for clear legislative guidance as to the applicability of the DFE to claims adjudicated at the administrative level under the MCA.[155]

F. Service Regulations Implementing the FCA

There is no jurisdictional overlap between the FTCA and the FCA, because the FCA only applies to claims arising outside of U.S. jurisdiction.[156] The stated purpose of the FCA is to "promote and

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[155] The Hernandez matter is just one example of how the same claim, based upon identical facts and adjudicated under the MCA, could be resolved differently depending upon which agency adjudicated.

[156] 10 U.S.C. § 2734 (2000). The FTCA is inapplicable to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k) (2000). While the FTCA is limited to the jurisdiction of the United States, claims based upon damages and/or injuries occurring in a foreign country or territory may be actionable under the FTCA if the negligent or wrongful act or omission occurred within the jurisdiction of the United States. *See*, *e.g.*, Alvarez-Machain v. United States, 266 F.3d 1045, 1054 (9th Cir. 2001) (stating the mere

maintain friendly relations" between the United States and other countries.[157] Similar to the MCA, the FCA provides compensation for damage or injury caused by noncombat activities.[158] While the MCA provides compensation for damage or injury caused by an agent only if the agent was "acting within the scope of his employment,"[159] the FCA provides compensation more broadly to any damage or injury caused by an agent, regardless of scope of employment (the "casualty prong").[160] Service implementing regulations require proof of scope of employment only in those FCA cases where the agent is indigenous to the country where the damage or injury occurred; no proof of scope of employment is required where the damage or injury is caused by an agent who was brought to the country by the United States.[161]

Neither Navy regulations,[162] Air Force regulations,[163] nor Coast Guard regulations[164] implementing the FCA contain any direct reference to the DFE. The respective Army regulation, however, incorporates the DFE in the same fashion as the portion of the regulation that implements the MCA: "[a] claim is not payable if it . . .[i]s listed in paragraph 2-39(d) [includes the DFE exclusion] . . . the exclusions set forth in paragraphs 2-39*d*(1) and (2) [specifically referencing both prongs of the DFE exclusion] do not apply to a claim arising incident to noncombat activities."[165] Thus, the Army regulation provides that claims arising under the causality prong of the FCA are subject to all of the limitations

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fact that the operative effect of governmental negligence takes place in a foreign country does not remove a claim from the ambit of the FTCA so long as the negligent act itself took place in the United States); Couzado v. United States, 105 F.3d 1389, 1395-96 (11th Cir. 1997) (holding negligent actions of federal agents in Florida are actionable under the FTCA when injuries from negligence are sustained outside of the United States); Leaf v. United States, 588 F.2d 733, 736 (9th Cir. 1978) (providing an FTCA claim would not be subject to dismissal on jurisdictional grounds if claimant could show that negligent acts in the United States led to injuries occurring in Mexico).

157 10 U.S.C. § 2734.

158 *See id.*

159 *Id.* § 2733(a).

160 *Id.* § 2734(a)(3).

161 ADMINISTRATIVE CLAIMS—FOREIGN CLAIMS, 32 C.F.R. § 842.64 (2002) (Air Force); Air Force guidance on the FCA may also be found at AFI 51-501, *supra* note 37, at 27-31; CLAIMS—FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002) (Coast Guard); AR 27-20, *supra* note 38, para. 10-3 (Army); JAGMAN, *supra* note 48, para. 0810(d) (Navy).

162 JAGMAN, *supra* note 48, para. 0811.

163 32 C.F.R. § 842.65 (2002); AFI 51-501, *supra* note 37, para. 4.16.

164 33 C.F.R. § 25.509.

165 AR 27-20, *supra* note 38, para. 10-4(k).

of the DFE, while those claims arising incident to noncombat activities are not.

