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The FTCA Discretionary Function Exception Nullifies \$25 Million Malpractice Judgment Against the DCAA: A Sigh of Relief Concludes the DIVAD Contract Saga

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Introduction: A Welcome Reversal of Fortune

Fortunately, it was kite-flying season at Fort Belvoir when the United States Court of Appeals for the Ninth Circuit decided *General Dynamics Corp. v. United States*.¹ Most observers assume that the collective sigh of relief grew to gale force.² In ending two decades of litigation involving the Divisional Air Defense (DIVAD) gun system,³ the Ninth Circuit reversed a 1996 federal district court decision⁴ awarding General Dynamics more than \$25 million in damages due to professional malpractice committed by the Defense Contract Audit Agency (DCAA).

The \$25 million that remains in the general treasury pales in comparison to the potential impact of the case. Until the Ninth Circuit's decision, the DIVAD case appeared to be the first successful use of the Federal Torts Claims Act (FTCA)⁵ by a government contractor to pursue a professional malpractice claim against a federal agency.⁶ At least for now, such liability returns to the realm of legal theory and advocacy, rather than harsh reality for the government.

This article: (1) briefly summarizes the history of the *General Dynamics* case, explaining how a routine contractual compliance audit lead to a \$25 million malpractice award against the DCAA; (2) introduces the discretionary function exception

to the FTCA, which General Dynamics was able to avoid at the trial level in recovering its attorney's fees based upon the DCAA's actions; (3) examines the application of the discretionary function exception in the context of prosecutorial discretion, which led to the Ninth Circuit's decision in *General Dynamics*; (4) discusses two significant cases, analyzed by the Ninth Circuit in *General Dynamics* that demonstrate the fragile boundaries of the discretionary function exception; (5) describes guidance from the Department of Justice (DOJ) for government counsel faced with raising the discretionary function exception to dismiss FTCA actions; and (6) concludes by acknowledging that efforts to "reign in" the scope of the discretionary function exception to the FTCA are sure to continue.

Brief Recitation of a Long History⁷

The DIVAD litigation arose from General Dynamics' competition for a 1978 developmental contract. Following a subsequent compliance audit, the DCAA informed the Naval Investigative Service and the DOJ of suspected labor mischarging by General Dynamics. In conducting that audit, the DCAA failed to distinguish between a firm fixed-price contract and a firm fixed-price (best efforts) contract.⁸ The DCAA proceeded to issue an audit report asserting that General Dynamics fraudulently mischarged more than \$8 million on the DIVAD con-

1. 139 F.3d 1280 (9th Cir. 1998).

2. See, e.g., *DCAA Director Takes Heart in Reversal of DIVAD Malpractice Award*, 98-4 Costs, Pricing & Accounting Rep. (Fed. Pubs) 26 (Apr. 1998) (reporting that DCAA Director William H. Reed, in a 6 April 1998 memorandum, opined that the appellate court decision "makes it clear that DCAA's referral of suspected wrongdoing or its support of investigative agencies will not be grounds for a successful lawsuit"). See also *DCAA: Auditors Shouldn't Fear Lawsuits in Wake of Reversal of DIVAD Case*, 69 Fed. Cont. Rep. (BNA) 428 (Apr. 20, 1998); "Discretionary Function" Exemption Shields DCAA - Ninth Circuit Reverses Professional Malpractice Action, 98-3 Costs, Pricing & Accounting Rep. (Fed. Pubs) 17 (Mar. 1998); Robert M. Cowen, *Ninth Circuit Panel Reverses General Dynamics' \$26M Award for DCAA Audit Negligence on DIVAD Contract, Rules U.S. Is Immune From Suit Under FTCA*, 69 Fed. Cont. Rep. (BNA) 370 (Apr. 6, 1998); *Prosecutorial Immunity Shields DCAA-Ninth Circuit Reverses Malpractice Award Against DCAA*, 40 THE GOV'T CONTRACTOR 166, Apr. 8, 1998.

3. Divisional Air Defense (DIVAD) referred to a prototype divisional air defense system. Ford Aerospace Corporation eventually was selected for the DIVAD production contract. The Department of Defense (DOD) invested approximately \$1.8 billion and seven years on the DIVAD gun system before cancelling the program in 1985. See generally *Weinberger Scraps DIVAD Program*, 44 Fed. Cont. Rep. (BNA) 508 (Sept. 9, 1985).

