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# COMMENTS

## PUTTING THE DISCRETIONARY FUNCTION EXCEPTION IN ITS PROPER PLACE: A MATURE APPROACH TO “JURISDICTIONALITY” AND THE FEDERAL TORT CLAIMS ACT\*

“And none could be expected to foresee at that time the monstrous joker now threatening to engulf the entire Act in a twilight zone . . . .”<sup>1</sup>

### I. INTRODUCTION

If Justices Scalia and Ginsburg share the same opinion on a particular legal issue then that opinion is likely correct. Both have remarked, at different times, that the word “jurisdiction” is “a word of many, too many, meanings.”<sup>2</sup> The characterization of any rule as “jurisdictional” carries with it fatal consequences. If a rule is labeled “jurisdictional” then courts will apply it strictly and rigidly.<sup>3</sup> Specifically, jurisdictional issues may be raised at any stage of litigation by lawyers, and must be addressed sua sponte by courts.<sup>4</sup> A court must address subject matter jurisdiction on its own because without subject matter jurisdiction a court lacks authority to hear the case.<sup>5</sup> Therefore, a jurisdictional issue can never be waived.<sup>6</sup> For these reasons, deciding whether a certain legal issue is jurisdictional requires the utmost scrutiny.<sup>7</sup> Some areas that courts have

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\* Thomas E. Bosworth, J.D. Candidate, Temple University Beasley School of Law, 2016. I thank Professor Robert Reinstein for the invaluable guidance and advice he has provided through many drafts of this Comment. I also thank the Editorial Board and staff members of the *Temple Law Review* for their hard work in preparing this Comment for publication. Finally, I thank my wonderful fiancée Jess and my entire family for their love and support.

1. Hugh C. Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U. INT’L L. REV. 41, 42 (1955) (referring to the discretionary function exception to the Federal Tort Claims Act).

2. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (opinion of Ginsburg, J.) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (opinion of Scalia, J.)).

3. Alex Lees, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1458 (2006).

4. *Id.*; see also *Arbaugh*, 546 U.S. at 514 (noting that courts have an “independent obligation” to address whether subject matter jurisdiction exists, even when parties do not raise the issue).

5. *Arbaugh*, 546 U.S. at 514. Courts have been required to address jurisdiction sua sponte for over one hundred years. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that it is the “duty” of courts to raise the issue of subject matter jurisdiction regardless of whether the parties raise the issue).

6. *Arbaugh*, 546 U.S. at 514.

7. See 15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901 (2d ed. 1986) (warning that “unthinking use” of the jurisdictional label leads to “untoward consequences”); see also Lees, *supra* note 3, at 1458 (recognizing that courts

grappled with include a day limit for appeals under the Medicare statute,<sup>8</sup> the Copyright Act of 1976's registration requirement,<sup>9</sup> and the Suits in Admiralty Act's (SAA) service-of-process requirement.<sup>10</sup> Indeed, the prevalence of this issue has created a distinct strain of United States Supreme Court decisions, sometimes referred to as "jurisdictionality jurisprudence."<sup>11</sup>

Presently, the Federal Tort Claims Act (FTCA) contains a provision fraught with this jurisdictional debate. The FTCA confers exclusive jurisdiction to federal courts to hear tort claims against the United States.<sup>12</sup> Because the United States was immune from suit for tort actions prior to the FTCA, the FTCA is considered a statutory waiver of sovereign immunity.<sup>13</sup> However, the FTCA contains thirteen exceptions.<sup>14</sup> If any one of these exceptions applies to an FTCA claim then that claim fails.<sup>15</sup> One of these exceptions is called the discretionary function exception (DFE).<sup>16</sup> In recent years, courts and scholars have become increasingly unsure of whether the DFE is "jurisdictional" or whether it is merely an "affirmative defense" to a cause of action.<sup>17</sup> The resolution of this issue matters, in part, because it will determine whether the United States or FTCA plaintiffs bear the burden of proving the DFE.<sup>18</sup>

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have begun to use the word "jurisdictional" as a means of achieving a particular result in cases because the word itself carries so much weight).

8. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 828 (2013) (not jurisdictional).

9. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168–69 (2010) (not jurisdictional).

10. *Henderson v. United States*, 517 U.S. 654, 656 (1996) (not jurisdictional).

11. See *The Supreme Court, 2006 Term—Leading Cases, Statutory Time Limits to Appeal*, 121 HARV. L. REV. 315, 321 (2007) (noting that the Court's "recent jurisdictionality jurisprudence ha[s] rightly begun to 'clean up' the overbroad use of the jurisdictional label," which had led to "unfair dismissals" and restrictive interpretation); see also Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 552–53 (2008) [hereinafter Sisk, *The Continuing Drift*] (explaining that the Court has recently taken a more "mature" approach to statutory waivers of sovereign immunity by confining its "jurisdictional" analysis to the core provisional grant of jurisdiction rather than to all of the statute's provisions); Brief of Professor Gregory C. Sisk as Amicus Curiae in Support of Respondents at 23–29, *United States v. Wong*, 135 S. Ct. 1625 (2015) (No. 13-1074), 2014 WL 6436671 (arguing that the Court has refrained from loosely labeling the Federal Tort Claims Act's (FTCA) provisions "jurisdictional" merely because they are conditions on a waiver of sovereign immunity).

12. 28 U.S.C. § 1346(b)(1) (2012).

13. See *Federal Deposit Insurance Co. v. Meyer*, 510 U.S. 471, 477 (1994) ("Section 1346(b) [of the FTCA] grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed]' itself liable." (alteration in original) (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962))).

14. 28 U.S.C. § 2680(a)–(n).

15. *Id.* § 2680.

16. *Id.* § 2680(a).

17. See *infra* notes 78–82 and accompanying text for a brief summary of this debate.

18. Those jurisdictions that label the DFE "jurisdictional" hold that FTCA plaintiffs bear the burden of proving the exception because plaintiffs generally bear the burden of proving subject matter jurisdiction. See *infra* notes 126–31 and accompanying text for an example of this approach. On the contrary, other jurisdictions label the DFE an "affirmative defense" and therefore place the burden of proof on the United States as the defendant. See *infra* notes 87–102 and accompanying text for an example of this approach.

This Comment argues that the United States bears the burden of proving the applicability of the DFE because the DFE is an affirmative defense and not a jurisdictional provision. This thesis finds deep support in Supreme Court jurisprudence, early treatment of the DFE, and other statutory schemes. Due to a circuit split over the DFE, this Comment further suggests a (perhaps) radical solution: amend Federal Rule of Civil Procedure 8(c) (Rule 8(c)) to include the DFE as an enumerated affirmative defense. Adding the DFE to Rule 8 would eliminate uncertainty by mandating that the United States plead and prove this matter as an affirmative defense. In turn, this would save money, improve efficiency of the federal courts, and return fairness to litigants.