G. Comparing Agency Treatment of Discretionary Activities under the FCA and MCA

Of the respective service regulations, the Army and Navy regulations are the most consistent in their treatment of discretionary activities with respect to the MCA and FCA. The Navy implementing regulations contain no provisions specifically applying the DFE to either the MCA or FCA, while Army regulations consistently apply the DFE to the causality prongs of both the MCA and the FCA and exclude it from the noncombat activities prongs of both statutes. Air Force and Coast Guard regulations, on the other hand, apply the DFE to the MCA but not to the FCA. Given that the FCA does not provide a private cause of action and is jurisdictionally exclusive with the FTCA, the Army regulations appear to be premised on the rationale that certain categories of discretionary activities intrinsically merit protection at all times and in all places (irrespective of their actionability in court). In contrast, Air Force and Coast Guard regulations focus more on the territorial overlap of the MCA and FTCA, and, accordingly, relax the DFE limitations with respect to the FCA. Another rationale for the Air Force and Coast Guard including the DFE in the MCA and not the FCA may be found in the stated purpose of the FCA: "to promote and maintain friendly relations" with other nations.[166] Regardless of reasons why the service regulations differ so significantly in their treatment of the DFE, when viewed together these regulations highlight the inconsistent and uneven application of the DFE at the administrative adjudication level.

V. The Issue in Context: Assessing Governmental Equities

Although the DFE is applied within a certain set of legislative and judicially-created parameters, it often has been difficult for the courts to define these parameters with precision.[167] As one court noted: "Congress has not defined the vague phrase 'discretionary function or

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[166] 10 U.S.C. § 2734(a) (2000). The equities countenanced in the FCA (the promotion of "friendly relations" with other nations) are concededly different from the MCA and the FTCA.

[167] *See supra* parts III.A, II.B.

duty' in the [Federal Tort Claims] Act. Legislative history is of little assistance. *Judicial inconsistency and confusion pervade this area of federal tort liability.*"[168] Similarly, another court observed, "where no identical precedent exists, the vague and situational guidelines in this area have been of minimal help to courts faced with a deliberation over 'discretionary' function."[169] This sentiment has been echoed in a Tenth Circuit opinion: "a tension exists in our cases and . . . the confusion in this area of the law needs to be acknowledged and confronted."[170] Conceptually complicated, the DFE has been the subject of exhaustive argumentation and interpretation in federal case law. It therefore is logical to presume that importing this complex and multifaceted legal concept into the MCA will engender difficulties and inconsistencies.

A. Governmental Equities and the DFE

At its core, the DFE is a powerful and effective statutory provision that has repeatedly been interpreted to shield the United States from liability. As the Supreme Court observed, "[o]ne need only read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions."[171] The DFE must not, however, be viewed in a vacuum: the DFE exists within the FTCA, a statute that provides for a private cause of action against the United States. Thus, while Congress inserted the DFE within the FTCA to protect important governmental equities, it was done so with the understanding that any agency decision denying an administrative FTCA claim under the auspices of the DFE would be subject to a possible court challenge.[172] While an agency may deny a claim on the basis of the DFE, the claimant has the right under the FTCA to challenge that denial in a U.S. district court. In contrast, there is no private cause of action under the MCA against the United States.[173]

Claims denied under the MCA, irrespective of the basis of the denial, are not per se actionable in U.S. district court. There is one caveat: if a claim is cognizable under the FTCA based upon scope of employment and negligence, it does not matter whether the agency labels that claim

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[168] Hernandez v. United States, 112 F. Supp. 369, 370 (D. Haw. 1953) (emphasis added).
[169] Jackson v. Wise, 385 F. Supp. 1159, 1166 (D. Utah 1974).
[170] Domme v. United States, 61 F.3d 787, 793 (10th Cir. 1995) (Henry, J., concurring).
[171] Dalehite v. United State, 346 U.S. 15, 32 (1953).
[172] 28 U.S.C. § 1346(b) (2000).
[173] 10 U.S.C. § 2733 (2000).

an FTCA claim or an MCA claim. In such a case, a claimant is not precluded from filing suit in U.S. district court upon agency denial of the claim simply because the agency labeled it an MCA claim.[174]

