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Are Police People Too?

AN EXAMINATION OF THE FEDERAL TORT CLAIMS ACT'S "PRIVATE PERSON" STANDARD AS IT APPLIES TO FEDERAL LAW ENFORCEMENT ACTIVITIES

INTRODUCTION

Although the administration of criminal justice historically resided with the various states,¹ the scope of federal law enforcement has grown immensely over the years.² Today, there are numerous federal investigative and law enforcement agencies that are assigned significant duties and responsibilities for the protection of the public.³ Unfortunately, citizens are occasionally harmed by law enforcement officers in the process of carrying out these duties.⁴ The law provides both criminal and civil remedies to compensate citizens for these harms, and, at the same time, provides a deterrent to undesirable conduct.⁵ The Federal Tort Claims Act (FTCA)⁶ is one such remedy. The Act provides a means of obtaining compensation for harms caused by the negligent actions of federal employees and for certain intentional torts.⁷ The FTCA is necessary because the doctrine of sovereign immunity

¹ THE FEDERALIST NO. 17, at 109 (Alexander Hamilton) (Henry B. Dawson ed., 1868) ("There is one transcendent advantage belonging to the province of the *State Governments*, . . . the ordinary administration of criminal and civil justice. . . . [The administration of justice] being the immediate and visible guardian of life and property . . . [has] its benefits and its terrors in constant activity before the public eye" (emphasis added)).

² H.R. REP. NO. 74-2034, at 2 (1936).

³ See, e.g., 18 U.S.C. § 3052 (2006) (granting powers to agents of the Federal Bureau of Investigation); 28 C.F.R. § 0.85 (2009) (detailing general functions of the FBI).

⁴ See Sam Howe Verhovek, *Border Patrol Is Criticized as Abusive*, N.Y. TIMES, May 21, 1998, at A14; Frank York, *Doctor Seeks Justice After DEA's Clinical Assault*, WORLDNETDAILY (Feb. 21, 2000, 1:00 AM), <http://www.wnd.com/?pageId=4047>.

⁵ See *United States v. Westmoreland*, 982 F. Supp. 376, 378 (S.D. W. Va. 1997) (discussing the exclusionary rule in the criminal context and pointing out the availability of civil remedies).

⁶ 28 U.S.C. §§ 2674, 2680 (2006).

⁷ See *id.* The federal government retains its immunity for certain intentional torts, if they are committed by a federal employee who is not a law enforcement officer. See 28 U.S.C. § 2680(h).

shields the government from suit without its consent, and because the judicially created cause of action against individual officers has significant shortcomings, namely that those individuals may be judgment-proof.⁸

Because the FTCA was designed to address all tort actions brought against the United States,⁹ it is ill-suited to address the unique concerns that arise when the actions of law enforcement officers are the subject of a suit. The primary problem with the FTCA in these cases stems from its requirement that the United States be liable "in the same manner and to the same extent as a private individual."¹⁰ This private person standard is inappropriate because, in their mission to uphold the law, these officers are obligated to put themselves in situations that ordinary citizens are not.¹¹

Recognizing this issue, courts in the past employed different analyses to reach what seemed to be just results in cases involving law enforcement.¹² However, in recent years, the Supreme Court's decision in *United States v. Olson*,¹³ which advocated a strict interpretation of the wording of the FTCA,¹⁴ has eliminated the flexibility that lower courts have used in applying this statute. Since the FTCA is not well tailored to these types of cases, and the Supreme Court has mandated a plain meaning interpretation, courts have struggled to find new approaches to the FTCA that follow the holding in *Olson* while both allowing law enforcement agencies enough discretion to carry out their duties and recognizing that these officers are not similarly situated to private citizens. To date they have not been successful. This note argues that the only viable solution is for Congress to modify the FTCA by adding language providing that, in suits concerning the actions of law enforcement officers, the United States is liable in the same manner and to the same extent as a state or municipality under like circumstances.

⁸ See S. REP. NO. 93-588, at 2 (1973), reprinted in 1974 U.S.C.C.A.N. 2789, 2790. In today's world of indemnification, however, this shortcoming is debatable. See *infra* note 185 and accompanying text.

⁹ See *infra* notes 34-37 and accompanying text.

¹⁰ 28 U.S.C. § 2674.

¹¹ See *infra* Part II.

¹² See *Hetzel v. United States*, 43 F.3d 1500, 1505 (D.C. Cir. 1995); *Crider v. United States*, 885 F.2d 294, 296 (5th Cir. 1989); *Louie v. United States*, 776 F.2d 819, 823 (9th Cir. 1985); *Tomcsik v. United States*, 720 F. Supp. 588, 591 (E.D. Mich. 1989), *aff'd*, 917 F.2d 564 (6th Cir. 1990).

¹³ 546 U.S. 43 (2005).

¹⁴ See *id.* at 44.

Part I of this note provides a brief history of the FTCA and the 1974 law enforcement amendment. Part II discusses the differences between the obligations of law enforcement officers and private citizens, and the problems that arise when applying the private person standard of the FTCA to the actions of law enforcement officers. Part III discusses the recent case law in the area and details why the current judicial approaches are unsatisfactory. Lastly, Part IV provides a recommendation for how the FTCA could be modified by Congress to better address the concerns that arise in law enforcement cases.

I. HISTORY OF THE FEDERAL TORT CLAIMS ACT

To fully explain the role that the FTCA plays in suits brought against the United States, it is necessary to briefly discuss the doctrine of sovereign immunity. The idea of sovereign immunity was inherited from English law,¹⁵ under which “[the King could] not be compelled to answer in his own court”¹⁶ This concept enjoyed widespread acceptance in America during the nation’s founding,¹⁷ and continues to be applicable today.¹⁸ The practical effect of sovereign immunity is that “the United States may not be sued without its consent.”¹⁹ Thus, the federal government can only be sued where it has waived its right to this immunity, and then only under the conditions that it prescribes.²⁰ This doctrine places a substantial, and sometimes insurmountable, burden on would-be plaintiffs.²¹ Despite this doctrine, throughout our nation’s

¹⁵ LESTER JAYSON & ROBERT LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 2.01 (2010).

¹⁶ *Nevada v. Hall*, 440 U.S. 410, 415 n.6 (1979) (quoting 1 FREDERICK POLLOCK & FREDERIC MAITLAND, *HISTORY OF ENGLISH LAW* 518 (2d ed. 1899)).

¹⁷ THE FEDERALIST NO. 81, at 318 (Alexander Hamilton) (J. & A. McLean eds., 1788) (“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*.”); see also Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443 (2005) (statements by James Madison and John Marshall).

¹⁸ *United States v. Navajo Nation*, 129 S. Ct. 1547, 1551 (2009) (“The Federal Government cannot be sued without its consent.”).

¹⁹ *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

²⁰ *Honda v. Clark*, 386 U.S. 484, 501 (1967) (“It is well settled, of course, that the Government is ordinarily immune from suit, and that it may define the conditions under which it will permit such actions.”).

²¹ See Chelsea Sage Durkin, Comment, *How Strong Stands the Federal Tort Claims Act Wall? The Effect of the Good Samaritan and Negligence Per Se Doctrines on Governmental Tort Liability*, 39 ARIZ. ST. L.J. 269, 270 (2007).

history Congress has continually provided remedies for individuals harmed by actions of the federal government and its employees.²² The FTCA is the largest and most notable waiver of sovereign immunity.²³ This section briefly discusses the remedies that were available prior to the FTCA, the enactment of that statute, and the 1974 amendment.

A. *Remedies Prior to the Federal Tort Claims Act*

Early in our nation's history, the only remedy available to citizens harmed by the actions of the federal government and its actors was through the private bill system, where an individual would lobby his or her representative in Congress to pass specific legislation granting monetary relief.²⁴ Dissatisfaction with this process emerged as early as 1832,²⁵ resulting in a number of different congressional acts that provided remedies for a few specific harms.²⁶ These remedies were limited because they usually required the approval of the executive branch that had caused the harm before any compensation would be awarded.²⁷ Moreover, the types of scenarios that were compensable under these acts were very limited—for example, damage to oyster growers arising from dredging operations or other equipment while making river and harbor improvements that were approved by Congress—and only one of these bills actually addressed the area of domestic law enforcement.²⁸

The one act that was aimed at the law enforcement function was passed in 1936 when Congress recognized the need to compensate individuals harmed by agents of the Federal Bureau of Investigation (FBI).²⁹ This legislation came on the heels of a series of incidents where civilians were harmed during attempts to capture John Dillinger, a notorious bank robber in

²² See JAYSON & LONGSTRETH, *supra* note 15, §§ 2.05, 2.10.

²³ *Id.* § 1.03.

²⁴ See *id.* § 2.01.

²⁵ See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 49 (1942) ("As early as February 23, 1832, John Quincy Adams wrote: 'There ought to be no private business before Congress. . . . It is judicial business, and legislative assemblies ought to have nothing to do with it.'").

²⁶ *Id.* § 2.05.

²⁷ *Id.*

²⁸ See *id.* Several of these bills did address damage caused by the armed services, but those are distinct from domestic law enforcement. See *id.*

²⁹ Act of Mar. 20, 1936, ch. 159, § 2603, 49 Stat. 1184, 1184-85 (1936) (current version at 31 U.S.C. § 3724 (2006)).

the 1930s.³⁰ Congress, acknowledging the unique responsibilities of these officers, stated that “[agents] must be free to act on the spur of the moment and in the most reasonable manner which the particular circumstances may afford.”³¹ Notwithstanding this legislation, Congress remained inundated with private bills.³² The various remedies available simply did not cover the vast majority of the scenarios where individuals could be harmed by the actions of government actors.