4. No. CV 89-6762JGD, 1996 WL 20025 (C.D. Cal. Apr. 5, 1996).

5. 28 U.S.C.A. § 1346(b) (West 1998).

6. This was not the first large-scale attack by a government contractor under the FTCA. Government contracts practitioners may be familiar with the discretionary function exception to the FTCA, discussed at length below, due to recent coverage of *Boyle v. United Technologies Corp.* See *Boyle v. United Technologies Corp.* 487 U.S. 500 (1988) (barring a suit against a Marine Corps contractor for the negligent design of helicopter hatch).

tract. Unfortunately, the DCAA “negligently prepared” the audit report.⁹

Based on the audit report, the DOJ issued a grand jury subpoena and obtained millions of documents relating to the DIVAD contract. In addition, the DOJ interviewed numerous witnesses and conducted an extensive investigation. Eventually, the grand jury indicted General Dynamics and four of its executives and employees on conspiracy and false statement charges.¹⁰ This case, possibly the most high-profile fraud prosecution of its time, generated widespread interest.¹¹ After years of investigation and litigation (in multiple fora) the DOJ “gained an understanding of the significance of the differences”

between the two types of contracts.¹² The DOJ then “forthrightly moved to voluntarily dismiss the indictment.”¹³

After the DOJ dismissed the indictment, General Dynamics returned to federal court to recover its massive costs in defending the case. In describing General Dynamics’ situation, Judge Fernandez¹⁴ stated: “Fortunately for the cause of justice, General Dynamics and its employees could afford to keep fighting; unfortunately, it cost them a lot of money to do so.”¹⁵ This was not hyperbole; General Dynamics sought \$29 million for the attorney’s fees that it paid to defend the fraud prosecution and a related civil action.¹⁶

7. See Contract Law Note, *Forewarned is Forearmed: DCAA Held Liable for \$25 Million in Damages for Accounting Malpractice*, ARMY LAW., Sept. 1996, at 37 [hereinafter *Forewarned*]. Those interested in additional details of the case or its seemingly endless tour of the court system should consult this earlier coverage or some of the following analyses not referenced elsewhere in this article. See, e.g., *General Dynamics Awarded \$26M in DIVAD Case, Court Finds DCAA Negligently Conducted Audit*, 65 Fed. Cont. Rep. (BNA) 392 (Apr. 15, 1996); *General Dynamics’ \$29M Claim for DIVADS Defense Costs Not Time Barred*, 63 Fed. Cont. Rep. (BNA) 533 (Apr. 24, 1995); *ASBCA Declines to Hear DIVADS Breach Claim Pending Resolution of Tort Claim in Court*, 57 Fed. Cont. Rep. (BNA) 49 (Jan. 13, 1992); *Hearing Set on McKenna Cuneo Disqualification*, 55 Fed. Cont. Rep. (BNA) 688 (May 20, 1991); *McKenna & Cuneo Disqualified from DIVADS Case*, 55 Fed. Cont. Rep. (BNA) 479 (Apr. 15, 1991); *Gov’t May Be Held Liable for Professional Malpractice in Conducting DIVAD Audit*, 54 Fed. Cont. Rep. (BNA) 747 (Nov. 19, 1990); *Gov’t, General Dynamics Spar Over \$29.2M Suit to Recover DIVAD Defense Costs*, 53 Fed. Cont. Rep. (BNA) 740 (May 21, 1990); *General Dynamics Sues to Recover \$29.2M in Damages from DIVAD Case*, 52 Fed. Cont. Rep. (BNA) 952 (Nov. 27, 1989); *Judge Dismisses DIVAD Indictment Against General Dynamics Executives*, 47 Fed. Cont. Rep. (BNA) 1155 (June 29, 1987); *General Dynamics Renews Call to Dismiss DIVAD Indictments, Hearing to be Held Today*, 47 Fed. Cont. Rep. (BNA) 1125 (June 22, 1987).

8. *General Dynamics Corp. v. United States*, 139 F.3d 1280, 1282 (9th Cir. 1998). “In a pure fixed-price contract, the bargain is stated in terms of a fixed amount of compensation with no formula or technique for varying the price in the event of unforeseen contingencies.” JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1080 (3d ed. 1988). “A fixed-price, level-of-effort term contract is similar to a cost reimbursement term type contract except that the price is paid upon the incurrence of the specified number of labor hours.” *Id.* at 1180. Federal Acquisition Regulation 16.207-2 explains that, with this type of contract, “payment is based on the effort expended rather than on the results achieved.” GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 16.207 (June 1997).