B. The MCA Viewed Against Judicial Safeguards and the DFE

As conceived, the DFE was included within a statute that provides the right to judicial recourse in a legislative effort to protect important governmental equities. As stated, when an agency denies a claim under the FTCA based upon the DFE, the claimant has the right to challenge that decision in federal district court regardless of the merits of the agency's denial decision. Further, as also stated, even if an agency adjudicates a claim arising within the United States under the MCA, the claimant is still entitled to judicial review of an agency denial so long as the claim is also cognizable under the FTCA. The statutory label that the agency places on a claim is immaterial in such an instance. This calculus changes, however, for claims arising outside the jurisdiction of the United States, where the FTCA does not apply. Irrespective of whether a claim is filed under the MCA or FCA, a denial of the claim is not actionable. Accordingly, agency decisions with respect to the DFE on claims arising outside the jurisdiction of the United States are not subject to judicial review.

As enacted, the provisions of the MCA are silent with respect to discretionary functions,[175] keeping within the original purpose of the MCA as a "small claims" statute.[176] In contrast, Congress addressed discretionary functions within the provisions of the FTCA, a statute that creates a limited waiver of sovereign immunity.[177] Any resolution to the discrepancy between the statutes must begin with the understanding that while the DFE was not considered by Congress when it enacted the MCA, the DFE was central to the enactment of the FTCA.

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[174] *See*, *e.g.*, Huslander v. United States, 234 F. Supp. 1004, 1005 (W.D.N.Y. 1964); *supra* notes 97-101 and accompanying text.
[175] 10 U.S.C. § 2733.
[176] JAYSON, *supra* note 19, § 2, at 42.
[177] 28 U.S.C. § 2674.

VI. Striking the Balance: A Proposed Solution

Each of the services, respectively, attempts to resolve the problems associated with the implementation of the DFE outside the parameters of an FTCA claim. The Air Force[178] applies the DFE to overseas MCA scope of employment claims, while the Coast Guard[179] appears to apply the DFE to the full scope of the MCA. Similar to the Air Force, the Army specifically exempts claims arising from noncombat activities from the purview of the DFE, but without creating a dichotomy between overseas MCA claims and MCA claims arising in the U.S.[180] The Army and Air Force approach is premised on the assumption that noncombat activities claims cannot be cast as scope of employment claims.[181] In contrast to the Air Force, Coast Guard and Army approaches, the Navy is silent on the DFE in its MCA regulation.[182] Thus, under the Navy regulations, true MCA claims are adjudicated without reference to the DFE. In addressing FCA claims, the only service that preserves the DFE is the Army, which specifically exempts claims stemming from noncombat activities from the DFE analysis.[183]

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[178] *See* 32 C.F.R. § 842.50 (2002); AFI 51-501, *supra* note 37, at 20, 23. The Air Force MCA statute presents a number of questions which are beyond the scope of this article. For instance, a plain reading of AFI 51-501, *supra* note 37, at 20, 23 appears to indicate that incident to service property damage claims of military members arising in the U.S. are a distinct subcategory of MCA claims (para 3.1) and that the such claims could still be subject to a DFE exclusion (para 3.7.17-.18) if they are not capable of being classified as noncombat activities claims. Further, the Air Force regulation expressly limits the MCA's applicability in the U.S. to noncombat activities claims and incident to service property damage claims of military members. This would appear to create a bright line dichotomy between FTCA and MCA practice with respect to the DFE's applicability in the U.S. and foreign countries. The construct collapses, however, when faced with a noncombat claim arising in the U.S. that stems from the allegedly negligent conduct of a government agent acting within the scope of his employment. Are such claims nevertheless handled under the noncombat activities prong of the MCA? Are they recast as FTCA claims and subject to a DFE exclusion? What about incident to service property damage claims of military members arising in the U.S.? If they are not capable of being classified as noncombat activities claims, are they subject to a DFE exclusion? The regulation does not appear to offer a definitive answer to these difficult questions.

[179] *See* 33 C.F.R. § 25.405.

[180] *See* AR 27-20, *supra* note 38, para. 3-4(9), at 26.

[181] *See supra* section IV.

[182] *See* 32 C.F.R. § 750.44; JAGINST 5890.1, *supra* note 36, encl. 2, at 3-4.