## II. OVERVIEW

This Section provides an overview of the sovereign immunity doctrine, as well as the political environment that led to enactment of the FTCA in 1946. Specifically, Part II.A explains the origin of sovereign immunity and the reasoning behind it, which dates back to early English common law. Part II.B explains how the United States adjudicated tort claims against the federal government before the FTCA and why the FTCA was eventually passed. Part II.C focuses on the DFE to the FTCA. Particularly, Part II.C examines the legislative history of the DFE, as well as courts’ interpretations of the DFE. Part II.C concludes by illustrating the current circuit split regarding whether the DFE is jurisdictional and which party bears the burden of proving it. Because this circuit split involves jurisdictional issues, Part II.D provides an outline of the Supreme Court’s emerging jurisdictionality jurisprudence. Finally, Part II.E briefly explains the promulgation of the Federal Rules of Civil Procedure. In particular, Part II.E explains what constituted an affirmative defense at common law and how Rule 8(c) attempts to codify that idea.

### A. *The Nature and Evolution of Sovereign Immunity in the United States*

Since this country’s independence from Great Britain, the legitimacy of the sovereign immunity doctrine has rested upon shaky grounds.<sup>19</sup> Allegedly, sovereign immunity has its roots in the English maxim that “the King could do no wrong.”<sup>20</sup> In Great Britain, sovereign immunity embodied the simple reality that, because the king was the highest authority in the feudal system, it was impossible to appeal one of his decisions.<sup>21</sup> In 1879, Justice Miller opined that,

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19. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–02 (2001) (arguing that “the entire doctrine should be eliminated from American law” because it is derived from an English concept—“the King can do no wrong”—which does not fit in American democracy); see also Sisk, *The Continuing Drift*, *supra* note 11, at 525–28 (calling into question sovereign immunity’s validity as a viable doctrine).

20. Katherine Florey, *Sovereign Immunity’s Penumbras: Common Law, “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 771–72 (2008) (quoting *Nevada v. Hall*, 440 U.S. 410, 415 (1979)).

21. See *Hall*, 440 U.S. at 15 (stating that “[t]he King’s immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong”). *But see*

with respect to sovereign immunity's proper place in the United States, "[w]e have no king to whom it can be applied."<sup>22</sup> Despite this, courts have repeatedly invoked the doctrine to immunize both the states and federal government.<sup>23</sup>

State sovereign immunity cannot be found in the text of the U.S. Constitution. Quite the opposite, Article III of the Constitution expressly mandates that "[t]he judicial Power shall extend . . . to Controversies to which the United States shall be a Party[,] . . . to Controversies between two or more States; [and] between a State and Citizens of another State."<sup>24</sup> Only two years after the Supreme Court held that the Constitution permits suits against states,<sup>25</sup> the Eleventh Amendment to the Constitution was ratified.<sup>26</sup> On its face, the Eleventh Amendment only prohibits suits against a state by a citizen of "another State."<sup>27</sup> Nonetheless, in 1890, the Supreme Court construed the Eleventh Amendment to bar a citizen from suing its own state.<sup>28</sup> The Supreme Court has consistently found that state sovereign immunity is an inherent right that is wholly separate from the text of the Constitution or Eleventh Amendment.<sup>29</sup> This approach has been widely criticized by judges and scholars.<sup>30</sup>

Scholars have likewise struggled to find a textual basis in the Constitution for federal sovereign immunity.<sup>31</sup> Some have gone so far as to characterize the doctrine as a "ghost[] that haunt[s] the early Republic"<sup>32</sup> and one of the

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Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-3 (1963) (finding historical evidence suggesting that English common law provided legal mechanisms for people to sue the king, even without his consent).

22. Langford v. United States, 101 U.S. 341, 343 (1879).

23. See Chemerinsky, *supra* note 19, at 1201-02 (noting that U.S. courts have endorsed sovereign immunity despite its inconsistency with the U.S. Constitution).

24. U.S. CONST. art. III, § 2, cl. 1.

25. Chisholm v. Georgia, 2 U.S. 419 (1793) (basing its decision on Article III).

26. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

27. *Id.*

28. See Hans v. Louisiana, 134 U.S. 1, 21 (1890) (extending the Eleventh Amendment to prevent suits by a state's own citizens).

29. See Alden v. Maine, 527 U.S. 706, 713 (1999) (arguing that state sovereign immunity derives from the Constitution's "structure," history, and case law, not the express terms of the Eleventh Amendment); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (reaffirming that a state may be sued only if Congress abrogates sovereign immunity pursuant to the Fourteenth Amendment, or if the state consents to the suit); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 267 (1997) (treating state sovereign immunity as a fundamental right of states); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (interpreting state sovereign immunity and the Eleventh Amendment in a similarly broad fashion).

30. E.g., *Seminole Tribe*, 517 U.S. at 153-55 (Souter, J., dissenting); Chemerinsky, *supra* note 19, at 1209-10; Florey, *supra* note 20, at 774-75.

31. E.g., Florey, *supra* note 20, at 776-77.

32. Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383 (1998).

"greatest mysteries" in American law.<sup>33</sup> In general, historians have debated whether the Framers intended the Constitution to embrace or eliminate the possibility of federal sovereign immunity.<sup>34</sup> As with state sovereign immunity, a majority of the Supreme Court has come to view federal sovereign immunity as a "well established" doctrine adopted from English law.<sup>35</sup> However, some Supreme Court Justices and scholars argue that federal sovereign immunity has no foundational basis in the Constitution.<sup>36</sup>

In the first Supreme Court case to address the scope and purpose of federal sovereign immunity, *United States v. Lee*,<sup>37</sup> the majority was quick to question the fitness of the analogy between Great Britain's monarchical system and federal sovereign immunity.<sup>38</sup> In any event, the doctrine of federal sovereign immunity has become an accepted ingredient of federalism.<sup>39</sup> The current doctrine can be summed up as follows: individuals may not sue the United States for monetary damages unless the United States has consented to suit by a statutory waiver of sovereign immunity.<sup>40</sup> The first of these statutory waivers came in 1855 when Congress created the United States Court of Claims.<sup>41</sup> Through this tribunal, citizens could bring claims against the United States for breach of contract or violations of federal statutes.<sup>42</sup> In 1887, Congress passed the Tucker Act, which confirmed the Court of Claims' authority to hear these kinds of claims against the United States.<sup>43</sup> Most importantly, the Tucker Act expanded the Court of Claims' jurisdiction to include actions for constitutional violations.<sup>44</sup> Significantly, the Tucker Act expressly forbade tort claims.<sup>45</sup>

Not surprisingly, the origin of foreign sovereign immunity is similarly difficult to trace.<sup>46</sup> In the first case to address foreign sovereign immunity principles, Chief Justice Marshall dismissed a U.S. citizen's claim of title to a French ship docked in Philadelphia.<sup>47</sup> After admitting that foreign countries'

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33. Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 395 (2005).

34. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443-45 (2005) [hereinafter Sisk, *A Primer*] (discussing the history of federal sovereign immunity).

35. *Alden v. Maine*, 527 U.S. 706, 715 (1999).

36. Sisk, *A Primer*, *supra* note 34, at 443-44 (discussing some of the Supreme Court Justices who have taken this position).

37. 106 U.S. 196 (1882).

38. *Lee*, 106 U.S. at 206 (finding that "[n]o such reason exists in our government" to follow English common law because American democracy is incomparable to England's feudal system).

39. Sisk, *The Continuing Drift*, *supra* note 11, at 528.

40. Sisk, *A Primer*, *supra* note 34, at 456.

41. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612.

42. Sisk, *The Continuing Drift*, *supra* note 11, at 530-31.

43. *Id.* at 531.

44. *Id.*

45. *Id.* at 569.

46. See William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1612 (2013).

47. *Schooner Exchange v. McFaddon*, 111 U.S. (7 Cranch) 116 (1812).

immunity in U.S. courts is “not expressly stipulated,”<sup>48</sup> Marshall went on to base his decision on the supposed universal implication that a foreign person could not be arrested or detained in the United States.<sup>49</sup> Over time, “the Court began . . . defer[ring] to the State Department[] . . . regarding which [foreign] defendants enjoyed immunity.”<sup>50</sup> Eventually, Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976.<sup>51</sup> Grounded in a presumption that foreign countries are immune from suit in U.S. courts,<sup>52</sup> the FSIA contains exceptions.<sup>53</sup> In most circuits, the ultimate burden lies with a foreign defendant to disprove the applicability of one of these exceptions.<sup>54</sup>

### B. *The FTCA*

Prior to 1946, individuals who were injured by the federal government’s negligence could not sue the United States because no statutory waiver of sovereign immunity for tort actions existed.<sup>55</sup> Rather, they were required to petition Congress for a “private bill.”<sup>56</sup> Upon receipt of a private bill, Congress would either deny relief, provide tort compensation, or grant the party a one-time jurisdictional ticket to sue.<sup>57</sup> The private bill system quickly became an unpopular method for adjudicating tort actions because it was viewed as unfair and inefficient.<sup>58</sup>

Following years of frustration with the private bill system, and failed attempts to pass a comprehensive tort claims act, Congress enacted the FTCA in

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48. *Id.* at 137.

49. *Id.*

50. Wood, *supra* note 46, at 1612–13.

51. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602–1611 (2012)).

52. 28 U.S.C. § 1604.

53. *Id.* §§ 1605–1607. If one of these exceptions applies, the foreign sovereign is no longer immune.

54. *E.g.*, Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 734 F.3d 1175, 1183 (D.C. Cir. 2013); Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts, 727 F.3d 10, 17 (1st Cir. 2013); Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for A.W. Galadari, 12 F.3d 317, 325 (2d Cir. 1993); Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 289 n.6 (5th Cir. 1989).

55. Stephen L. Nelson, *The King’s Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 265 (2009).

56. *Id.* at 270–71.

57. Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 SETON HALL L. REV. 174, 190 (2000).

58. See 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, 693–94 (listing the following as reasons the private bill system was unpopular: Congress did not have the time to handle such bills, gathering of evidence was subpar, and the process required political influence); see also D. Scott Barash, Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1308 (1987) (noting that eventually a “general sentiment arose that injured parties should have a right to recover for harms caused by the government, rather than being subjected to Congress’ ‘grace’ in passing a private bill”).

1946.<sup>59</sup> The FTCA allows private individuals to sue the federal government for the negligence of its employees, but only in federal district courts.<sup>60</sup> The purpose of the FTCA is to provide a remedy to plaintiffs whose meritorious claims would have previously been barred by the doctrine of sovereign immunity.<sup>61</sup> Although the FTCA acts as a statutory waiver of sovereign immunity, the statute contains thirteen exceptions.<sup>62</sup> For years, courts have been treating these exceptions as “jurisdictional bar[s]” to recovery.<sup>63</sup> Thus, FTCA claims have routinely been dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction if one of the enumerated exceptions applies.<sup>64</sup> The most frequently litigated and controversial of these exceptions is the DFE.<sup>65</sup>

### C. *The DFE*

The DFE provides that the FTCA “shall not apply” to [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>66</sup>

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59. Nelson, *supra* note 55, at 270–71.

60. 28 U.S.C. § 1346(b)(1) (2012).

61. 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3658 (3d ed. 2014); *see also* Celestine v. Mount Vernon Neighborhood Health Ctr., 403 F.3d 76, 80 (2d Cir. 2005) (recognizing the additional purpose of the FTCA to “immunize [federal] employees and agents from liability for negligent or wrongful acts done in the scope of their employment” (citing 28 U.S.C. § 2679(b) (2000))). *But see* United States v. Mass. Bonding & Ins., 227 F.2d 385, 394 (1st Cir. 1955) (suggesting the true purpose of the FTCA was to relieve Congress of the cumbersome private bill system by shifting the adjudicatory duty of federal tort claims to the courts); Zillman, *supra* note 58, at 715 (explaining the FTCA transferred tort responsibility from Congress to the federal courts and that “[t]he goal [of the transfer] was much more to aid Congress than to open the federal government to new theories of tort liability”).

62. 28 U.S.C. § 2680(a)–(n).

63. Nelson, *supra* note 55, at 271.

64. *See, e.g.*, Bogues v. United States, 703 F.Supp.2d 318, 329 (S.D.N.Y. 2010) (dismissing plaintiff’s FTCA claim under Rule 12(b)(1) for want of subject matter jurisdiction because one of the FTCA’s enumerated exceptions applied); Smith v. Steffens, 429 F.Supp.2d 719, 723 (E.D. Pa. 2006) (same); Hostetler v. United States, 97 F.Supp.2d 691, 695, 698 (E.D. Va. 2000) (same).

65. LEONARD A. COLE, MILITARY EXPERIMENTS AND SOVEREIGN IMMUNITY 2–3 (1990) (stating that the DFE has produced more confusion for scholars and jurists than any other provision of the FTCA); James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (labeling the DFE the “most gaping and frequently litigated” of the FTCA’s exceptions); Nelson, *supra* note 55, at 262 (declaring that the DFE is the “most criticized and litigated” of the FTCA exceptions); *see also* Baird v. United States, 653 F.2d 437, 440 (10th Cir. 1981) (describing the act of deciding whether something is discretionary or nondiscretionary as “wallow[ing] . . . in the quagmire”).