9. “DCAA, unaccountably, failed to recognize, or seek information about, the vast difference between a firm fixed-price contract and a firm fixed-price (best efforts) contract.” *General Dynamics*, 139 F.3d at 1282.

10. *Id.* at 1282. The DOJ filed charges pursuant to 18 U.S.C. §§ 371, 1001 (1982).

11. Before its conclusion, the case involved then Attorney General Ed Meese, former Massachusetts Governor William Weld (then a senior official in the DOJ), and former General Dynamics executive and NASA Administrator James M. Beggs. Mr. Beggs, one of the named defendants, took a leave of absence from NASA to prepare his defense. See *General Dynamics*, 139 F.3d at 1287; see also *Navy Suspends General Dynamics After Fraud Indictment, Holds Sub Bids Open*, 44 Fed. Cont. Rep. (BNA) 1005 (Dec. 9, 1985).

12. *General Dynamics*, 139 F.3d at 1282. See *Forewarned*, *supra* note 7, at 37-38.

13. *General Dynamics*, 139 F.3d at 1282.

14. Surprisingly, commentators have not addressed Judge Ferdinand F. Fernandez’s prior involvement with this litigation. Before moving to the Ninth Circuit Court of Appeals, Judge Fernandez presided over this litigation as a district court judge in California. In 1986, Judge Fernandez, in an effort to obtain clarity on questions related to the type of contract in issue, sought an advisory opinion from the Armed Services Board of Contract Appeals (ASBCA). See *United States v. General Dynamics Corp.*, 644 F. Supp. 1497 (C.D. Cal. 1986). The list of questions submitted by Judge Fernandez offered some insight into the confusion that must have confounded both the DCAA and the DOJ. Nonetheless, the ASBCA concluded, among other things, that they lacked jurisdiction to render such an advisory opinion. See *General Dynamics Corp.*, ASBCA No. 33633, 87-1 BCA ¶ 19,607. “Issuance of advisory type of decisions or recommendations is not the Board’s function under either the CDA or its present charter.” *Id.* at 99,205. The board previously found that it lacked jurisdiction over this matter because there was no contracting officer’s decision and because there was a related criminal action pending in Federal District Court. See *General Dynamics Corp., Pomona Division*, ASBCA No. 32297, 86-2 BCA ¶ 18,903. Subsequently, the Ninth Circuit agreed with the ASBCA that, among other things, the district court lacked the authority to refer these issues to the ASBCA. See *United States v. General Dynamics Corp.*, 828 F.2d 1356 (9th Cir. 1987). See generally *Stay of General Dynamics Case Pending Referral to ASBCA Ruled Improper*, 47 Fed. Cont. Rep. (BNA) 717 (Apr. 27, 1987); *Government Appeals Referral to ASBCA in General Dynamics DIVAD Case*, 46 Fed. Cont. Rep. (BNA) 735 (Oct. 27, 1986); *Federal Judge Refers to ASBCA Questions About General Dynamics’ DIVAD Overrun*, 46 Fed. Cont. Rep. (BNA) 483 (Sept. 22, 1986). The Ninth Circuit’s 1987 decision was cited frequently before and after the amendment to the Contract Disputes Act of 1978. See 41 U.S.C.A. § 609(f) (West 1998), as amended by Federal Acquisition Streamlining Act, Pub. L. No. 103-355, tit II, § 2354, 108 Stat. 3323 (1994). The Contract Disputes Act now permits the federal district courts to request advisory opinions from boards of contract appeals (BCAs). *Id.* See generally Albert A. Cortese & Frank M. Rapoport, *Implications of Section 2354 of the Federal Acquisition Streamlining Act of 1994, Which Gives Federal District Courts Authority to Seek Advisory Opinions From Boards of Contract Appeals in Contract Fraud Cases*, 62 Fed. Cont. Rep. 443, 444 (BNA) (Oct. 31, 1994).

15. *General Dynamics*, 139 F.3d at 1282.