[183] AR 27-20, *supra* note 38, para. 10-4(k). As discussed in Part IV, *supra*, adjudications under the FCA highlight some of the inconsistencies at the administrative adjudication level with respect to discretionary functions. The purpose of the FCA to promote "friendly relations," 10 U.S.C. § 2734(a) (2000), between the United States and other nations, however, removes the FCA from the immediate focus of this analysis.

The considerations involved in implementing the DFE at the administrative level within the parameters of the MCA can be viewed against competing equities. On one hand, whether or not an MCA claim is paid should not depend on which branch of service adjudicates the claim, as the situation currently stands. On the other hand, the critical role the DFE plays as a liability exclusion in FTCA practice may be eroded if claims that would otherwise be barred by the DFE if considered under the FTCA are paid under the MCA. This is especially true in the case of claims arising from noncombat activities: while two services expressly exempt MCA claims stemming from noncombat activities from a DFE analysis, many of these claims involve the negligent acts or omissions of government employees acting within the scope of employment, and are thus susceptible of a DFE exclusion under an FTCA analysis. A comprehensive review of these competing interests, especially in light of divergent agency implementing regulations, points to the need for a revision of the MCA.

As stated, the ultimate effect of the DFE is to shield the United States from *liability* arising from the performance of discretionary functions. To this extent, the problems engendered by importing the DFE into the MCA only materialize at the point where the FTCA and MCA intersect. The solution, therefore, does not merit drawing an artificial DFE dichotomy between the MCA's scope of employment prong and noncombat activities prong. Rather, the first dichotomy should be between claims arising within United States and those arising outside of the United States[184]. Given that there are no jurisdictional precedents that would countenance inconsistent outcomes at the administrative adjudication level for claims arising outside the United States, such claims should not be subject to the DFE. As demonstrated *supra* at Section IV, none of the services, with the exception of the Army, include the DFE in their regulations implementing the FCA. Considering that the factors for compensation set forth in the MCA and FCA are similar, this further supports the conclusion that the DFE is only relevant to the MCA insofar as the MCA intersects the jurisdiction of the FTCA.

Having established the jurisdictional area of application of the DFE to the MCA, the remaining issue is determining the types of MCA claims

[184] *See supra* note 178. As already explained, the Air Force bifurcation between MCA claims arising in the United States and MCA claims arising overseas does not create an adequate dichotomy.

that should be subject to a DFE analysis. Claims adjudicated under the MCA should be isolated from those that are actionable in district court under the FTCA. While this approach focuses on protecting important governmental interests with respect to discretionary functions, it also provides agencies with clear direction on the types of claims that should be subject to a DFE analysis. Simply drawing a dichotomy, however, between claims stemming from noncombat activities and those arising under the scope of employment prong of the MCA does not accomplish this goal. Irrespective of whether a claim may be associated with noncombat activities, the test should consider whether or not the claim arises from the negligent or wrongful conduct of a government agent acting within the scope of his employment. The following language, if added to the MCA, would accomplish this objective:

> *The limitations set forth in 28 U.S.C. § 2680(a) shall apply to claims adjudicated under this section, but only to those claims which (1) arise in United States jurisdiction and (2) are determined by the agency to result from the negligent or wrongful act or omission of an employee of the United States while acting in the scope of his employment. To the extent that claims arising from noncombat activities are determined by the agency to be attributable to a negligent or wrongful act or omission of an employee of the United States while acting in the scope of his employment, such claims shall also be subject to the limitations set forth at 28 U.S.C. § 2680(a).*

This proposed addition balances competing equities.[185] On the one hand, the proposal protects important governmental interests by safeguarding the critical role that the DFE plays as a liability exclusion in FTCA practice. It carefully preserves the legal force of the DFE as an important defense in areas subject to FTCA jurisdiction by ensuring that claims arising within United States, which would otherwise be barred by the DFE, would likewise not be compensable under the MCA. Should such claims be denied under the FTCA, plaintiffs would have the corresponding ability to litigate them. On the other hand, the proposed addition to the MCA would also protect societal equities: whether an MCA claim is paid will no longer depend upon which service happens to

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[185] The question of whether DOJ concurrence should be required before an agency denies an MCA claims based upon the DFE is beyond the scope of this article.

adjudicate the claim. Rather, the statute will define clearly the scope and extent to which the DFE applies to MCA claims. The proposed language would eliminate the arbitrary and inconsistent application of the DFE to MCA claims since the services will no longer be left to resolve the inherent difficulties engendered in implementing the DFE outside the parameters of an FTCA claim.