66. 28 U.S.C. § 2680(a).

Simply put, if the DFE applies to an FTCA claim then that claim shall be dismissed. After fifty years and several Supreme Court decisions,<sup>67</sup> a two-part test has emerged to determine whether the DFE applies.<sup>68</sup> The first requirement is that the alleged negligent conduct must involve an element of judgment or choice.<sup>69</sup> In other words, the DFE would not apply if a federal employee violated a mandatory statute or regulation.<sup>70</sup> On the contrary, the DFE would apply—and therefore bar recovery—if the statute or regulation at issue afforded the employee some discretion.<sup>71</sup> The second requirement is that the conduct must be “susceptible to policy[-related] analysis.”<sup>72</sup> Courts still grapple with how exactly to apply this framework.<sup>73</sup> Part of this confusion is exacerbated by the limited legislative history of the DFE.

### 1. Legislative History of the DFE

Discussions of a discretionary function exception appeared for the first time amidst proposed tort claims legislation in 1942.<sup>74</sup> Prior to 1942, Congress had

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67. *United States v. Gaubert*, 499 U.S. 315 (1991) (suggesting for the first time that the burden of proving the DFE exception may be on the plaintiff); *Berkovitz v. United States*, 486 U.S. 531 (1988) (expanding the coverage of the DFE exception); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) (reemphasizing the policy goals of the DFE); *Dalehite v. United States*, 364 U.S. 1 (1953) (specifically stating that the DFE should be treated as an affirmative defense).

68. ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 670 (Vicki Been et al. eds., 6th ed. 2012) (recognizing this two-part test); *see Sanchez v. United States*, 671 F.3d 86, 93 (1st Cir. 2012) (applying the two-part test).

69. *Sanchez*, 671 F.3d at 93 (citing *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009)). Some scholars have described this prong as meaning that the conduct alleged must be “discretionary in nature.” *See, e.g.,* Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 *FORDHAM L. REV.* 2859, 2922 (1999) (clarifying that the DFE does not apply when the conduct alleged was the result of “mandatory compliance with a specific ‘federal statute, regulation or policy’” (quoting *Gaubert*, 499 U.S. at 322)).

70. *See, e.g., Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 100–01 (D.D.C. 2001) (holding that certain federal regulations governing the conduct of U.S. Customs officials did not involve an element of judgment of choice and, therefore, the Customs officers’ conduct pursuant to these regulations was not “discretionary” for purposes of the DFE).

71. A practical example of mandatory, nondiscretionary conduct would be an employee who simply pushed a button every hour as instructed by some regulation, policy, or law. In that example, the DFE would not apply to bar a plaintiff’s claim—assuming the employee violated the law or regulation by failing to push the button—because there is no element of judgment or choice inherent in the decision to push a button every hour. On the contrary, if a federal statute or regulation directed a federal employee to mop the floor every hour or so, this might involve discretion (i.e., where to mop, where not to mop, whether to put a “wet floor” sign up, etc.).

72. *Gaubert*, 499 U.S. at 325; *see id.* at 325 n.7 (offering an example that distinguishes between acts that are susceptible to policy analysis and acts that are not); *see also Varig Airlines*, 467 U.S. at 808 (restating the oft-quoted phrase that “[t]he [DFE] . . . marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals”).

73. *Gaubert*, 499 U.S. at 335 (Scalia, J., concurring in part and concurring in the judgment) (recognizing that “lower courts have had difficulty in applying this test”).

74. Zillman, *supra* note 58, at 705.

already introduced various types of exceptions to proposed tort claims bills, all of which were eventually included in the FTCA.<sup>75</sup> During a 1942 hearing before the House Judiciary Committee, former Assistant Attorney General Francis Shea entered into the record the following explanation of the DFE:

Section 402 contains certain exemptions from the bill. The first subdivision of Section 402 exempts claims based upon an act or omission of an employee exercising due care in the execution of a statute or regulation. It also exempts claims based upon the conduct of an employee of the government involving discretion, whether or not the discretion has been abused. This is a highly important exception, designed to avoid any possibility that the act may be construed to authorize damage suits against the government growing out of a legally authorized activity, such as a flood-control or irrigation project, where no wrongful act or omission on the part of any government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency—for example, the Federal Trade Commission, the Securities & Exchange Commission, the Foreign Funds Control Office of the Treasury, or others. It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like.

On the other hand, the common law torts of employees of regulatory agencies, as well as of all other Federal agencies, would be included within the scope of the bill. Thus, section 402(5) and (10), exempting from the purview of the bill claims arising from the administration of the Trading with the Enemy Act or from the fiscal operations of the Treasury, are not intended to exclude common law torts committed by employees of the Treasury Department or other Federal agency administering these laws and activities, such as those involving an automobile collision.<sup>76</sup>

These two paragraphs represent the entirety of the sparse—but famous and frequently cited—legislative history of the DFE.<sup>77</sup>

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75. *See id.* at 703–05 (discussing Congress’s proposed exceptions to federal tort claims legislation prior to the enactment of the FTCA).

76. *Id.* at 706–07 (quoting *Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before H. Comm. on the Judiciary, 77th Cong. 1942*) (statement of Francis Shea, Assistant Att’y Gen.).

77. *Id.* at 706 (discussing the brevity of the DFE’s legislative history).

This lack of a real legislative history has led to significant disagreement and confusion regarding various aspects of the DFE. For instance, courts have disagreed as to which party bears the burden of proving the DFE.<sup>78</sup> Some courts have treated the DFE as a jurisdictional requirement.<sup>79</sup> These courts reason that plaintiffs bear the burden of proving the DFE as a part of their overall burden to establish subject matter jurisdiction.<sup>80</sup> On the contrary, other courts do not consider the DFE to be a jurisdictional rule. Instead, they treat the exception like an affirmative defense, placing the burden on the United States to prove that it applies.<sup>81</sup> These two schools of thought have created a circuit split.<sup>82</sup>

## 2. Judicial Interpretation of the DFE

In 1991, the Supreme Court decided *United States v. Gaubert*,<sup>83</sup> which marks the last time the Court addressed the DFE.<sup>84</sup> Courts' interpretations of the DFE can be grouped into two relevant time periods: pre-*Gaubert* and post-*Gaubert*. Before *Gaubert*, nearly every court to confront the DFE applied it as an affirmative defense.<sup>85</sup> This rationale is illustrated by cases like *Stewart v. United*

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78. Colella & Bain, *supra* note 69, at 2923 (noting that "courts have reached inconsistent results with respect to which party bears the burden of proving the applicability or non-applicability of the discretionary function exception").

79. *E.g.*, *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) ("The [DFE] poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction." (quoting *Miller v. United States*, 710 F.2d 656, 662 (10th Cir. 1983))).