B. *The Federal Tort Claims Act and the 1974 Amendment*

In response to the continued influx of private bills, Congress passed the FTCA as a part of the Legislative Reorganization Act of 1946.³³ The FTCA was broadly written so that it would define the liability of the United States in all circumstances where a federal employee, acting in the course of his or her employment, was alleged to have committed a tort.³⁴ It was not the first attempt at passing legislation to confer jurisdiction on the courts for these suits.³⁵ Similar bills had been under consideration for years, but had failed to pass because of disagreements within Congress.³⁶ Congress hoped that authorizing tort suits against the United States would eliminate the need for private legislation, and that justice would be better served by having a continually operating and uniform process for addressing these claims.³⁷

The result is that the FTCA grants federal courts jurisdiction in any case brought against the United States where injuries to persons or property are “caused by [a] negligent or wrongful act or omission of any employee of the Government

³⁰ There were two such incidents. One resulted in three civilians being shot during a raid on the Little Bohemia resort in rural Wisconsin, and the second caused minor injuries to civilians in Chicago. See ALSTON PURVIS & ALEX TRESNIOWSKI, *THE VENDETTA: FBI HERO MELVIN PURVIS’S WAR AGAINST CRIME*, AND J. EDGAR HOOVER’S WAR AGAINST HIM 91, 109-11 (2005) (describing the incident at Little Bohemia); *Dillinger Slain in Chicago; Shot Dead by Federal Men in Front of Movie Theatre*, N.Y. TIMES, July 22, 1934, at 1 (reporting on the shooting in Chicago).

³¹ H.R. REP. NO. 74-2034, at 2 (1936). This act is still in force for agencies within the Department of Justice for harms that are not covered by the FTCA. See 31 U.S.C. § 3724 (2006).

³² See JAYSON & LONGSTRETH, *supra* note 15, § 2.08.

³³ Act of Aug. 2, 1946, ch. 753, 60 Stat. 812 (codified at 28 U.S.C. §§ 1346(b), 2671-2680 (2006)).

³⁴ See *id.*

³⁵ H.R. REP. NO. 79-1287, at 2 (1945).

³⁶ *Id.*

³⁷ *Id.* at 2-3.

while acting within the scope of his office or employment, under circumstances where . . . a private person would be liable . . . in accordance with the place where the act or omission occurred.”³⁸ Moreover, “the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.”³⁹ Thus, the FTCA performs both the function of abrogating sovereign immunity and defining the liability of the federal government.⁴⁰ In both of these functions, the FTCA defines the standard of liability for the United States as equivalent to the liability of private persons under state law.⁴¹ The government does, however, retain defenses related to judicial and legislative immunity, and “any other defenses to which the United States is entitled.”⁴²

The FTCA also includes several exceptions.⁴³ One of those is the intentional tort exception, which bars all suits against the United States for claims “arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”⁴⁴ As originally enacted, this exception applied to the actions of all federal employees.⁴⁵

During the early 1970s, however, a series of incidents involving agents of the newly created Office for Drug Abuse Law Enforcement (DALE) prompted Congress to reconsider this exception when intentional torts were committed by federal law enforcement officers.⁴⁶ Although there were several

³⁸ 28 U.S.C. § 1346(b) (2006).

³⁹ 28 U.S.C. § 2674 (2006).

⁴⁰ *Richards v. United States*, 369 U.S. 1, 6 (1962) (“The Tort Claims Act was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances.”).

⁴¹ See 28 U.S.C. §§ 1346(b), 2674.

⁴² 28 U.S.C. § 2674.

⁴³ See HENRY COHEN & VANESSA K. BURROW, CONG. RESEARCH SERV., AM. LAW. DIV., CRS REPORT FOR CONGRESS: FEDERAL TORT CLAIMS ACT 1-2 (2007) [hereinafter CRS REPORT FOR CONGRESS]. These exceptions include the Feres doctrine, which disallows liability injuries by military personnel incident to service; the discretionary function exception; the intentional tort exception; and an exception for an employee exercising due care in the execution of a statute or regulation, regardless of that statute’s validity. *Id.*

⁴⁴ 28 U.S.C. § 2680(h) (1970).

⁴⁵ *Id.*

⁴⁶ See S. REP. NO. 93-588, at 2 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791-2792; compare 28 U.S.C. § 2680(h) (1970), with 28 U.S.C. § 2680(h) (2006) (The latter was amended to state that “with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the

reported incidents of abuse by DALE agents, the most notable was a highly publicized series of “no knock” raids that occurred in Collinsville, Illinois.⁴⁷ On April 29, 1973, DALE agents broke down the door of the Giglottos’ home in Collinsville, handcuffed the couple, threatened them with violence, and ransacked their house before realizing that they were at the wrong location.⁴⁸ The agents quickly left the home, refusing to explain their actions.⁴⁹ All of this occurred within approximately thirty minutes.⁵⁰ The agents did not obtain a warrant or even properly identify themselves to the couple.⁵¹ An almost identical scene was replayed later that evening when DALE agents mistakenly raided a second family’s home, also in Collinsville.⁵² As a result of the intentional tort exception to the FTCA, these families were left without a remedy under the Act because the agents had acted intentionally rather than negligently.⁵³ Congress responded to this injustice by passing the 1974 amendment.⁵⁴ Unlike the original FTCA, the 1974 amendment specifically addressed the actions of law enforcement officers, but only in relation to the intentional tort exception.⁵⁵

The amendment provided that the United States could be held liable for any claims “arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious

date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.”).

⁴⁷ See S. REP. NO. 93-588, at 2.

⁴⁸ *Illinois: In the Name of the Law*, TIME, May 14, 1973, available at <http://www.time.com/printout/0,8816,907220,00.html>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See S. REP. NO. 93-588, at 2. It was noted that a violation of these individuals’ constitutional rights was actionable against the individual agents under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); however, that remedy was considered insufficient because many federal agents are likely to be judgment proof. S. REP. NO. 93-588, at 2.

⁵⁴ Act to Amend Reorganization Plan Numbered 2 of 1973, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974) (codified at 28 U.S.C. § 2680(h) (2006)). It is noteworthy that Congress was discussing the need to provide compensation to victims of constitutional torts, but did not desire to limit this amendment to include only those actions that rose to the level of a constitutional violation. S. REP. NO. 93-588, at 3 (“[T]he Committee’s amendment should not be viewed as limited to constitutional tort situations.”). Interestingly, the resulting statute expressly disallowed actions based on constitutional torts because it subjected this amendment to the other provisions of the FTCA, including the requirement that the United States be liable in accordance with state law. See *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (“[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims.”).

⁵⁵ See S. REP. NO. 93-588, at 2-3.

prosecution,” based on “the acts or omissions of federal investigative or law enforcement officers.”⁵⁶ By acknowledging that the federal government should be liable for these intentional torts when committed by law enforcement officers, but not by other federal employees, Congress recognized that this unique area of federal activity creates circumstances that are different from the other areas of government action. Nevertheless, it is clear that Congress’s intent was to compensate victims of law enforcement abuses, but not for harm caused during the valid execution of law enforcement authority.⁵⁷

While the 1974 amendment took a much-needed step by providing a remedy to victims of law enforcement abuse, it did not change the overall standard of liability for the actions of law enforcement officers. The result is that liability for the actions of federal law enforcement officers is still determined by the liability of a private person in like circumstances, just as it would be in the case of any other government employee.⁵⁸ The remainder of this note discusses why the private person standard is inappropriate for determining liability in the law enforcement context, and the need for the FTCA to be modified yet again to account for the unique role that law enforcement plays in American society and the inherent differences between law enforcement officers and private citizens.

II. THE PRIVATE PARTY ANALOGUE AND POLICY ISSUES RAISED BY ITS APPLICATION IN LAW ENFORCEMENT SUITS

The primary difficulty in applying the FTCA to cases involving the actions of law enforcement officers is the private person standard for determining the liability of the government.⁵⁹ This standard, which was not addressed by the 1974 amendment, is often implemented by using a private party analogue (PPA).⁶⁰ This process involves finding a private party that would be in “like circumstances” and trying the case

⁵⁶ 28 U.S.C. § 2680(h).

⁵⁷ See *Tekle v. United States*, 511 F.3d 839, 858 (9th Cir. 2007) (Fisher, J., concurring); S. REP. NO. 93-588, at 3.

⁵⁸ *Id.*

⁵⁹ See 28 U.S.C. § 2674 (2006). As provided in the FTCA, the government is liable “in the same manner and to the same extent as a private individual under like circumstances.” *Id.*

⁶⁰ See Transcript of Oral Argument at 4-10, *United States v. Olson*, 546 U.S. 43 (2005) (No. 04-759).

as if the federal actor was that private person.⁶¹ For example, a doctor at a Veterans Affairs (VA) hospital would be compared to a private doctor at a private hospital for the purposes of assessing liability. Thus, if a state were to implement a shield of liability for all publicly employed doctors, that shield would not protect the doctor employed by the federal government because a public employee is not a private person.⁶² Similarly, if state employees were held to a higher standard than private individuals, the United States would not be held to that heightened standard.⁶³ Normally, finding a comparable private party for purposes of assessing liability is a fairly simple endeavor;⁶⁴ however, law enforcement activities present a challenge because private citizens do not have the same authority or responsibility to enforce laws as government agents.⁶⁵ This problem was well articulated by the Ninth Circuit in *Louie v. United States*:

Questions as to the power and authority to arrest, to maintain custody, and to lawfully restrict a person's liberty, are unique to the law enforcement function. Because private persons do not wield such police powers, the inquiry into the government's liability in this situation must include an examination of the liability of state and municipal entities under like circumstances.⁶⁶

Recently, the appropriate PPA for the actions of law enforcement was raised at the oral argument in *Olson*, where the Justices questioned the government about what PPA would apply to the actions of federal law enforcement officials.⁶⁷ During that discussion, Chief Justice Roberts offered the possibility that "if it's a police officer stopping somebody on a highway, it's the same as a private security guard stopping somebody."⁶⁸

⁶¹ *Id.* at 6-7.