In this phase of the proceedings, lacking another legal avenue for the recovery of its attorney's fees, General Dynamics advanced a somewhat novel legal theory. It alleged that, under the FTCA, the DCAA had committed professional malpractice in performing the audit that led to the indictment.¹⁷ In the trial and appellate courts, the government responded that General Dynamics could not recover under the FTCA for professional malpractice committed by the DCAA. The government argued that, because of the FTCA's discretionary function exception, the courts lacked jurisdiction to provide General Dynamics a remedy.¹⁸

The district court disagreed with the government, finding that the DCAA ultimately caused the damage for which General Dynamics sought recovery. Finding that the DCAA's negligence in preparing and submitting the audit report was not a discretionary function, the district court awarded tort damages to General Dynamics. On appeal, the government continued to assert that the discretionary function exception specifically applied to the DOJ (i.e. the prosecutors). In addition, the government asserted that General Dynamics and the district court had misdirected their focus towards the DCAA. The Ninth Circuit agreed and reversed the lower court's decision.¹⁹ These issues (the relationship between actions taken by the DCAA

and the subsequent decisions and steps taken by the DOJ) expose the Achilles heel of the discretionary function exception.

The Discretionary Function Exception to FTCA Liability

The FTCA, like other laws that permit suits against the United States, is a limited waiver of sovereign immunity.²⁰ "That waiver of sovereign immunity is subject to a number of exceptions. If an exception applies, sovereign immunity is not waived, and no subject-matter jurisdiction exists."²¹ The relevant FTCA exception here dictates that the court lacks jurisdiction over claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function."²²

Because the discretionary function exception clearly covers prosecutorial discretion,²³ General Dynamics recognized that it could not seek recovery solely upon the DOJ's decision to proceed with its cases. Accordingly, General Dynamics "pointed the finger" at the DCAA.²⁴ The district court "took the bait" and held the DCAA liable under the FTCA.²⁵

16. The total amount of reimbursement awarded to General Dynamics by the district court eventually came to \$25,880,752. *See id.* at 1281.

17. *See Forewarned*, *supra* note 7, at 38-39; notes 45-52 and accompanying text.

18. The discretionary function exception, states that the FTCA shall not apply to:

Any 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 of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C.A. § 2680(a) (West 1998) (emphasis added). As the text indicates, section 2680(a) also contains the "due care" exception. *See generally* Lively v. United States, 870 F.2d 296 (5th Cir. 1989); Doe v. Stevens, 851 F.2d 1457 (D.C. Cir. 1988) (discussing the due care exception).

19. One dissenting judge disagreed with the majority's reasoning regarding the discretionary function exception to the FTCA. Nonetheless, the judge would have denied recovery because General Dynamics' claim was time-barred. *See General Dynamics*, 139 F.3d at 1287-88.

20. In the United States, the origins of the doctrine of sovereign immunity, based upon the principle that the king could do no wrong, remains a mystery. Developed primarily through the common law, the doctrine quickly became well entrenched in the legal system. "A sovereign is exempt from suit, because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawanakoa v. Polyblank*, 205 U.S. 348, 353 (1907). *See generally* KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* 797-98 (1951) (suggesting that this fragmentary, haphazard situation led Congress to enact the FTCA in 1946). "Legal scholars and political scientists have been virtually unanimous in judging most of the legislative and judicial relaxations of sovereign immunity to be fragmentary and haphazard and to allow many occasions for injustice to continue." Paul H. Sanders, *Foreword*, 9 *LAW & CONTEMP. PROB.* 179 (1942). Sanders also aptly notes that sovereign immunity "has persisted in modern law to a degree which would astonish most citizens." *Id.* *But see* Joshua I. Schwartz, *Assembling WINSTAR: Triumph of the Ideal of Congruence in Government Contract Law*, 26 *PUB. CONT. L.J.* 481 (1997); Michael Grunwald, *Lawsuit Surge May Cost U.S. Billions*, *WASH. POST*, Aug. 10, 1998, at A1 (discussing an example of a successful, large-scale assault based upon sovereign acts of the government).

21. *General Dynamics Corp.*, 139 F.3d at 1283 (citing *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996)).

22. *Id.* at 1283 (citing 28 U.S.C.A. § 2680(a) (West 1998); *Sabow*, 93 F.3d at 1451). Courts employ two steps to determine whether the discretionary function bars a suit. *See id.* (citing *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988)). "First, does the challenged action involve an element of choice or judgment? . . . Second, is any judgment at issue of the sort Congress intended to shield?" *United Cook Inlet Drift Assocs. v. Trinidad Corp. (In re Glacier Bay)*, 71 F.3d 1447, 1450 (9th Cir. 1995). *See* *Gaubert v. United States*, 499 U.S. 315 (1991). Professor Davis writes that Congress "carefully preserve[d] sovereign immunity with respect to" discretionary functions. DAVIS, *supra* note 20, at 798.