80. *Id.*; *accord* *Carroll v. United States*, 661 F.3d 87, 100 n.15 (1st Cir. 2011) ("Our precedent places the burden on the plaintiff to show that discretionary conduct . . . falls outside the exception."); *Welch v. United States*, 409 F.3d 646, 650–51 (4th Cir. 2005) (reasoning that "it is the plaintiff's burden to show that . . . none of the [FTCA]'s waiver exceptions apply" because "[a]ll waivers of sovereign immunity must be 'strictly construed'" (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996))); *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130, 1149 (N.D. Ala. 2013) ("Because the discretionary function doctrine is considered a challenge to the court's subject matter jurisdiction, plaintiff bears the burden to 'establish that the discretionary function does not apply.'" (quoting *Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006))).

81. *E.g.*, *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012); *Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008) (citing *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992)); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952).

82. Some federal courts of appeals have found the DFE to be a jurisdictional rule. *Carroll*, 661 F.3d at 100 n.15; *Hart v. United States*, 630 F.3d 1085, 1089 n.3 (8th Cir. 2011); *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175 (10th Cir. 2008). Other circuit court rulings have placed the burden on the United States to prove that the DFE applies. *Young v. United States*, 769 F.3d 1047, 1052 (9th Cir. 2014); *Keller v. United States*, 771 F.3d 1021, 1023 (7th Cir. 2014); *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 333. Other courts have simply declined to decide the issue. *See, e.g.*, *Mesa v. United States*, 123 F.3d 1435, 1439 n.6 (11th Cir. 1997); *Ruiz ex rel. E.R. v. United States*, No. 13–CV–1241 (KAM)(SMG), 2014 WL 4662241, at \*4 n.5 (E.D.N.Y. Sept. 18, 2014); *Walding v. United States*, 955 F. Supp. 2d 759, 770–71 (W.D. Tex. 2013); *Donahue v. United States*, 870 F. Supp. 2d 97, 104 n.4 (D.D.C. 2012).

83. 499 U.S. 315 (1991).

84. *Gaubert*, 499 U.S. at 334.

85. See *infra* Part III.C.2 for a discussion of the nearly unanimous treatment of the DFE as an affirmative defense by early courts.

*States*,<sup>86</sup> later adopted by the United States Court of Appeals for the Ninth Circuit in *Prescott v. United States*.<sup>87</sup> After *Gaubert*, some courts viewed the decision as placing the burden of proving the DFE on plaintiffs. This rationale is illustrated by the United States Court of Appeals for the Tenth Circuit’s decision in *Aragon v. United States*.<sup>88</sup>

a. *Pre-Gaubert Decisions*

The first court of appeals to discuss how burden of proof relates to the DFE was the United States Court of Appeals for the Seventh Circuit in *Stewart v. United States*.<sup>89</sup> In *Stewart*, several minors filed suit against the United States after the explosion of hand grenades that had been stocked and maintained by the United States Army injured them.<sup>90</sup> Plaintiffs appealed following dismissal of their complaint.<sup>91</sup> On appeal, the Seventh Circuit reversed, holding that the plaintiffs were entitled to recovery.<sup>92</sup> On remand, the government filed an amended answer in district court invoking the DFE.<sup>93</sup> The district court entered judgment in favor of the plaintiffs, and the government again appealed to the Seventh Circuit.<sup>94</sup> On its second time before the Seventh Circuit, the government presented the issue of whether the government waives the DFE if it fails to raise the exception in district court.<sup>95</sup> Deciding whether the DFE may be waived is necessary to determine whether the DFE is jurisdictional in nature, because if a particular defense is jurisdictional its applicability can never be waived.<sup>96</sup> Thus, judicial recognition that the government cannot raise a particular defense on appeal necessarily implies that that defense is not jurisdictional, and vice versa. That is exactly what happened in *Stewart*.

The *Stewart* court held that the FTCA “confer[s] general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven.”<sup>97</sup> Accordingly, the court concluded that the government had waived the DFE because it had not raised it in the lower court.<sup>98</sup> After noting the lack of

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86. 199 F.2d 517 (7th Cir. 1952).

87. 973 F.2d 696 (9th Cir. 1992).

88. 146 F.3d 819 (10th Cir. 1998).

89. 186 F.2d 627 (7th Cir. 1951).

90. *Id.* at 628.

91. *Id.*

92. *Id.* at 634. Subsequently, the government petitioned the Supreme Court for certiorari, which was denied. *See United States v. Stewart*, 341 U.S. 940 (1951) (denying certiorari).

93. *Stewart v. United States*, 199 F.2d 517, 518 (7th Cir. 1952).

94. *Id.*

95. *Id.* at 518–19.

96. *See Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987) (noting that jurisdictional defenses may be raised on appeal, or sua sponte by the court, because such defenses cannot be waived (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513–14 (1940))).

97. *Stewart*, 199 F.2d at 519.

98. *Id.*

authority supporting its position,<sup>99</sup> the court pulled language from the only case that previously discussed the issue of pleading the DFE.<sup>100</sup>

*Stewart* illustrates one side of the current circuit split, which treats the DFE as an affirmative defense and places the burden of proving the DFE on the government. In fact, the *Stewart* court adamantly pressed this point, going so far as to characterize the government's position—requiring the plaintiff to negative all of the FTCA's exceptions in his complaint—as “preposterous.”<sup>101</sup> Essential to the court's reasoning was the notion that, even if the DFE is technically a jurisdictional issue,<sup>102</sup> it nonetheless operates as an affirmative defense.<sup>103</sup> *Stewart* quickly became the benchmark case for scholars and courts that considered the DFE an affirmative defense.<sup>104</sup> This approach has since been muddled by various interpretations of the burden of proof's effect on the DFE.

For example, the *Stewart* approach was partially adopted by the United States Court of Appeals for the Sixth Circuit in *Carlyle v. United States*.<sup>105</sup> The *Carlyle* court disagreed with the proposition found in *Stewart* that a plaintiff can invoke subject matter jurisdiction without regard to the exceptions of the FTCA.<sup>106</sup> The *Carlyle* majority agreed that the government bears the ultimate burden of proving the applicability of the DFE.<sup>107</sup> However, the majority added a minor caveat—that the plaintiff's pleaded facts, in his complaint, must fall outside of the FTCA's exceptions.<sup>108</sup>

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99. *Id.* (conceding that “the view which we take . . . finds little direct support”).

100. *Id.* (“Unless the pleadings show upon their face the applicability of the [DFE] . . . the same must be raised by way of an affirmative defense and the burden therefore devolves upon the Government to establish its applicability.” (quoting *Boyce v. United States*, 93 F. Supp. 866, 868 (S.D. Iowa 1950))).