⁶² See *United States v. Olson*, 546 U.S. 43, 44-45 (2005) (directly overruling *Aguilar v. United States*, 920 F.2d 1475, 1477-78 (9th Cir. 1990), which held that the United States could be shielded from liability by applying state law granting immunity to state employees).

⁶³ See, e.g., *Ortiz v. U.S. Border Patrol*, No. 99-2143, 2000 U.S. App. LEXIS 6664, at *3-4 (10th Cir. Apr. 11, 2000); *Crider v. United States*, 885 F.2d 294, 296 (5th Cir. 1989).

⁶⁴ *Durkin*, *supra* note 21, at 273.

⁶⁵ See *Louie v. United States*, 776 F.2d 819, 825 (9th Cir. 1985).

⁶⁶ *Id.* (internal quotations omitted). The context of the *Louie* case made it an interesting choice for the court to depart from the private person standard because under the facts of the case the liability of municipal entities and private persons was the same under Washington law. *Id.*

⁶⁷ See Transcript of Oral Argument, *supra* note 60, at 4-10.

⁶⁸ See *id.* at 7.

However, no private citizen is truly comparable to a law enforcement officer,⁶⁹ and it seems counterintuitive that the unique characteristics of these officers would go without consideration when determining the government's liability for their actions. Although citizens should be compensated for any wrongful conduct of law enforcement officers, failing to consider the differences between law enforcement officers and private persons when determining liability could place an undue burden on the agencies and officers that have an affirmative duty to uphold the law.

Law enforcement officers are unique because of the extensive training they receive and the fact that the government places responsibilities on those officers that are not applicable to private persons.⁷⁰ As one commentator put it, "There are many . . . differences between [law enforcement] officers and civilians: officers cannot 'call the police' to avoid using force; they often are not permitted to retreat; they are trained and prepared to use force; and they routinely and legitimately initiate contact that subsequently requires force to be used."⁷¹ These differences generally give rise to a more deferential standard of liability.⁷²

Of course, simply stating that it is logical to use different standards to determine liability for law enforcement officers and private citizens does not by itself explain why the private person standard is undesirable. The problem is that using a stricter standard of liability will create an incentive for law enforcement officers to be overly cautious in discharging their duties, which will result in a suboptimal level of law enforcement.⁷³ Recognizing this issue, one court stated, "If law

⁶⁹ See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1182-83 (2008).

⁷⁰ *Id.*; see also H.R. REP. NO. 74-2034, at 2 (1936) ("[FBI agents] must be free to act on the spur of the moment and in the most reasonable manner which the particular circumstances may afford, and they have been trained to this end."); RESTATEMENT (SECOND) OF TORTS § 121 cmt. g (1977) ("The additional privilege is given because the peace officer has a duty to the public to prevent crime and arrest criminals.").

⁷¹ Harmon, *supra* note 69, at 1182.

⁷² See *Lee v. United States*, 570 F. Supp. 2d 142, 151-52 (D.D.C. 2008) ("[W]hat may be reasonable for police officers may not always be reasonable for ordinary citizens."); *Munoz v. City of Union City*, 16 Cal. Rptr. 3d 521, 545 (Cal. Ct. App. 2004) ("Appellants are correct . . . that police officers are given more deference in judging the reasonableness of use of force than a private citizen would be.").

⁷³ This is especially true because the difference between desirable and undesirable conduct in this instance is "vanishingly small." William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 444 (1997). Stuntz's article addresses the merits of the exclusionary rule; however, it is equally applicable in this

enforcement officers are compelled to keep the peace at their peril, without some discretion as to how to respond to an apparent crisis, the peace will simply not be kept.”⁷⁴ Still, at least under the FTCA, these officers are not keeping the peace “at their peril” in a strict sense because the officers themselves are not liable under that statute.⁷⁵ Nevertheless, assigning liability to the government rather than to the officer will create the same incentive, just at a higher level within the hierarchy of the enforcement agency.⁷⁶ It is unlikely that an officer would be indifferent to the possibility that the government could be held liable based on his or her conduct, either because of a feeling of loyalty to the agency or out of concern that costing the government money would have a negative effect on her career. Indeed, “even where officers are indemnified, it is reasonable to suppose that there are immense political costs (in the sense of everyday workplace politics) associated with a finding of liability and exposing the municipal employer to budgetary pay-outs.”⁷⁷

To avoid making law enforcement officers overly-cautious in the course of their duties, the liability of the United States should reflect these officers’ unique responsibilities and training. This would ensure that the liability of the government is better aligned with a standard of conduct that permits officers to do their job effectively.⁷⁸ Unfortunately, the private

context because both the exclusionary rule and civil liability provide remedies for the violations of an acceptable standard of conduct in the context of law enforcement.

⁷⁴ *Arrington v. Moore*, 358 A.2d 909, 916 (Md. App. 1976). For a discussion of the risks of over-deterrence in the context of the Fourth Amendment, see Stuntz, *supra* note 73, at 445-46.

⁷⁵ See Act of Aug. 2, 1946, ch. 753, 60 Stat. 812 (codified at 28 U.S.C. §§ 1346(b), 2671-2780 (2006)).

⁷⁶ See Stuntz, *supra* note 73, at 446 (discussing the effects of holding state governments liable for damages as a result of Fourth Amendment violations).

⁷⁷ Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854-55 (2001).

⁷⁸ See Act of May 2, 1792, § 9, ch. 28, 1 Stat. 265 (codified at 28 U.S.C. § 564 (2006)) (recognizing that federal authority should be coextensive with state authority). Also, although it is outside of the scope of this note, it is worth considering whether or not we should use this distinction to further incentivize law enforcement officers to use their skills in situations where a private person would be under no such obligation. See Lisa McCabe, Note, *Police Officers’ Duty to Rescue or Aid: Are They the Only Good Samaritans?*, 72 CAL. L. REV. 661, 681 (1984) (arguing that law enforcement should be held to a higher duty to rescue than ordinary citizens). Some jurisdictions already differentiate between private persons and local law enforcement officials in determining a duty to rescue. See *Lee v. State*, 490 P.2d 1206, 1209-10 (Ala. 1971), *rev’d on other grounds*, *Monroe v. City Council for City of Anchorage*, 545 P.2d 165 (Ala. 1976). However, the additional duties placed on local law enforcement officers do not currently apply to federal officers. See *Ortiz v. U.S. Border Patrol*, No. 99-2143,

party standard of the FTCA, as currently interpreted, makes it impossible to take these factors into account.

III. RECENT CASES DEALING WITH LAW ENFORCEMENT ACTIONS AND THE FTCA

Recognizing that law enforcement activities are not well suited to the private person standard, several courts, led by the Ninth Circuit, had previously rejected the PPA approach in circumstances involving federal law enforcement officers.⁷⁹ The Ninth Circuit also set the high water mark for this approach by allowing state immunity statutes to shield the federal government from liability in certain cases.⁸⁰ By contrast, the Fifth, Sixth, and D.C. Circuits refused to apply statutory immunity to the federal government, but they still applied general law enforcement privileges and used the more deferential standards of reasonableness that applied to local officers when determining negligent behavior.⁸¹ However, in 2005, the Supreme Court's decision in *United States v. Olson* rejected the proposition that the private party requirement of the FTCA can be set aside, even for actions that are uniquely governmental.⁸² This holding has resulted in uncertainty as to what standard should apply in law enforcement cases.⁸³ At least four different judicial approaches have arisen since *Olson*, none

2000 U.S. App. LEXIS 6664, at *3-4 (10th Cir. Apr. 11, 2000) (holding that the United States was protected from liability by the local "Good Samaritan" statute, even though local law enforcement officers would be subject to a separate test to determine if they had a duty to render aid).

⁷⁹ See *Hetzel v. United States*, 43 F.3d 1500, 1503-04 (D.C. Cir. 1995); *Crider v. United States*, 885 F.2d 294, 296 (5th Cir. 1989); *Louie v. United States*, 776 F.2d 819, 825 (9th Cir. 1985); *Tomcsik v. United States*, 720 F. Supp. 588, 591 (E.D. Mich. 1989), *aff'd*, 917 F.2d 564 (6th Cir. 1990).

⁸⁰ See *Cimo v. INS*, 16 F.3d 1039, 1041 (9th Cir. 1994) (citing *City of Sacramento v. Superior Court*, 182 Cal. Rptr. 443, 449 (Cal. Ct. App. 1982)), *abrogated by United States v. Olson*, 546 U.S. 43 (2005); *Aguilar v. United States*, 920 F.2d 1475, 1476 (9th Cir. 1990), *abrogated by Olson*, 546 U.S. 43.

⁸¹ See *Hetzel*, 43 F.3d at 1503-04; *Crider*, 885 F.2d at 296; *Tomcsik*, 720 F. Supp. at 591. In some cases the distinction between a statute granting immunity and a statute defining a standard of care is blurry at best. See *Hetzel*, 43 F.3d at 1506 (Williams, J., concurring). If a statute defines the extent of law enforcement's immunity according to a specific standard of conduct, that statute can be serving a dual purpose. *Id.* Moreover, "[a]nytime a court raises the standard of care that defines a legal duty that is owed . . . it implicitly immunizes a part of the conduct that otherwise would be considered tortious and actionable." *Crawn v. Campo*, 643 A.2d 600, 604 (N.J. 1994).

⁸² *Olson*, 546 U.S. at 45.