23. On the subject of prosecutorial discretion, the Ninth Circuit stated: "The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability. The exercise of that discretion is by no means easy, and prosecutors do make mistakes." *General Dynamics*, 139 F.3d at 1283 (citations omitted).

The appellate court, however, realized that it could not “simply look at the surface of a complaint for the purpose of ascertaining the true basis of an attack upon something the government has done.”²⁶ The court believed that further examination was required.

*Limiting the Reach of the FTCA:
“The Buck Stopped at the Prosecutors”*

The appellate court analyzed the nature of prosecutorial discretion and properly concluded that prosecutors, not the investigators upon whom they rely, exercise that discretion. The court refused to believe that the DCAA’s actions ultimately injured General Dynamics. Regardless of the plaintiff’s carefully structured pleading, General Dynamics had incurred attorney’s fees based upon the DOJ’s actions (not DCAA’s).

The court accepted its responsibility to look at the facts, rather than to accept plaintiff’s theory, as pled. “We see no reason to accord amaranthine obeisance to a plaintiff’s designation of targeted employees when we refuse to be bound by his choice of claim label.”²⁷ The court realized that General Dynamics *targeted* the DCAA, rather than the DOJ, because General Dynamics knew that the discretionary function exception insulated the DOJ from FTCA liability. “We may take cognizance of the fact that a target has been *selected for the purpose of evading the discretionary choice of the persons who actually caused the damage*—here the prosecutors’, who were pushing a criminal (and civil) attack upon General Dynamics and its employees”²⁸ In this respect, the court realized that this case was not unusual. “Prosecutors do not usually do all of their own investigation, so a victorious defendant could almost

always argue that this or that report was negligently prepared.”²⁹ As a result, the court refused to leave the DCAA exposed to FTCA liability.

The court, however, was neither apologetic for nor unduly deferential to the government’s actions.³⁰ The court stated:

Perhaps the prosecutors should have listened to General Dynamics’ lawyers; perhaps they should have done more of their own investigation and spoken to government employees who really knew what the contract meant; perhaps they were merely misled by the arcane differences between the [contractual definitions] . . . perhaps reasonable minds could, even today, differ about the true meaning of the contractual words.³¹

Regardless of the quality of the DCAA’s work, the DCAA lacked the authority to bring either a criminal or civil action against General Dynamics. The audit report could not evolve into a legal action because it produced no self-executing remedy. Although the prosecutors obviously relied upon DCAA’s work, the Ninth Circuit concluded that the ills that befell General Dynamics derived from the discretion exercised by the DOJ. The court makes clear that, as a matter of law and fact, “the buck stopped with the prosecutors.”³² The prosecutors were ultimately responsible for the decisions that prompted the lawsuit. Given the exceptions to the FTCA, however, the human fallibility of the prosecutors could not lead to recovery.³³

24. “General Dynamics . . . recognizes that it cannot succeed in an attack on that revetment and adopts the ancient tactic of attempting to circumvent it instead. That is, it seeks to posture its case as an attack on the DCAA rather than as an attack on the prosecutors.” *Id.*

25. *Id.* at 1282.

26. *Id.*

27. *Id.* To be amaranthine is to be unfading or everlasting. To the extent that obeisance suggests a bodily movement expressing deferential courtesy or homage, one could conclude that Judge Fernandez was disinclined to simply concur with the plaintiff’s characterization of its cause of action.

28. *Id.* (emphasis added).

29. *Id.* at 1283-84.

30. “The actions taken . . . will not be recorded as the Department of Justice’s finest hour, nor, considering the ultimate candid request for dismissal, was it the Department’s darkest one.” *Id.* at 1286.

31. *Id.* As the dissent stated: “That the Department is immune from suit in this case does not mean it is immune from criticism.” *Id.* at 1287 (O’Scannlain, C.J., dissenting).

32. The court stated:

Where . . . the harm actually flows from the prosecutor’s exercise of discretion, an attempt to recharacterize the action as something else must fail. *And there can be no doubt that the buck stopped with the prosecutors.* True, they had a report from the DCAA, but the decision to prosecute was all their own. They were not required to prosecute, and were not forced to do so. . . . In fact, they gathered a great deal of information and even met with General Dynamics’ redoubtable lawyers before the prosecution went forward.