101. *Id.* at 520.

102. *Id.* at 519 (“The word ‘jurisdiction’ is an illusive and uncertain characterization, depending upon the environment in which it is employed.”).

103. *Id.* at 520 (concluding that “[i]f the government desires to rely upon [the DFE] it has a right to do so in defense of the action, providing such defense is aptly pleaded and proven”).

104. *See, e.g.*, *Neher v. United States*, 265 F. Supp. 210, 215 (D. Minn. 1967) (following *Stewart* and holding that the government bears the burden of proving the applicability of the DFE after acknowledging, but disagreeing, with other courts that had placed the burden on the plaintiff); *Smith v. United States*, 155 F. Supp. 605, 612 (E.D. Va. 1957) (following *Stewart* and *Boyce* in holding that the government must prove the applicability of the DFE); Note, *Torts—Federal Tort Claims Act—Accident Held to Be Within Discretionary Function Exception Without Proof Where Government Claims Military Secrecy*, 67 HARV. L. REV. 1279, 1280–81 (1954) (endorsing the “practical merit[s]” of the *Stewart* approach to the DFE because the opposite approach would be unfair to plaintiffs who likely cannot “obtain the information necessary to sustain the burden”).

105. 674 F.2d 554, 556 (6th Cir. 1982).

106. *Carlyle*, 674 F.2d at 556 (disagreeing with the Seventh Circuit's determination in *Stewart* “to the extent that it [held] that a plaintiff may invoke jurisdiction under [the FTCA] without regard to the requirements of [the statutory exceptions]” and stating that a “plaintiff can invoke jurisdiction only if the complaint is facially outside the exceptions”).

107. *Id.*

108. *Id.*

Following the Sixth Circuit’s decision, courts interpreted *Carlyle* as placing the burden of proving the DFE on the government.<sup>109</sup> However, not all circuits agreed with this interpretation.<sup>110</sup> Nine years after *Carlyle*, the Supreme Court addressed the DFE.

*b. Gaubert Muddies the Water*

In *Gaubert*,<sup>111</sup> the Supreme Court addressed the substantive scope of the DFE.<sup>112</sup> Respondent, Thomas Gaubert, had been the chairman of the board and the largest shareholder of the Independent American Savings Association (IASA).<sup>113</sup> IASA was a savings and loan institution in Texas.<sup>114</sup> In 1984, pursuant to the Home Owners’ Loan Act of 1933,<sup>115</sup> federal regulators took over IASA and began instituting a merger with another failing savings and loan institution.<sup>116</sup> Due to their concerns with Gaubert’s financial dealings, the federal regulators removed Gaubert from management at IASA and required him to post a \$25 million interest in real property, which served as a personal guarantee that IASA’s net worth would meet federal regulatory standards.<sup>117</sup> Eventually, federal regulators replaced IASA’s then-existing board of directors.<sup>118</sup> Several years later, the new directors at IASA released statements that the IASA had a “substantial negative net worth.”<sup>119</sup> Based on the subsequent decline in value of his shares, Gaubert sued the federal government, alleging that the federal regulators who took over IASA were negligent in their management of the company.<sup>120</sup>

The United States District Court for the Northern District of Texas dismissed Gaubert’s complaint, holding that all of the challenged conduct of the regulators fell within the purview of the DFE.<sup>121</sup> However, the United States Court of Appeals for the Fifth Circuit disagreed, and the United States then appealed to the Supreme Court.<sup>122</sup> The government argued to the Supreme

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109. *E.g.*, *Martinez v. United States*, 740 F. Supp. 399, 401 (D.S.C. 1990) (“Once the plaintiff has established a prima facie case of applicability of the FTCA, the burden shifts to the government to prove that an act is excepted by 28 U.S.C. § 2680.” (citing *Carlyle*, 674 F.2d at 554)); *Bergman v. United States*, 565 F. Supp. 1353, 1404–05 (W.D. Mich. 1983) (relying on *Carlyle* in placing the burden on the government).

110. *E.g.*, *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987) (recognizing that *Carlyle* placed the burden on the government but declining to follow its approach).

111. 499 U.S. 315 (1991).

112. *Gaubert*, 499 U.S. at 322–25.

113. *Id.* at 319.

114. *Id.*

115. 12 U.S.C. §§ 1461–1468c (2012).

116. *Gaubert*, 499 U.S. at 319.

117. *Id.*

118. *Id.* at 319–20.

119. *Id.* at 320.

120. *Id.*

121. *Id.*

122. *Id.* at 322.

Court that the conduct of the federal regulators who intervened in the savings and loan industry fell within the scope of the DFE.<sup>123</sup> Ultimately, the Supreme Court held that such conduct did fall within the DFE and consequently dismissed Gaubert's claim.<sup>124</sup>

Although *Gaubert* never directly addressed the burden of proof issue, courts and scholars alike have questioned whether the decision created a certain framework for dealing with burden of proof in the context of the DFE.<sup>125</sup> In particular, they have grappled with the following language from Justice White's majority opinion in *Gaubert*:

For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.<sup>126</sup>

Some courts have interpreted the above language as placing the ultimate burden of proving the DFE on plaintiffs.<sup>127</sup>

c. *Post-Gaubert Decisions*

*Aragon v. United States* embodies the antithesis of the *Stewart* approach: plaintiffs should bear the burden of proving the applicability of the DFE.<sup>128</sup> In *Aragon*, the Tenth Circuit stressed that the DFE is a jurisdictional "prerequisite to suit."<sup>129</sup> The Court relied on the general rule that plaintiffs bear the ultimate burden of establishing subject matter jurisdiction.<sup>130</sup> Consequently, the court reasoned, plaintiffs bear the burden of proving the applicability of the DFE "as a part of [their] overall burden to establish subject matter jurisdiction."<sup>131</sup> Ultimately, the Tenth Circuit affirmed dismissal of the case for lack of subject

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123. *Id.* at 318–19.

124. *Id.* at 334.

125. *E.g.*, *Kiehn v. United States*, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993) (questioning whether *Gaubert* supports the position that the government bears the burden of proving the applicability of the DFE); *Autery v. United States*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) (declining to decide which party bears the burden of proving the DFE after noting that in *Gaubert* "the Supreme Court *appeared to* impose the burden on the tort plaintiff to show that the government's conduct is not protected under the [DFE]" (emphasis added)). *But see* *Colella & Bain, supra* note 69, at 2926–27 (arguing that *Gaubert* created a burden-shifting scheme that places the burden on FTCA plaintiffs).

126. *Gaubert*, 499 U.S. at 324–25.

127. *E.g.*, *Autery*, 992 F.2d at 1526 n.6 (interpreting *Gaubert* as shifting the burden of proving the DFE to the plaintiff); *Northlight Harbor, LLC v. United States*, 561 F. Supp. 2d 517, 526 n.4 (D.N.J. 2008) (same).