⁸³ See *Cantanhio v. United States*, No. CV 06-2496, 2009 WL 1160256, at *8-9 (C.D. Cal. Apr. 28, 2009) (discussing the uncertainty in the wake of *Olson* as to whether law enforcement privileges apply to suits under the FTCA).

of which are entirely satisfactory.⁸⁴ This section provides a discussion of the *Olson* decision, outlines the four interpretations of the FTCA since *Olson*, and explains why none of those approaches is satisfactory.

A. United States v. Olson

In *Olson*, the Supreme Court directly overruled the Ninth Circuit's holding that, where the conduct that gave rise to the suit was uniquely governmental, courts should look to the liability of state and municipal entities to assess the liability of the federal government.⁸⁵ The claim in *Olson* involved allegations that a federal mine inspector was negligent, and that his negligence led to the plaintiff suffering injuries when a mine he was working in collapsed.⁸⁶ The plaintiff alleged that the inspector failed to follow the guidelines of the Mine Safety and Health Administration (MSHA) by failing to properly evaluate several complaints that were filed.⁸⁷ As a result, the weaknesses in the mine were not discovered and the plaintiff was still in the mine when the ceiling collapsed.⁸⁸ Approximately nine tons of earth fell where he was working.⁸⁹ The Ninth Circuit looked to Arizona case law, under which state mine inspectors could be held liable in similar circumstances.⁹⁰

On appeal, the Supreme Court first addressed the circuit court's decision to use state employees as the appropriate analogue to determine liability in this case.⁹¹ The Court rejected this comparison as inconsistent with the text of the FTCA.⁹² Specifically, it held that the lower court had "read something into the act that is not there."⁹³ Rather, the court stated that the words of the FTCA "mean what they say": the United States is to be liable "to the same extent as a private individual."⁹⁴

⁸⁴ See *infra* Part III.B.

⁸⁵ *Olson*, 546 U.S. at 45.

⁸⁶ *Id.*

⁸⁷ *Olson v. United States*, 362 F.3d 1236, 1238-39 (9th Cir. 2004), *vacated*, 546 U.S. 43, *remanded to* 433 F.3d 1091 (9th Cir. 2006).

⁸⁸ *Id.* at 1238.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1240.

⁹¹ *Olson*, 546 U.S. at 45-46.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 44 (citing 28 U.S.C. § 2674).

Moreover, it held that this private person standard of liability applies regardless of whether the analogy to a municipal entity is being used to escape or to create liability.⁹⁵

Next, the court addressed the method of determining what private individual would provide an appropriate comparison.⁹⁶ Justice Breyer stated that the words of the FTCA require that the liability of the federal government be based on the liability of private persons in “like circumstances,” not the same circumstances.⁹⁷ In this case, although no private persons in the state were in the same circumstances because there were no private mine inspectors, the court should have looked to private parties that conduct other types of safety inspections because those circumstances were sufficiently similar to the mine inspectors.⁹⁸

It is important to note that *Olson* did not involve law enforcement activity; however, it is still important in that context because of its unequivocal holding that the FTCA should be interpreted according to the plain language of the statute.⁹⁹ In light of this decision it is clearly inappropriate to make explicit exceptions to the PPA, even if the conduct at issue has no realistically comparable analogue in the private sector. More than that, because *Olson* offers no escape whatsoever from the private person standard, it can also be read to undermine the application of any law enforcement privilege given to federal agents, at least for the purposes of determining the government’s civil liability.¹⁰⁰ This decision has featured prominently in recent cases brought based on the actions of federal law enforcement officers.

B. Recent Judicial Interpretations

In the years since *Olson*, courts have recognized that the Supreme Court has overruled precedent that used comparisons to local law enforcement to determine the federal government’s liability,¹⁰¹ and in response have fashioned their own interpretations of the proper way to apply *Olson* and the

⁹⁵ See *id.* at 46.

⁹⁶ *Id.* at 46-47.

⁹⁷ *Id.* at 46.

⁹⁸ *Id.* at 47.

⁹⁹ *Id.* at 44.

¹⁰⁰ See *infra* Part III.B.2.

¹⁰¹ See *Lee v. United States*, 570 F. Supp. 2d 142, 148-50 (D.D.C. 2008).

FTCA in the context of federal law enforcement. Before discussing possible solutions to the problems that arise under the private person standard of liability in this context, it is necessary to analyze the current judicial solutions to see if any of them adequately address those concerns. Unfortunately, none of them offers a truly effective solution.¹⁰² Each approach is discussed in turn.

1. The True “Private Person Standard” Interpretation

Judge Tashima, in the case of *Tekle v. United States*,¹⁰³ offered the first approach to the private person standard of liability under *Olson*. His approach was that, under the plain meaning interpretation of the FTCA, the federal government should be subject to exactly the same standard of liability as a private person, which would include being barred from asserting any privileges that are unique to law enforcement.¹⁰⁴

The claims in *Tekle* were based on the actions of Internal Revenue Service (IRS) agents who were executing an arrest warrant.¹⁰⁵ The agents attempted to execute the warrant when the suspects’ children were not home, but one of the children was in fact present during the arrest.¹⁰⁶ The child exited the house before the arrest began and was handcuffed and held at gunpoint while the arrest was completed.¹⁰⁷ The child was allegedly subjected to abusive treatment in the form

¹⁰² Although the cases below address the private person requirement in the context of negligence and the application of privileges in response to intentional torts, the issue arises in any situation where the law deals with law enforcement officials. An example of another scenario is where a police officer uses force during an arrest where there has been some physical threat. This issue was discussed, but not decided, in a recent case. *See Cantanho v. United States*, No. CV 06-2496, 2009 WL 1160256, at *8 (C.D. Cal. Apr. 28, 2009) (“A police officer is entitled to the even greater use of force than might be in the same circumstances required for self defense.” (quoting *Brown v. Ransweiler*, 89 Cal. Rptr. 3d 801 (Cal. Ct. App. 2009) (internal quotation marks omitted))). In *Cantanho*, the result was the same under either standard based on the facts of the case, making it unnecessary for the court to determine which standard applied under the FTCA. *Id.* at *9.

¹⁰³ 511 F.3d 839 (9th Cir. 2007).

¹⁰⁴ *See id.* at 850-54. Although the discussion of this interpretation focuses primarily on the issues that arise under the standard of citizen’s arrest, it is important to note that this approach also suffers from the same problems as the following interpretation when it comes to claims of negligence. *See infra* Part III.B.3.

¹⁰⁵ *Tekle*, 511 F.3d at 842.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 843.

of abusive comments, spitting on his shoes, and pulling him off the ground by the handcuffs.¹⁰⁸

Judge Tashima stated that, although law enforcement officers are generally given greater authorization than ordinary citizens in deciding when to make an arrest,¹⁰⁹ the government was not entitled to that privilege under a strict interpretation of the FTCA.¹¹⁰ The facts alleged in *Tekle* seem egregious enough to warrant compensation under any standard; however, the use of a citizen's arrest statute to determine the federal government's liability could create issues in other scenarios. As *Tekle* pointed out, many citizen's arrest statutes are more limited than the authority granted to law enforcement officers.¹¹¹ For example, the citizen's arrest statute in California only authorizes an arrest without a warrant if a misdemeanor has been witnessed, where the individual has actually committed a felony, or where a felony has actually taken place and the arrestor has reason to believe that the individual being arrested was responsible for that felony.¹¹² Therefore, it follows that if a person is arrested without a warrant, even with probable cause, the arrestor could be held liable if no felony was actually committed.¹¹³ It is possible to imagine a scenario where a Drug Enforcement Agency (DEA) agent observes a suspect carrying a bag of white powder out of a building and chooses to detain that person. If the white powder turned out to be cocaine or some other drug then the detention of that person would be authorized for peace officers and citizens alike.¹¹⁴ If, however, the powder turned out to be something harmless, then the arrest would not be protected by the citizen's arrest privilege since no misdemeanor was committed in the

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 851, 854 (stating that although the standard applicable to a citizen's arrest has been considered inappropriate for application to law enforcement, the holding in *Olson* requires that the court apply that standard); see also *Tomlin v. State*, 869 P.2d 334, 338 (Okla. Crim. App. 1994) (stating that, in Oklahoma, a citizen's right to make an arrest is more narrow than that of a peace officer).

¹¹⁰ *Tekle*, 511 F.3d at 851, 854.

¹¹¹ See *id.* at 854.

¹¹² CAL. PENAL CODE § 837 (West 2009).

¹¹³ This corresponds to the common law rule. See *United States v. Hillsman*, 522 F.2d 454 (7th Cir. 1975); *Allen v. Lopinsky*, 94 S.E. 369 (W. Va. 1917); *Napier v. Sheridan*, 547 P.2d 1399 (Or. Ct. App. 1976); RESTATEMENT (SECOND) OF TORTS § 119 cmt. i at 197 (1965). But see *Burton v. McNeill*, 13 S.E. 10 (S.C. 1941); *Stevenson v. State*, 413 A.2d 1340 (Md. 1980).