Id. at 1286 (emphasis added).

*A Healthy Tension: Expanding and Shrinking
The Discretionary Function Exception*

In its opinion, the court thoroughly discussed *Fisher Bros. Sales, Inc. v. United States*,³⁴ and *United Cook Inlet Drift Associates v. Trinidad Corp. (In re The Glacier Bay)*.³⁵ While both cases “strike a similar chord,” they also appear to represent “opposite ends of a spectrum” in defining the bounds of the discretionary function exception.³⁶ This spectrum offers insight into the interplay between officials that exercise discretion, those that perform duties that influence the exercise of that discretion, and the connection between truly discretionary acts and the injuries incurred by FTCA plaintiffs. In examining these cases, the court concluded that it “cannot wholly ignore causation concepts when a robust exercise of discretion intervenes between an alleged government wrongdoer and the harm suffered by a plaintiff.”³⁷

Fisher Bros. arose from the 1989 incident involving an allegation of tampering with Chilean fruit. An anonymous caller told the United States Embassy that Chilean fruit being exported to the United States would contain cyanide. As a result, the Food and Drug Administration (FDA) detained incoming fruit from Chile, tested it, found no poison, and declared the call a hoax. A second, more specific call, however, led to additional testing and some evidence of tampering on three Chilean grapes. Based on the information available, the FDA Commissioner refused entry of Chilean fruit into the country and required Chilean fruit to be destroyed in domestic distribution channels.

Chilean growers, exporters, and a shipper, along with American importers and distributors, sued the U.S. government. The plaintiffs alleged that “the lab technicians were negligent . . . [and] but for this negligence, the Commissioner would not have issued his orders and the Chilean fruit business for the spring season of 1989 would not have been destroyed.”³⁸ Both the trial court and the appellate court found that the Commissioner’s decisions “were policy decisions protected by the discretionary function exception to the FTCA.”³⁹

The reality here is that the injuries . . . were caused by the Commissioner’s decisions and, as a matter of law, their claims are therefore, “based upon” those decisions. Any other view would defeat the purpose of the discretionary function exception. In situations like this where the injury complained of is caused by a regulatory policy decision, the fact of the matter is *that there is no difference* in the quality or quantity of interference occasioned by judicial second guessing, *whether the plaintiff purports to be attacking the data base on which the policy is founded or acknowledges outright that he or she is challenging the policy itself.*⁴⁰

The court acknowledged that policy-makers must make judgments regarding “the reliability, adequacy, and significance of the information available to [them].”⁴¹ Such is the nature of exercising discretion. Unlike the court’s decision in *Glacier Bay*,⁴² this conclusion clearly distinguishes between the official

33. “A mistake was made, but, because prosecutors do not have ichor in their veins, mistakes can be expected from time to time. Mistakes, however, do not necessarily equal governmental liability.” *Id.* at 1286.

34. 46 F.3d 279 (3d Cir. 1995) (en banc), *cert. denied*, 516 U.S. 806.

35. 71 F.3d 1447 (9th Cir. 1995). The dissent in *General Dynamics* relied upon *Glacier Bay* to conclude that “DCAA clearly was not immune.” *General Dynamics*, 139 F.3d at 1288 (O’Scannlain, C.J., dissenting).

36. See Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365 (1995); Barry R. Goldman, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837 (1992); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 UCLA L. REV. 871 (1991); Osborne M Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration*, 42 OKLA. L. REV. 459 (1989); Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687; Donald N. Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act*, 110 MIL. L. REV. 115 (1985).

37. *General Dynamics*, 139 F.3d at 1285.

38. *Fisher Bros.*, 46 F.3d at 282-83. The en banc panel split 7-6. The dissent did not dispute that the Commissioner’s action in ordering tests was discretionary. Rather, the dissent accepted “that the decision to withdraw Chilean fruit from the market was proximately caused by the positive test results.” *Id.* at 289. The dissent concludes that: “once the decision was made to do the testing, the discretionary function exception should not protect the government from the consequences of the negligence of the laboratory technicians in performing their routine duties.” *Id.* at 292.

39. *Id.* at 284.

40. *Id.* at 286 (emphasis added). The court correctly noted that: “The social cost of permitting the inquiries required by the plaintiffs’ theory are prohibitive.” *Id.*

41. Moreover, “[e]ach responsible decision . . . necessarily reflects the decisionmaker’s judgment that it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data.” *Id.* at 287.

who exercised discretion and those who influenced the exercise of that discretion.