128. *Aragon*, 146 F.3d at 823, 827.

129. *Id.* at 823 (internal quotation marks omitted).

130. *Id.*

131. *Id.* (quoting *Miller v. United States*, 710 F.2d 656, 662 (10th Cir. 1983)).

matter jurisdiction, citing *Gaubert* in doing so.<sup>132</sup> This position conflicts with other circuits that believe *Gaubert* did not address the issue of burden of proof.

For example, in *Prescott v. United States*, the Ninth Circuit expressly rejected the rationale employed in *Aragon*.<sup>133</sup> After holding that the government bears the burden of proving the applicability of the DFE,<sup>134</sup> the court went on to counter the government’s assertion that its decision conflicted with *Gaubert*.<sup>135</sup> The *Prescott* rationale—like the *Stewart* rationale—is that the DFE operates as an affirmative defense and therefore defendants bear the ultimate burden of proving it.<sup>136</sup> Like *Aragon*, the *Prescott* court acknowledged that plaintiffs bear the burden of persuading a court that it has subject matter jurisdiction.<sup>137</sup> Unlike *Aragon*, however, the *Prescott* court did not interpret this general jurisdictional principle as conflicting with placing the burden on defendants because *Prescott* viewed the two principles as separate.<sup>138</sup> Since *Prescott* was decided in 1992, disagreement among circuits regarding the burden of proving the DFE has only increased.<sup>139</sup>

#### D. “Jurisdictionality”

The aforementioned circuit split begs the following question: What makes a particular rule “jurisdictional”? All of the circuits that place the burden of proving the DFE on plaintiffs rest their conclusion on an assumption that the

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132. See *id.* at 827 (employing *Gaubert*’s “to survive a motion to dismiss” language to find that the plaintiffs had failed to carry their burden of proof).

133. *Prescott*, 973 F.2d at 701–03.

134. *Id.* at 702 (“Because an exception to the FTCA[] . . . , although jurisdictional on its face, is analogous to an affirmative defense, we believe the Sixth and Seventh Circuits [in *Carlyle* and *Stewart*] correctly placed the burden on the United States as the party which benefits from the defense”).

135. *Id.* at 702 n.4 (boldly claiming that “*Gaubert*, of course, did not deal with the burden of proof question”).

136. *Id.* at 702.

137. *Id.* at 701.

138. See *id.* at 701–02 (emphasizing that mere recognition of the general principle that plaintiffs must establish subject matter jurisdiction in federal court does not address the issue of allocation of that burden regarding the FTCA’s “exceptions”).

139. Compare *St. Tammany Parish ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 315 n.3 (5th Cir. 2009) (declining to decide the issue after providing a comprehensive summary of the circuit split), *Sharp ex rel. Estate of Sharp v. United States*, 401 F.3d 440, 443 n.1 (6th Cir. 2005) (recognizing that *Prescott* might be suspect in light of *Gaubert* but ultimately declining to decide the issue of burden of proof), *Kiehn v. United States*, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993) (same), and *Autery v. United States*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) (same), with *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012) (acknowledging the circuit split and the contentious *Gaubert* language, but ultimately concluding that “absent an explicit statement from the Supreme Court that the plaintiff bears the ultimate burden, . . . the burden of proving the applicability of the [DFE] is most appropriately placed on the Government”), *Hawes v. United States*, 409 F.3d 213, 216 (4th Cir. 2005) (placing the burden of proof on the plaintiff), and *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (stating that the plaintiff bears the ultimate burden of proving the nonapplicability of the DFE because the DFE “poses a jurisdictional prerequisite to suit” (quoting *Miller v. United States*, 710 F.2d 656, 662 (10th Cir. 1983))).

DFE is jurisdictional. Thus, resolution of this question would be determinative in deciding which party bears the burden.

As various Supreme Court Justices have mentioned, the word “jurisdiction” carries many meanings.<sup>140</sup> And of course, a jurisdictional rule carries with it extreme consequences for litigants.<sup>141</sup> With these considerations in mind, the Supreme Court has recently begun to develop a framework for analyzing the “jurisdictionality” of statutory provisions.<sup>142</sup> The Court’s decision to provide a bright-line rule for jurisdictional determinations was borne out of recognition that courts had been loosely and inappropriately using the jurisdictional label.<sup>143</sup> The framework created by the Court—and more specifically, Justice Ginsburg—is now referred to as the “clear-statement principle.”<sup>144</sup> The clear-statement principle was first articulated in *Arbaugh v. Y & H Corp.*<sup>145</sup> In *Arbaugh*, the Court addressed whether Title VII of the Civil Rights Act of 1964’s definition of “employer”<sup>146</sup> is a required substantive element, or rather, a jurisdictional requirement of a Title VII claim.<sup>147</sup> At the outset, Justice Ginsburg noted that courts have been “erroneously confla[ing]” subject matter jurisdiction with “merits-related” determinations.<sup>148</sup> These “drive-by jurisdictional rulings,” Justice Ginsburg wrote, have contributed to inaccurate characterizations of statutory provisions as jurisdictional.<sup>149</sup>

Under the clear-statement principle, the Court first looks to whether the legislature “clearly states” that the statutory provision is jurisdictional.<sup>150</sup> If the legislature has, then the Court finds the provision to be jurisdictional.<sup>151</sup> If the legislature has not labeled such provision jurisdictional, then the Court treats it as nonjurisdictional.<sup>152</sup> In *Reed Elsevier, Inc. v. Muchnick*,<sup>153</sup> Justice Thomas applied the clear-statement principle to determine whether the Copyright Act’s registration requirement is jurisdictional.<sup>154</sup> Justice Thomas held that the

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140. See *supra* note 2 and accompanying text for a reference to Justices Scalia and Ginsburg’s recognition of the word’s complexity.

141. See *supra* notes 3–7 and accompanying text for a brief discussion of the unique and dire consequences associated with labeling a rule jurisdictional.

142. See *supra* Part II.D for an in-depth discussion of this strain of decisions.

143. See, e.g., *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (admitting that the Court has lacked discipline in its usage of the term “jurisdiction,” which has resulted in “untoward consequences” for litigants).

144. E.g., *Gonzalez v. Thaler*, 132 S. Ct. 641, 648–49 (2012).

145. 546 U.S. 500, 515–16 (2006).

146. To be actionable, a Title VII claim must be filed against an “employer,” defined as a person with “fifteen or more employees.” 42 U.S.C. § 2000e(b) (2012).

147. *Arbaugh*, 546 U.S. at 503.

148. *Id.* at 511 (quotation marks omitted).

149. *Id.* at 511–13.

150. *Id.* at 515–16.