¹¹⁴ See CAL. PENAL CODE § 837. The possession of cocaine would be an actual felony, and, at least for the purposes of this example, the visual observation would provide the requisite probable cause.

presence of the agent and no felony was actually committed.¹¹⁵ The agent would be personally protected from civil liability¹¹⁶ and criminal charges¹¹⁷ by the applicable statute, but under Judge Tashima's interpretation of the FTCA, that protection would not be extended to the United States in a corresponding false imprisonment claim.¹¹⁸ Although it seems absurd that the government would be liable in this scenario, it is a possibility under this approach to the FTCA.¹¹⁹ Even though the officers retain a level of personal immunity, liability on the part of the government could still lead to officers being overly cautious, thereby making them less effective in carrying out their duties.¹²⁰

2. The "Privileges Expressly Granted by Federal Statute" Interpretation

The next interpretation of the private person requirement came from Judge Fisher's concurring opinion in *Tekle*.¹²¹ Judge Fisher opined that even after the decision in *Olson*, the United States was entitled to assert law enforcement privileges granted by federal statute in actions

¹¹⁵ As noted previously, not all states require that a felony actually be committed. *See, e.g., Stevenson*, 413 A.2d 1340; *Burton*, 13 S.E. 10. However, in many jurisdictions the felony requirement is still in place. *See Hillsman*, 522 F.2d 454; *Allen*, 945 S.E. 369; *Napier*, 547 P.2d 1399. Moreover, liability could arise if the detention was categorized as an arrest or as an investigative (*Terry*) stop, *see Terry v. Ohio*, 392 U.S. 1 (1968), because in many jurisdictions private citizens have no special authority to make a *Terry* stop unless a citizen's arrest would also be justified. *See United States v. Sealed Juvenile 1*, 255 F.3d 213, 219 (5th Cir. 2001); *United States v. Atwell*, 470 F. Supp. 2d 554, 564-65 (D. Md. 2007); *Commonwealth v. Gullick*, 435 N.E.2d 348, 351 (Mass. 1982); *Garner v. State*, 779 S.W.2d 498, 501 (Tex. App. 1989).

¹¹⁶ *See* 28 U.S.C. § 2679(b) (2006).

¹¹⁷ In this hypothetical that statute would be 21 U.S.C. § 878(a)(3) (2006).

¹¹⁸ As another commentator noted, the idea that the statutory privilege granted to these agents applies to them individually but not to the government seems unusual, to say the least. *See Durkin, supra* note 21, at 282-83. It is worth pointing out, however, that although this is undesirable, it is not entirely irrational. An argument could be made that individuals who are wrongly arrested should receive some compensation, but if that compensation came from the agents themselves it would be a great disincentive to becoming a law enforcement officer.

¹¹⁹ Although it is not mentioned in the *Tekle* opinion, the government could argue that the decision to detain the plaintiff fell under the discretionary function exception of the FTCA. *See* 28 U.S.C. § 2680(a) (2006). This argument has enjoyed some success in the courts. *See Shuler v. United States*, 531 F.3d 930, 934-35 (D.C. Cir. 2008) (decision when to arrest a suspect is a discretionary function).

¹²⁰ *See supra* Part II.

¹²¹ *Tekle v. United States*, 511 F.3d 839, 857-58 (9th Cir. 2007) (Fisher, J., concurring).

under the FTCA.¹²² He reasoned that this approach was necessary to avoid conflicts between statutes that grant law enforcement privileges to federal agents, in this case 26 U.S.C. § 7608, and the FTCA.¹²³ He also noted that, because the Supreme Court did not expressly foreclose the use of law enforcement privileges in FTCA cases, to disallow the application of these privileges was unnecessary and would force courts to reach absurd results.¹²⁴

This argument is attractive because it effectively harmonizes two statutes that seem to be in conflict under the purely private person standard.¹²⁵ The conflict arises because 26 U.S.C. § 7608 authorizes a privilege, and the FTCA, at least under a strict interpretation, would deny the same privilege in proceedings to determine the government's liability.

Unfortunately, the limitations of this approach arise out of its reasoning. Because the argument states that the private person requirement should be limited to avoid a conflict of statutes, it is logical that where the conflict between statutes ends, the strict PPA should go back into effect. Hence, even though the federal statute cited by Judge Fisher provides IRS agents with the privilege to undertake arrests and searches, thereby trumping the use of a citizen's arrest statute to determine the false imprisonment claim, there is no statutory privilege that addresses the appropriate standard for negligence actions or defines the use of force during an arrest.¹²⁶ Without additional statutory privilege, there is no justification for courts to treat federal agents any differently than how they would treat

¹²² *Id.* at 857. The district court chose to apply this approach to the private person requirement on remand. *See Tekle v. United States*, No. CV 01-3894-RSWL, 2009 U.S. Dist. LEXIS 39091, at *26-27 (C.D. Cal. May 8, 2009).

¹²³ *Tekle*, 511 F.3d at 857 (Fisher, J., concurring).

¹²⁴ *Id.* at 858. It is not entirely clear that there is a conflict between the privileges afforded to IRS agents in the statute cited by the court, 26 U.S.C. § 7608(a)(2) (2006), and the privileges afforded to private persons generally. That statute authorizes agents to "execute and serve search warrants and arrest warrants." 26 U.S.C. § 7608(a)(2). A similar privilege has been recognized as applicable to private persons. *See* RESTATEMENT (SECOND) OF TORTS §§ 122, 213 (1977) (citing privileges to arrest or to enter land pursuant to a court order). The conflict between the citizen's arrest statute and the privilege afforded to the IRS agents under federal statute arises only when agents are making an arrest based on probable cause that the suspect has committed a felony. *Compare* 26 U.S.C. § 7608(a)(3), *with* CAL. PENAL CODE § 834 (West 2009).

¹²⁵ *Tekle*, 511 F.3d at 857-58 (Fisher, J., concurring) (citing *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000)).

¹²⁶ *See* 26 U.S.C. § 7608 (2006). Statutes granting privileges to other law enforcement agencies are similar. *See, e.g.*, 21 U.S.C. § 878 (2006) (DEA); 18 U.S.C. § 3052 (2006) (FBI).

a private citizen in these other claims.¹²⁷ So while this interpretation takes the court part of the way toward handling the problems created by the private person requirement of the FTCA, it still falls short in how it addresses certain scenarios. These deficiencies could still act to impair the enforcement of laws and indirectly impinge on executive policy.

This problem can be seen in *Sauceda v. United States*, which is currently being litigated in the District of Arizona.¹²⁸ In that case, the plaintiffs were harmed when a Border Patrol agent allegedly deployed a controlled tire deflation device (CTDD) while attempting to apprehend a vehicle containing a number of illegal immigrants.¹²⁹ The plaintiff brought a claim based on negligence and suggested that an appropriate PPA would either be a person throwing a water balloon at a car, which seems like a particularly poor analogy, or, perhaps more appropriately, a shopkeeper attempting to detain someone suspected of shoplifting.¹³⁰ The second option seems much more fitting because it involves a party attempting to stop an individual suspected of committing a crime on his or her premises. In addition, many corporations and retailers have security guards on their grounds.¹³¹

Under Judge Fisher's approach, the United States would be entitled to assert privileges that have been expressly granted by statute; however, there is no federal statute that grants the government greater deference in negligence actions.¹³² Without a statute granting this additional privilege, the private person standard would apply. Thus, for a negligence claim, the court must use analogies to water balloon throwers, private security guards, and shopkeepers to determine whether or not the alleged deployment of the CTDD

¹²⁷ The result would seem to be similar to the Second Circuit's approach in an earlier case, where the court evaluated the government's liability as it would a private "person having legal authority to participate in the . . . raid at issue." *Castro v. United States*, 34 F.3d 106, 111 (2d Cir. 1994).

¹²⁸ *Sauceda v. United States*, No. CV-07-2267-PHX-DGC, 2009 WL 3756703 (D. Ariz. Nov. 5, 2009).

¹²⁹ Defendant's Reply Memorandum in Support of Its Motion to Dismiss and Motion for Summary Judgment at 1, *Sauceda v. United States*, No. CV-07-2267-PHX-DGC (D. Ariz. Sept. 4, 2009) [hereinafter Defendant's Reply Memorandum]. It was contested whether the agent deployed the CTDD or simply dropped it while trying to avoid being hit by the oncoming vehicle. *Id.*

¹³⁰ *Id.* at 8.

¹³¹ Moreover, this analogy seems to be in keeping with the opinion of Chief Justice Roberts as expressed during the oral argument for *Olson*. See Transcript of Oral Argument, *supra* note 60, at 7.

¹³² Westlaw search conducted by author on Nov. 22, 2010.

was reasonable. Under any of these analogies, the United States would almost surely be held liable. It is difficult to imagine any court sanctioning the use of a CTDD by a private party under any circumstances.¹³³ Even under the shopkeeper/security guard analogy, which would certainly be more flexible, it is hard to conceive of a scenario where those individuals would be allowed to use a CTDD without incurring liability.¹³⁴ Just the idea of a retail security guard throwing stop sticks under the car of a suspected thief seems outlandish. On the other hand, law enforcement agents are clearly permitted to use these instruments in the appropriate circumstances,¹³⁵ and it seems entirely natural, and even desirable, for them to do so. By analogizing to a private person, that is, a private security guard, federal agents are more limited than local law enforcement officers in the methods available to them in apprehending suspects, at least without incurring liability on behalf of the government. As discussed above, this has potentially serious drawbacks for the enforcement of agencies' responsibilities.¹³⁶ Thus, this interpretation is ultimately insufficient to fully address the private person problem.

¹³³ This problem arises under multiple tort claims. For example, a plaintiff could argue, as did the plaintiff in *Sauceda*, that the deployment of the CTDD was negligent under the circumstances. *Sauceda*, 2009 WL 3756703, at *5. A plaintiff could also argue that the agent committed the intentional tort of assault or battery by using the CTDD. Although private citizens are allowed to use some force in effecting an arrest without incurring liability for battery or other intentional torts, see RESTATEMENT (SECOND) OF TORTS §§ 119, 132 (1977), it still seems unlikely that a court would allow citizens to use such devices. As a general rule, private persons do not have the training or the experience to know how and when to use these types of tools. See *supra* Part II.