In 1987, the oil tanker *Glacier Bay* ran aground upon a submerged rock in Cook Inlet, Alaska, causing an oil spill. The local fishing community sued the corporation with interests in the oil tanker, for damage to their livelihood. The government also sued the corporation for clean-up costs. The corporation responded by suing the government for negligence in preparing the nautical charts used by the *Glacier Bay's* captain. The charts, prepared as a public service by National Oceanic and Atmospheric Administration (NOAA), failed to note the existence (and, in effect, failed to warn) of what is now known as "Glacier Bay Rock."⁴³

The issues the Ninth Circuit faced in *Glacier Bay* were whether the hydrographers failed to follow mandatory instructions⁴⁴ and whether NOAA reviewers erred by approving the charts based upon the faulty surveys. The district court found that the discretionary function exception applied to the NOAA reviewers. As a result, the court dismissed the case because "the persons who have the ultimate responsibility for approving the charts . . . have unfettered discretion in reaching that decision."⁴⁵

The appellate court disagreed with the district court about how to analyze the discretionary function exception. The court concluded that "the analysis of the discretionary function exception must proceed on an act by act basis. Discretion to perform one act cannot bring another nondiscretionary act within the exception's protection."⁴⁶ The discretion accorded to

the NOAA reviewers "would not shield allegedly negligent non-discretionary acts by the hydrographers."⁴⁷ Although the appellate court affirmed in part, it reversed in part and remanded the case to the district court on issues relating to some aspects of the hydrographers' work.⁴⁸

In *General Dynamics*, the Ninth Circuit suggested that, "while *Glacier Bay* and *Fisher Bros.* seem to be in healthy tension, they are not in opposition unless one or the other is read in an overly broad fashion."⁴⁹ Whether future courts will read these cases more broadly remains unclear. Almost fifty years ago, Professor Davis suggested that, due to the discretionary exception, FTCA liability was "hardly of consequence in administrative law."⁵⁰ As a result, he suggested that "reformers and commentators, who have contributed so much to the winning of the battle to limit sovereign immunity, should probably now direct their efforts to the difficult problems of fixing proper boundaries for sovereign liability."⁵¹ These boundaries remain in flux.⁵²

Guidance from the DOJ

These issues rarely confront agency counsel at the field activity level. Interpretation of exceptions to the waiver of sovereign immunity tends to take place in federal district courts. The DOJ, rather than individual agencies, typically controls the development of this body of law. Counsel facing FTCA issues or, more specifically, considering invoking the discretionary function exception, should obtain the most recent copy of the relevant DOJ *Torts Branch Monograph*.⁵³ The DOJ requests

42. *United Cook Inlet Drift Assocs. v. Trinidad Corp. (In re The Glacier Bay)*, 71 F.3d 1447, 1449-50 (1995).

43. *Id.*

44. The corporation claimed that the hydrographers failed to follow instructions regarding how widely to space their bottom soundings and under what circumstances they should investigate bottom anomalies suggesting features such as the now infamous rock. *Id.* at 1450.

45. *Id.* at 1450-51.

46. *Id.* at 1455.

47. *Id.* at 1451.

48. The court concluded that the discretionary function exception did not apply to the hydrographers' work involving the separation of sounding lines (a maximum of 50 or 100 meters), the running of splits (or the use of supplemental sounding lines), failure to develop anomalies during a 1964 survey, and a failure to report all of the above. *See id.* at 1452-54.

49. *See General Dynamics*, 139 F.3d at 1284-85 (analyzing *Fisher Bros.* and *Glacier Bay*). *See also* *Varig Airlines v. United States*, 467 U.S. 797 (1984) (alleging negligent certification of an aircraft design by the FAA); *Dalehite v. United States*, 346 U.S. 15 (1953) (involving a devastating explosion in Texas City, Texas, of a ship containing fertilizer produced by contractors at government facilities).

50. *See* DAVIS, *supra* note 20, at 810.

51. *Id.* Professor Davis perceived that, while high ranking officials and "governmental units are generally immune from liability for torts committed in the performance of discretionary acts [lower level] and so called ministerial officers are liable for torts causing physical harm, and the line between such workers and those exercising discretionary powers is wavering." *Id.* at 810 (emphasis added).