The claims stemming from the Texas border-shooting incident[186] exemplify how the proposed addition to the MCA would operate in practice. The legislative proposal requires a two-step analysis for determining whether to apply the DFE to claims adjudicated under the MCA. The first step of the analysis determines whether the MCA claim arose in a geographical jurisdiction that is subject to the FTCA. With respect to the Hernandez matter, which arose in Texas, FTCA jurisdiction applies.[187] Accordingly, the first step of the DFE analysis is met. The second step of the analysis determines whether the MCA claim stems from the negligent or wrongful act or omission of a U.S. employee acting in the scope of his employment. Under the proposed MCA amendment, the DFE analysis is not truncated simply because the claim arises under the noncombat activities prong of the MCA. For instance, irrespective of the fact that the Hernandez claim arose under the noncombat activities prong of the statute,[188] a negligence and scope of employment analysis is still required. The government's conclusion that the Hernandez incident was not attributable to the negligent or wrongful conduct of a U.S. employee acting in the scope of his employment[189] resolves the second step of the proposed analysis. Since the MCA claims submitted in the wake of the Hernandez matter stemmed from a noncombat activity, and because it was determined that the incident was not attributable to the tortious conduct of government employees, the proposed legislation would permit adjudication of the claims without application of the DFE.

The proposed addition to the MCA preserves the integrity of the DFE at the administrative adjudication level by requiring the application of the DFE to any claim that might be actionable in district court under

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[186] *See supra* part I (providing an account of the Texas border-shooting incident, including a description of the claims that were filed by the family of the decedent).

[187] *See supra* part I.A (stressing that the FTCA is limited to claims arising within the United States); *see also* 28 U.S.C. § 1346(b) (2000).

[188] *See supra* part IV (providing a discussion of why these claims could only have been settled under the noncombat activities prong of the MCA).

[189] *See* Romo, *supra* note 14, at C3.

the FTCA. At the same time, those MCA claims stemming from noncombat activities with no indication of governmental negligence would not require a DFE analysis. With the sphere of the DFE thus brightly defined and safeguarded, claims will not be denied on the basis of the DFE unless judicial recourse is available in the form of an FTCA action. Fundamentally, a claim should not be denied on the basis of a legal construct as complex and multifaceted as the DFE absent the right to litigate that denial. The fact that the services imported the DFE from the FTCA into MCA implementing regulations in asymmetrical and divergent fashions serves only to underscore this premise.[190]

VII. Conclusion

The MCA is silent with respect to the DFE, one of the most prominent exceptions to the limited waiver of sovereign immunity found in the FTCA. In the face of this silence, numerous courts have been forced to interpret the contours and parameters of the DFE. Against this backdrop, the four agencies which apply the MCA have promulgated their own regulations for its implementation. Given the lack of congressional guidance and the inherent complexity of the DFE, these four agencies have each applied the DFE to MCA claims in different ways. The result is that an MCA claim submitted to one agency may well be resolved differently if submitted to another. The proposed change to the MCA resolves these inconsistencies by providing clear guidance to the agencies on the types of MCA claims that require application of the DFE. The proposal protects the important governmental equities associated with the performance of discretionary activities, while at the same time providing a less arbitrary mechanism for the administrative adjudication of claims.

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[190] *See supra* part IV (providing a detailed comparison of the agency regulations implementing the MCA). The concerns engendered by these divergent regulations are heightened by the fact that the MCA provides no judicial recourse and makes no mention of the DFE. *See* 10 U.S.C. § 2733 (2000).