¹³⁴ Defendant's Reply Memorandum, *supra* note 129, at 8-9. In *Sauceda*, this argument was made by the government, but ultimately proved unpersuasive. *Sauceda*, 2009 WL 3756703, at *5. Judge Campbell stated that the question at issue was whether or not this particular incident constituted negligence, not whether or not every deployment of a CTDD would be negligence under a purely private person standard. *Id.* It is also of interest here that Judge Campbell endorses the opinion of Judge Fisher that law enforcement privileges should be available to federal agents; however, the government argued no such privilege. *Id.* Moreover, in this particular instance the regulations governing the use of force by Border Patrol agents do not offer much guidance. 8 C.F.R. § 287.8 (2008).

¹³⁵ See *United States v. Guzman-Padilla*, 573 F.3d 865, 886-89 (9th Cir. 2009); *Estate of Curran v. N.C. Dep't of Crime Control & Public Safety*, No. COA08-305, 2009 WL 131178, at *5 (N.C. Ct. App. Jan. 20, 2009). Although the facts in *Guzman-Padilla* also concern agents of the Border Patrol, the facts are different than those in *Sauceda* because the latter dealt with an arrest whereas the former was not considered an arrest but merely a border stop. Compare *Sauceda*, 2009 WL 3756703, at *4, with *Guzman-Padilla*, 573 F.3d at 885-86.

¹³⁶ See *supra* Part II.

Beyond the concerns expressed above, applying the private person requirement to law enforcement activity could also undermine the “discretionary function” exception to the FTCA. “The discretionary function exception is the most significant exception to government liability that is explicitly provided for in the FTCA.”¹³⁷ It disallows claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function”¹³⁸ The exception is based largely on separation of powers concerns.¹³⁹

Before granting immunity under the discretionary function exception, a court must determine what conduct the claim is based upon and if that conduct is protected by the exception.¹⁴⁰ The question of whether or not the conduct is discretionary involves a two-part test: (1) does the conduct involve a choice, rather than a mandated action, and (2) is it the kind of discretion that Congress intended.¹⁴¹ This exception has significant practical effects on suits against the United States, because if the government can successfully argue that the actions taken by a law enforcement official were actually caused by a policy decision made at a planning level, then the discretionary exception will apply.¹⁴² However, that argument is often difficult to apply to the actions of federal agents carrying out a spur-of-the-moment search or arrest.¹⁴³ Moreover, the discretionary function exception does not rule out the possibility that a decision that falls within the discretionary function could be carried out negligently. For example, if the FBI chose to use tear gas as part of an operation, that decision would be considered within the discretionary function exception.¹⁴⁴ On the other hand, the discretionary function would not bar a claim that the FBI agents deployed the tear

¹³⁷ CRS REPORT FOR CONGRESS, *supra* note 42, at 9.

¹³⁸ 28 U.S.C. § 2680(a) (2006).

¹³⁹ Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 703 (1997).

¹⁴⁰ *Id.* at 696.

¹⁴¹ *Id.* at 704-05.

¹⁴² *See id.* at 715-17.

¹⁴³ *See Sutton v. United States*, 819 F.2d 1289, 1296-97 (5th Cir. 1987) (finding that if the discretionary function were drawn too broadly it would prevent government liability for actions like the Collinsville raids that Congress clearly intended to be compensable); *Morales v. United States*, 961 F. Supp. 633, 636 (S.D.N.Y. 1997) (“[T]o expand the exception to encompass any government act or decision that simply involved the exercise of discretion would entirely eviscerate, and contradict, the Government’s waiver of sovereign immunity under the FTCA.”).

¹⁴⁴ *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 466 (W.D. Tex. 1999).

gas in a negligent manner.¹⁴⁵ This can be a somewhat narrow distinction, and it is possible that imposing a private person standard on the government in a case like *Sauceda* could violate the spirit of the discretionary function exception, even if it only attacks the individual officer's actions in carrying out that policy decision. This argument closely parallels the one above, but with emphasis on the policy concerns expressed by the discretionary function exception.

In *Sauceda*, the Border Patrol had made the policy decision to allow its officers to use CTDD devices.¹⁴⁶ Presumably, the Border Patrol weighed the policy benefits of enforcing its duties against the potential dangers of using CTDD devices and made a decision that they were appropriate for use, at least under certain conditions. That decision is analogous to a decision by the FBI to use tear gas as part of a planned raid, and it is exactly the type of discretion that Congress intended to protect by including the discretionary function exception.¹⁴⁷ But the question presented in *Sauceda* was not whether a CTDD was appropriate for use generally, but rather whether the Border Patrol agent had used the device negligently in this one instance.¹⁴⁸ When framed this way, the discretionary function exception would not apply because the court is only asking if the agent was negligent in the particular way he used the CTDD device.¹⁴⁹ However, if the United States is liable to the same extent as a private person, then almost any use of a CTDD would expose the government to potential liability.¹⁵⁰ It is at this point that the line between liability based on a policy decision and liability based on negligent execution begins to blur. If there is virtually no scenario where a CTDD can be used without incurring liability, then any distinction between assigning liability to the policy versus the execution is not much more than semantics. If all, or substantially all, uses of CTDDs by Border Patrol agents trigger liability, then the sheer threat of that

¹⁴⁵ *Id.* at 467.

¹⁴⁶ See Defendant's Reply Memorandum, *supra* note 129, at 9.

¹⁴⁷ See *Andrade*, 65 F. Supp. 2d at 466.

¹⁴⁸ See *Sauceda v. United States*, No. CV-07-2267-PHX-DGC, 2009 WL 3756703, at *5 (D. Ariz. Nov. 5, 2009).

¹⁴⁹ See *Andrade*, 65 F. Supp. 2d at 467.

¹⁵⁰ See *infra* notes 151-54 and accompanying text. However, the government is still free to assert positive defenses to escape liability. See *Sauceda*, 2009 WL 3756703, at *5 (asserting self-defense).

liability will undermine the policy decision by discouraging them from ever being used.¹⁵¹

Thus, although this approach does avoid some of the problems that are inherent in the previous interpretation, it does not solve the private person problem in its entirety.

3. The “Privileges Granted by State Law” Interpretation

The next interpretation, also offered by Judge Fisher, posits that state law, in this particular case a state statute, can provide privileges to federal law enforcement agents that would apply in cases brought under the FTCA.¹⁵² To support this proposition, he cited California Penal Code § 847(b),¹⁵³ which explicitly provides privileges to federal law enforcement officers that are not available to private citizens.¹⁵⁴ This analysis relies on the fact that liability under the FTCA is determined under the law of the state.¹⁵⁵ This solution is unacceptable for two reasons. It allows the states to usurp Congress’s authority to define the liability of the United States, and it has the potential to create wide variations in the standards to which federal agents are held in each state.

The first problem with this approach is that it lets the states, rather than Congress, decide the extent to which the United States is liable. While it is true that Congress chose to determine the liability of the United States based on the law of

¹⁵¹ This argument was rejected by the court on summary judgment. *Sauceda*, 2009 WL 3756703, at *3, *5. Unfortunately, the bulk of the decision addressing the discretionary function exception of the FTCA is unavailable because it was filed under seal. *Id.* at *3.

¹⁵² See *Tekle v. United States*, 511 F.3d 839, 858-59 (9th Cir. 2007) (Fisher, J., concurring).

¹⁵³ CAL. PENAL CODE § 847(b) (West 2009) provides, in relevant part:

There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer or federal criminal investigator or law enforcement officer described in subdivision (a) or (d) of Section 830.8, acting within the scope of his or her authority, for false arrest or false imprisonment arising out of any arrest under any of the following circumstances:

- (1) The arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful.
- (2) The arrest was made pursuant to a charge made, upon reasonable cause, of the commission of a felony by the person to be arrested.

¹⁵⁴ Compare CAL. PENAL CODE § 847(b) (West 2009), with CAL. PENAL CODE § 834 (West 2009).

¹⁵⁵ See *Tekle*, 511 F.3d at 858 (Fisher, J., concurring). At least one other circuit has taken the same stance. See *Villafranca v. United States*, 587 F.3d 257, 262-64 (5th Cir. 2009).

the state in which the act occurred,¹⁵⁶ and that has been interpreted to include the choice of laws rules of that state,¹⁵⁷ Congress also limited the application of state law by requiring that liability be determined according to the law that would apply to “a private individual under like circumstances.”¹⁵⁸ If the words of the FTCA “mean what they say,”¹⁵⁹ then it should not matter which statutes or case law the individual states create to govern the conduct of federal agents, because liability is to be assessed according to “the state-law liability of private entities, not . . . that of public entities.”¹⁶⁰

Moreover, it is quite likely that in some situations Congress intended that the United States be held liable to an extent different from that of state law enforcement officers, at least for some purposes. For example, suppose that a state chose to incorporate federal officers into its definition of peace officers or law enforcement officers. In that event, federal agents would be entitled to receive all of the privileges of local officers within the state; however, if the same state chose to place an affirmative duty to rescue on its law enforcement officers, then the federal government could be held liable under the same duty to rescue,¹⁶¹ or otherwise be excluded from the protections of a “Good Samaritan” statute because of their status as federal agents.¹⁶² While it may be desirable for federal agents to have a duty to rescue from a public policy perspective,¹⁶³ it should be Congress, rather than state legislatures, that subjects the United States to such a duty.

The second problem is that the privileges, and potentially affirmative duties, applicable to the federal government would be subject to wide variation because they would come from the law of each individual state. Some states

¹⁵⁶ *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (“[W]e have consistently held that § 1346(b)’s reference to the ‘law of the place’ means law of the State—the source of substantive liability under the FTCA.”).

¹⁵⁷ *Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir. 1995).

¹⁵⁸ 28 U.S.C. § 2674 (2006).