52. Members of the DCAA may not care that their "lot in life" was found to be more analogous to that of lab technicians than hydrographers; hopefully, they perceive that their case turned upon the Ninth Circuit's conclusion that prosecutorial discretion was more closely aligned with policy level decision making at the FDA than a nautical map review at NOAA.

Conclusion

that: “In the interest of presenting a consistent and coherent defense, *the discretionary function exception should not be raised in any suit without the prior approval of the Torts Branch.*”⁵⁴

The DOJ leaves no doubt that it takes these cases very seriously. It emphasizes the importance of a strong record. The DOJ further suggests that “it is critical to identify the agency policy implicated in the claim”⁵⁵ In addition, counsel must be prepared to “articulate the agency’s political, economic, social or military policies”⁵⁶ In the *Torts Branch Monograph*, the DOJ articulates several key principles that agency attorneys should consider when raising the discretionary function exception. For example, the plaintiff bears the burden of proof when the government asserts the discretionary function exception.⁵⁷ Negligence is not relevant in conducting the discretionary function analysis.⁵⁸ Also, although it should be raised expeditiously, the jurisdictional defense of the discretionary function cannot be waived.⁵⁹

Although the government should savor the result in *General Dynamics*,⁶⁰ caution remains in order. Cynics could conclude that, while the government “dodged a bullet,” there is another “chink in the armor.” This issue split the Ninth Circuit, just as it aggravated that court in *Glacier Bay*. Similarly, the *Fisher Bros.* case almost equally split the *en banc* Third Circuit. As a bystander, the lesson from these cases may be no more than to acknowledge that discretionary decision-makers should exercise an appropriate level of care when they rely on the work of others for their decisions.⁶¹ Taxpayers (and, implicitly the courts) have a right to expect that policy-makers will marshal and consider appropriate facts before exercising discretion.

Government counsel, however, cannot afford to be bystanders. In exercising discretion, counsel must rely on the reliable and challenge the unreliable. For others exercising discretion, counsel can offer advice on what requires further examination and investigation. Right or wrong, decisions must be made. Whether counsel make those decisions or support the decision-maker, the taxpayer is entitled to counsel’s best judgment.

53. This multi-volume work is dedicated to FTCA issues. The monograph devoted two volumes to the discretionary function exception. Part A (1993) offers an updated analysis of the evolving law. Part B (1997) includes a digest of authorities (since 1984) plus a listing of cases (alphabetically, and by agency). See U.S. DEPT OF JUSTICE, DISCRETIONARY FUNCTION EXCEPTION, TORTS BRANCH MONOGRAPH, pt. A, Forward, 51-52 (1993) (emphasis in original).

54. *Id.* The DOJ implores agencies to “[p]lease keep in mind that the discretionary function defense is not to be used as an ‘extra throw-in’ defense, and should be asserted only when applicable.” *Id.* at 53.

55. *Id.* at 52. The DOJ encourages review of relevant “regulations, guidelines, directives, or policy statements” *Id.*

56. *Id.*

57. This may seem counter-intuitive to litigators, who assume that the moving party bears the burden. Conversely, while the government is the moving party seeking to dismiss the action, the plaintiff maintains the burden of demonstrating that the court has jurisdiction. “To carry the burden of establishing an unequivocal waiver of immunity under § 1346(b) . . . a plaintiff must plead and prove that § 2680(a) is inapplicable.” *Id.* at 28-31.

58. *Id.* at 32-33.

59. *Id.* at 27-28.

60. Conversely, it is difficult to see how this result reconciles with the Supreme Court’s statement in *Kosak v. United States*, that the objectives of the FTCA’s exceptions are: “[E]nsuring that ‘certain governmental activities’ not be disrupted by the threat of damage suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available.” *Kosak v. United States*, 465 U.S. 848, 858 (1984).

61. See Michael N. Hayes, *Sovereign Immunity in an Economic Theory of Government Behavior*, 12 LAW & POL’Y 293 (July 1990) (providing a more in-depth theory on applying the discretionary function exception, from a behavioral standpoint). Professor Hayes suggests that courts follow a “theoretically consistent path” that “[t]he government should be immune from tort suit for monetary damages if and only if it demonstrates that it decided, after weighing social costs and benefits, to risk the occurrence of some loss” *Id.* at 307 (citing M.L. Spitzer, *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. CAL. L. REV. 515 (1977)). Professor Hayes further suggests that “the presence of an explicit cost-benefit analysis on the part of any specific government agent readily identifies a discretionary function.” *Id.* at 308.