¹⁵⁹ *United States v. Olson*, 546 U.S. 43, 44 (2005).

¹⁶⁰ *Id.* at 46 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955)).

¹⁶¹ In some states, the fact that federal law enforcement officers have a specific area of jurisdiction might exempt them from liability because they would not be considered “general law enforcement officials.” *Flynn v. United States*, 902 F.2d 1524, 1528-29 (10th Cir. 1990).

¹⁶² Currently, the federal government is protected from liability by the private person requirement in these scenarios. *See Ortiz v. U.S. Border Patrol*, No. 99-2143, 2000 U.S. App. LEXIS 6664, at *3-4, *8-9 (10th Cir. Apr. 11, 2000); *Crider v. United States*, 885 F.2d 294, 296 (5th Cir. 1989).

¹⁶³ *See McCabe, supra* note 78, at 675.

might provide some limited privileges to federal agents, some might grant full privileges but also impose positive duties, and others might not enact statutory protections for federal law enforcement at all. The potential for such wide inconsistencies in the government's liability is clearly problematic. There would have to be extensive training on what is and is not acceptable in each state. However, even if there was little variation by state, the liability of the United States should be determined by Congress, not by state courts and legislatures.¹⁶⁴ Thus, the incorporation of privilege granted to federal law enforcement via state statute is not an optimal solution.¹⁶⁵

4. The "Hybrid" or "Reasonable Person/Reasonable Police Officer" Interpretation

The final approach to determining the government's liability under the private person standard was put forward in *Lee v. United States*.¹⁶⁶ In *Lee*, the United States was sued after the capitol police initiated a high-speed chase that ultimately resulted in an accident that killed one of the passengers in the

¹⁶⁴ This is not to say that the laws of each individual state have no bearing whatsoever on the liability of the United States. In fact, they have a significant effect because liability under the FTCA is based on the law of the state in which the wrongful act occurs. See *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 582 (D.C. Cir. 2003). There is, however, a difference between state courts and legislators defining liability for actions of the general population of "private persons," and determining the level of liability that is applicable specifically to federal actors. See Transcript of Oral Argument, *supra* note 60, at 9-13. This difficulty was explained away in *Villafranca v. United States*, by characterizing a privilege as something that "protects the actor from a finding of tortious conduct" as opposed to something that "affects liability." 587 F.3d 257, 263 (5th Cir. 2009) (quoting *Garza v. United States*, 881 F. Supp. 1103, 1106 (S.D. Tex. 1995)). This distinction is more form than function.

¹⁶⁵ A similar approach has been endorsed by a fellow commentator. See Durkin, *supra* note 21, at 282-83. In that note, the author argues that "if a state were to adopt a federal standard, it would be appropriate to look to the federal law to determine the question of duty." *Id.* This was discussed at the oral argument in *Olson*, where it was admitted that adoption of the federal standard would get you "most of the way home in getting [FTCA] . . . liability." Transcript of Oral Argument, *supra* note 60, at 10. However, this approach would fail to be in keeping with *Olson* because, as the author acknowledges, it would still require a "detour from the strict language of § 2674." Durkin, *supra* note 21, at 282-83. Furthermore, although there are federal standards for some actions of law enforcement, such as when an arrest is valid, there are a myriad of circumstances in which no statute or regulation currently exists. The use of a "federal standard" in these cases would be problematic because the FTCA was designed to avoid the creation of a common law of torts at the federal level. See *Devlin v. United States*, 352 F.3d 525, 532 (2d Cir. 2003) ("[T]he FTCA's basic thrust was decidedly not to create a federal common law of torts, but . . . to tie the government's liability . . . to the disparate and always evolving tort law of the several states.").

¹⁶⁶ See *Lee v. United States*, 570 F. Supp. 2d 142 (D.D.C. 2008).

fleeing vehicle.¹⁶⁷ The court looked to the law that applied to private persons to determine the existence of a duty, but evaluated whether that duty was breached based on the standard of care for local police officers in similar circumstances.¹⁶⁸ The result is a sort of hybrid of private person liability and the standard for liability that would be applicable to local police.

First, the court determined that the federal agents involved in this pursuit owed the same general duty of care that every private individual driving in the District of Columbia owes to other drivers.¹⁶⁹ While it acknowledged that chasing a suspect is clearly different from a citizen taking an everyday drive, the court stated that it was “bound[, by *Olson*,] to consider the circumstances as if the United States were a private individual.”¹⁷⁰ The court also stated that the United States would be held to a pure negligence standard,¹⁷¹ rather than the gross negligence standard that would normally apply to a pursuit undertaken by local police officers.¹⁷² Both of these determinations apply the private person standard of the FTCA by eschewing the statutory protections given to local officials.

It was at this point, however, that the court departed from the private person standard of liability. The decision went on to hold that the appropriate standard of care would be what a reasonable police officer would do under the circumstances.¹⁷³ In fact, the court concluded that expert testimony would be necessary to determine the appropriate standard of care.¹⁷⁴ If it is inappropriate under *Olson* to determine what duty is owed to a plaintiff by analogizing to local police, then it stands to reason that looking to those same police to determine whether or not the federal officers’ actions were reasonable would also

¹⁶⁷ *Id.* at 145. The capitol police were in pursuit of the car because it had been stolen during an armed carjacking earlier in the evening. *Id.* The passenger who was injured was not aware that the car was stolen when she accepted a ride from the driver. *Id.*

¹⁶⁸ *Id.* at 151-52.

¹⁶⁹ *Id.* at 150.

¹⁷⁰ *Id.* at 151. The government’s argument that this was not “a typical drive through the streets of the city” is not without merit. *Id.* In fact, an analogy to a private individual attempting to execute a citizen’s arrest would probably be more appropriate.

¹⁷¹ *See id.*

¹⁷² *See Abney v. District of Columbia*, 580 A.2d 1036, 1041 (D.C. 1990).

¹⁷³ *Lee*, 570 F. Supp. 2d at 151-52, 154.

¹⁷⁴ *Id.* at 154.

be inappropriate.¹⁷⁵ Nevertheless, when faced with the choice of determining whether the appropriate standard of care was that of a private citizen, such as a private security guard, or a public employee, in this case a police officer, this court chose the latter.¹⁷⁶ The district court did not offer an explanation for its departure from the private person analogy in this one area,¹⁷⁷ and there is no provision of the FTCA stating that the private person standard applies to determine the existence of a duty but not what actions are reasonable under the circumstances.¹⁷⁸

That is not to say that the decision in *Lee* was unjust. To the contrary, by looking at what sort of conduct would be reasonable for police officers, the court was able to take into account the responsibility and additional training that these federal officers possessed, as well as the considerations of over-deterrence that have shaped tort law as applied to local police officers.¹⁷⁹ The problem with this approach is not in its result, but in its inconsistency with the private person requirement of the FTCA under the plain language interpretation of *Olson*.

IV. POTENTIAL SOLUTIONS TO THE SHORTCOMINGS OF THE FTCA

For the reasons above, none of the judicial interpretations of the FTCA post-*Olson* provide a truly viable solution to the problem created by applying the private person standard of the FTCA in the law enforcement context. Moreover, because of the strict interpretation of the statutory language that has been endorsed by the Supreme Court, it is unlikely that any truly effective judicial alternative is

¹⁷⁵ See 28 U.S.C. § 2674 (2006) (stating that the United States is liable to the same extent as a private individual without making a distinction between the various elements of tort claims).

¹⁷⁶ See *Lee*, 570 F. Supp. 2d at 154. Some courts acknowledged that this practice was inappropriate even prior to *Olson*. See *Ortiz v. U.S. Border Patrol*, 39 F. Supp. 2d 1321, 1323 (D.N.M. 1999) (“Simply by using the phrase ‘private person[]’ [in the FTCA,] Congress appears to have decided that federal employees are *not* to be compared to state or local government employees, but to non-public-sector individuals.” (emphasis added)). The reasoning the court uses in its decision to use a law enforcement standard of care aligns quite closely with this note’s discussion *supra* Part II. See *Lee*, 570 F. Supp. 2d at 151-52. Judge Bates cites the challenges that police officers face in discharging their duties, including taking risks that would not be appropriate for an ordinary person. *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

¹⁷⁷ See *Lee*, 570 F. Supp. 2d at 151-52.

¹⁷⁸ See 28 U.S.C. §§ 1346(b), 2674-2680 (2006).

¹⁷⁹ See *Lee*, 570 F. Supp. 2d at 151-52 (discussing the difficulty in balancing the need to apprehend suspects with the risks of pursuit).

available. Therefore, the best solution is for Congress to amend the statute to clarify the extent to which the United States should be held liable when the actions of law enforcement agents are at issue. This solution is not limited by the Supreme Court's interpretation of the existing statute, so it could easily address the shortcomings of the FTCA in this area. In addition, while addressing the problems of the private person standard, Congress should also consider the possibility that states may choose to impose affirmative duties on their local law enforcement officers, and consider modifying the wording of the statute to allow plaintiffs to pursue constitutional tort claims under the FTCA.

Finding a solution to the problems of the private person standard of the FTCA is a fairly easy endeavor, and one that several courts had adequately handled prior to *Olson*.¹⁸⁰ The simplest solution is to add language to the FTCA stating that, although the United States is generally liable where a private person would be, in cases involving the conduct of law enforcement officers, the United States is liable to the same extent as local law enforcement. Putting federal law enforcement on the same footing as state actors is hardly a novel concept,¹⁸¹ but such an amendment would ensure that the civil liability of the United States for the actions of these agents is better aligned with the unique characteristics of law enforcement officers and the policy concerns that arise in that context.

However, analogizing federal agents to local law enforcement officers does present a concern that Congress should take into account when revising the FTCA. That is the possibility that mirroring the liability of local law enforcement could result in additional liability for the United States where individual states have chosen to place affirmative duties on law enforcement officers to aid the public.¹⁸² Moreover, the federal

¹⁸⁰ See *supra* note 81.

¹⁸¹ As early as 1792, Congress ensured that marshals of the United States had the same power in enforcing federal law that the law enforcement officers of the state had in executing local laws. Act of May 2, 1792, § 9, ch. 28, 1 Stat. 265 (1792) (codified at 28 U.S.C. § 564 (2006)). Granted, this act was passed at a time when the doctrine of sovereign immunity barred any suit against the federal government, so civil liability was not a concern. Nevertheless, the concept that federal officers should not be burdened to a greater extent than state actors is equally applicable in the context of civil liability.

¹⁸² Some states have already chosen to do so. See, e.g., *Praet v. Borough of Sayreville*, 527 A.2d 486, 488 (N.J. Super. Ct. App. Div. 1987) ("[T]he officers . . . were under a duty by virtue of their employment to render emergency assistance to victims of automobile accidents."); *Lee v. State*, 490 P.2d 1206, 1209-10 (Ala. 1971) (holding

government could lose the benefit of “Good Samaritan” statutes, whereas under the private person standard the government is able to take advantage of those benefits if its officers undertake a rescue attempt.¹⁸³ As mentioned previously, accepting these additional duties might be desirable as a matter of policy, but Congress should consider the issue when crafting a legislative solution to the private person problem.

A final issue that should be considered by Congress in any amendment to the FTCA in the law enforcement context is the fact that, in its current state, constitutional tort claims are unavailable under the FTCA.¹⁸⁴ In some instances, the actions of law enforcement officers might not be compensable under state law, but the conduct could create liability under a theory of constitutional tort. However, because constitutional torts are not cognizable under the FTCA, the federal government is shielded from liability for constitutional violations if those violations do not fall within a specific state law tort.¹⁸⁵ This is contrary to the intent of the 1974 amendment to the FTCA; namely, that the amendment would address both constitutional and non-constitutional torts.¹⁸⁶

An example of this scenario is *Washington v. DEA*.¹⁸⁷ The facts in *Washington* bear a remarkable similarity to the Collinsville raids that prompted Congress to amend the FTCA in 1974.¹⁸⁸ In *Washington*, an agent of the DEA obtained a

that a policeman was under a duty to render aid to a child who was attacked by a lioness at an amusement park).

¹⁸³ See *Ortiz v. U.S. Border Patrol*, 39 F. Supp. 2d 1321, 1325 (D.N.M. 1999).

¹⁸⁴ See *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994) (“[T]he United States simply has not rendered itself liable under [28 U.S.C.] § 1346(b) for constitutional tort claims.”).

¹⁸⁵ An action would still exist under *Bivens*, but, the argument goes, any judgment rendered would be subject to the individual officer’s financial ability to satisfy the judgment. See *supra* note 8 and accompanying text. This concern is arguably unfounded because in many instances defendants are indemnified by the United States anyway. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 811 n.2 (2010). Even still, many commentators argue that liability for constitutional torts should generally lie with the federal government. See *id.*; Susan Brandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 340-42 (1995) (noting the hurdles to compensation under *Bivens*, including qualified immunity); William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1152-53 (1996).

¹⁸⁶ See S. REP. NO. 93-588, at 3 (1973), reprinted in 1974 U.S.C.C.A.N. 2789, 2791 (“[T]he Committee’s amendment should not be viewed as *limited* to constitutional tort situations” (emphasis added)).

¹⁸⁷ *Washington v. DEA*, 183 F.3d 868 (8th Cir. 1999).

¹⁸⁸ See *id.* at 871-72. In addition, the Collinsville raids involved agents from DALE, which was a precursor to the DEA. *Drug Enforcement Administration: 1970-*

warrant to search the plaintiffs' home based on information received from a cooperator, but made no attempt to independently corroborate that information.¹⁸⁹ When acquiring the warrant, the agent requested that it allow for nighttime execution, but the magistrate judge did not grant the request.¹⁹⁰ Nevertheless, at approximately 12:30 a.m., DEA agents executed the warrant by breaking down the plaintiffs' door with a battering ram, entering the house with weapons drawn, ordering the plaintiffs around at gunpoint, threatening them, and shoving the husband.¹⁹¹ Plaintiffs, an elderly couple, were not physically injured, but they did suffer emotional distress and several items in their home were damaged.¹⁹² Even though no evidence of illegal activity was found, the agents seized firearms, ammunition, and personal papers.¹⁹³

The plaintiffs filed a lawsuit based on several grounds, including violations of the U.S. Constitution and FTCA claims for assault, battery, and abuse of process.¹⁹⁴ After holding that the constitutional claims were invalid under the FTCA, the court went on to analyze the FTCA claims based on state law.¹⁹⁵ The court held that the agents could not be held liable for assault or battery in this case because the force was not more than reasonably necessary to ensure their safety during the search.¹⁹⁶ The result was that the government was not liable in this case even though this conduct was particularly egregious.

This result is inconsistent with the intent of the 1974 amendment to the FTCA, because this is exactly the type of scenario that Congress intended to make compensable when it amended the statute.¹⁹⁷ While it is debatable whether or not the

1975, at 6-7, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/pubs/history/1970-1975.pdf> (last visited Nov. 19, 2010) (charting the genealogy of the DEA). Perhaps ironically, the same bill that created the DEA also amended the FTCA to create the exception for intentional torts committed by federal law enforcement. See S. REP. NO. 93-588, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791.

¹⁸⁹ *Washington*, 183 F.3d at 871.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 871-72. It was disputed whether the agents knocked before breaking down the door. *Id.*

¹⁹² *Id.* at 870-72.

¹⁹³ *Id.* at 872. Moreover, the receipt for items seized that was given to the plaintiffs at the scene did not include the ammunition or papers seized. *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Washington*, 183 F.3d at 873-74.

¹⁹⁶ *Id.* at 874. The court also held that there was not sufficient evidence to support the abuse of process claim because there was no evidence of a collateral purpose, which was a necessary element of that claim. *Id.* at 875.

¹⁹⁷ See *supra* Part I.B.2.

actions of the officers in *Washington* were reasonable for the purposes of the assault claim, an analysis of search and seizure under the federal constitution would extend beyond the use of physical force on a person.¹⁹⁸ Under a Fourth Amendment analysis, the search could be a violation if it was unreasonable for the agents to make a “no-knock” entry¹⁹⁹ or to execute the warrant at night.²⁰⁰ Therefore, looking beyond the problems with the private party standard of liability, Congress could also take the opportunity to address this issue.

For the foregoing reasons, the FTCA should be amended to resolve the issues created by the private person standard by aligning the liability of the United States with the liability of local law enforcement. This could be accomplished by amending 28 U.S.C. § 2674 with wording similar to the following:

For any claim under this chapter based on the actions or omissions of investigative or law enforcement officers of the United States Government, the United States shall be liable in the same manner and to the same extent as a state or municipality under like circumstances.²⁰¹

The result would be a statute that would limit the liability of the federal government to instances where the actions taken by its law enforcement officers reaches the level of abuse, yet still would provide officers with the necessary amount of discretion to perform their responsibilities. While amending the FTCA to address the private person problem, Congress should also consider the possibility that this modification might create additional positive duties and fashion the amendment accordingly. In addition, this amendment would provide

¹⁹⁸ See *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“The determination of the standard of reasonableness . . . requires ‘balancing the need to search against the invasion which the search entails.’” (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967))).

¹⁹⁹ See *United States v. Ramirez*, 523 U.S. 65, 67-68 (1998) (explaining when “no-knock” entries are justified).

²⁰⁰ See *United States ex. rel. Boyance v. Myers*, 398 F.2d 896, 897 (3d Cir. 1968) (“The time of a police search of an occupied family home may be a significant factor in determining whether in a Fourth Amendment sense, the search is unreasonable.”). This is particularly likely in this case because nighttime execution was requested by the officers, but was not given by the magistrate judge. *Washington*, 183 F.3d at 871. It is also possible that in some states, an action could be brought based on a theory of constitutional tort under the state constitution. Such an action would be cognizable under the FTCA because it would be brought according to the law of the state where the alleged wrongful act took place. See 28 U.S.C. § 2674 (2006).

²⁰¹ Because the FTCA plays the dual role of abrogating immunity and defining liability, see *supra* note 40 and accompanying text, it would also be necessary to add similar modifications to 28 U.S.C. § 1346(b) to ensure that the jurisdictional requirements align with the scope of liability.

Congress with an opportunity to effect the true intent of the 1974 amendment and allow suits under a theory of constitutional tort.

Only Congress possesses the ability to tailor the FTCA to meet the unique challenges of defining the liability of the United States under these circumstances. Congress may choose to do so as suggested above, or through other means; however, it should act to clarify this area of law.

V. CONCLUSION

This note suggests that liability for law enforcement actions under the FTCA should be determined with due consideration both of the harms caused to individuals and of the potential effects that liability could have on the enforcement of the laws, which provides the order essential to our society. Tort law at the state level is far more developed, and has evolved to take both of these factors into account. For that reason, a comparison to state actors seems to be an appropriate solution. That being said, any approach to assessing liability in this context—and the approach offered here is no exception—will still present serious difficulties because of the policy concerns that arise when balancing individual interests with societal interests. Those difficulties will be compounded as the roles and methods of law enforcement continue to evolve. However, it is important for any solution to recognize that liability in the law enforcement context cannot be handled in the same generalized way that is used for other government functions. Until the FTCA is revised to recognize these concerns, there will be significant drawbacks to applying that statute to the conduct of law enforcement officers.

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