151. *Id.*

152. *Id.*

153. 559 U.S. 154 (2010).

154. *Reed Elsevier*, 559 U.S. at 161–62.

registration requirement is not jurisdictional,<sup>155</sup> despite the fact that the word “jurisdiction” appears in the registration-requirement provision.<sup>156</sup> The majority also based its decision on the provision’s separation from the jurisdiction-granting provision of the Copyright Act.<sup>157</sup>

Several years later in *Henderson v. Shinseki*,<sup>158</sup> Justice Alito held that the provision in the Veterans’ Judicial Review Act allowing veterans 120 days to appeal their disability determination was not jurisdictional.<sup>159</sup> Applying the clear-statement principle, the majority reasoned that the provision contained no jurisdictional language and was separated from the jurisdiction-granting provision.<sup>160</sup> Justice Alito also added that, in determining whether Congress intended a provision to be jurisdictional, courts may look to context—namely, the Supreme Court’s past interpretation of similar provisions.<sup>161</sup> Since *Shinseki*, the Court has held that two other provisions—in the Medicare statute<sup>162</sup> and Clean Air Act<sup>163</sup>—were not jurisdictional.

With respect to the jurisdictionality of the FTCA’s exceptions, the Supreme Court has been inconsistent in its opinions.<sup>164</sup> One could presumably conclude that the Supreme Court regards FTCA exceptions as jurisdictional by pointing to *Sheridan v. United States*<sup>165</sup> or *Smith v. United States*.<sup>166</sup> In *Sheridan*, the Court mentioned in dicta that the FTCA’s jurisdictional grant does not extend to matters where an exception applies.<sup>167</sup> In *Smith*, the Court expressed, again in dicta, that the FTCA’s exceptions “preclude[] the exercise of jurisdiction.”<sup>168</sup> One could, however, just as easily conclude that the Court does *not* view the exceptions as jurisdictional by pointing to *Indian Towing Co. v. United States*<sup>169</sup> and *Block v. Neal*.<sup>170</sup> In both of these cases, the Court did not address the DFE after acknowledging that the government had conceded to the DFE’s inapplicability.<sup>171</sup> Therefore, the argument goes, the DFE cannot be jurisdictional because if it were, the Court in *Indian Towing* and *Block* would

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155. *Id.* at 163.

156. 17 U.S.C. § 411(a) (2012).

157. *Reed Elsevier*, 559 U.S. at 166. The jurisdiction-granting provision can be found at 28 U.S.C. § 1338 (2012), while the registration-requirement provision can be found at 17 U.S.C. § 411(a).

158. 562 U.S. 428 (2011).

159. *Shinseki*, 562 U.S. at 441–42.

160. *Id.* at 435–40.

161. *Id.* at 436.

162. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 826 (2013).

163. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602–03 (2014) (Clean Air Act).

164. Sisk, *The Continuing Drift*, *supra* note 11, at 557–58.

165. 487 U.S. 392 (1988).

166. 507 U.S. 197 (1993).

167. *Sheridan*, 487 U.S. at 398.

168. *Smith*, 507 U.S. at 199.

169. 350 U.S. 61 (1955).

170. 460 U.S. 289 (1983).

171. *Block*, 460 U.S. at 294; *Indian Towing*, 350 U.S. at 64.

have been required to raise the issue *sua sponte*.<sup>172</sup> In at least two other cases, the Court has expressed an inclination to construe FTCA exceptions differently than the FTCA's waiver provision.<sup>173</sup>

*E. Rule 8(c) and Affirmative Defenses*

Up until 1934, federal courts applied state procedural law in nearly all cases.<sup>174</sup> In 1934, Congress passed the Rules Enabling Act (REA), which authorizes the Supreme Court to promulgate rules of procedure.<sup>175</sup> The REA declares: "All laws in conflict with such rules shall be of no further force or effect . . ."<sup>176</sup> The REA also contains the limitation that any of these rules "shall not abridge, enlarge or modify any substantive right."<sup>177</sup> Most REA cases have implicated the Erie doctrine, which generally requires federal courts to apply state substantive law and federal procedural law (i.e., the Federal Rules of Civil Procedure).<sup>178</sup> In other contexts, the Supreme Court has considered whether a federal rule of civil procedure supersedes a federal statute's rule of procedure.<sup>179</sup> Notably, the Supreme Court has rejected every claim that a federal rule of civil procedure violates the REA.<sup>180</sup>

Rule 8 of the Federal Rules of Civil Procedure governs pleading procedure.<sup>181</sup> At common law, a defendant could admit the merits of a plaintiff's claim but still avoid liability by pleading new facts that would defeat a plaintiff's claim.<sup>182</sup> This type of plea was said to be "by way of 'confession and avoidance.'"<sup>183</sup> The doctrines of contributory negligence and assumption of risk are examples of confession-and-avoidance pleas.<sup>184</sup> A defendant's allegation that a plaintiff assumed the risk or was contributorily negligent says nothing of a defendant's liability. Nonetheless, a successful assumption of risk or contributory

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172. See Sisk, *The Continuing Drift*, *supra* note 11, at 558 (making this argument).

173. Dolan v. U.S. Postal Serv., 546 U.S. 481, 491–92 (2006) (stating that the general rule of strictly construing statutory waivers of sovereign immunity does not apply to FTCA exceptions because said construction would undermine the main purpose of the FTCA); see also United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (recognizing that, unlike other statutory waivers, the Court has narrowly construed FTCA exceptions in favor of plaintiffs).

174. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1690–91 (2004).

175. 28 U.S.C. § 2072(a) (2012); see *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07 (2010).

176. 28 U.S.C. § 2072(b).

177. *Id.*

178. Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595, 596 (2008).

179. See *Henderson v. United States*, 517 U.S. 654, 668–70 (1996) (holding that Federal Rule of Civil Procedure 4—the rule governing service requirements—supersedes the SSA's service rule). This case also contains a hearty discussion of jurisdictionality and the clear-statement principle.

180. *Shady Grove*, 559 U.S. at 407.

181. FED. R. CIV. P. 8.

182. 5 WRIGHT ET AL., *supra* note 61, § 1270 (quoting *Biglands v. Maysville Reg'l Water & Sewer Dist.*, No. 1:12-CV-00067, 2012 WL 2130555, at \*3 (N.D. Ind. June 12, 2012)).

183. *Id.*

184. *Id.*

negligence defense would carry the day at common law. Simply put, a plaintiff’s claim could be dismissed, per a successful affirmative defense, despite the merits of that claim.

The Federal Rules of Civil Procedure sought to codify the concept of affirmative defenses in Rule 8(c).<sup>185</sup> Specifically, Rule 8(c) requires defendants to “affirmatively state any avoidance or affirmative defense.”<sup>186</sup> It goes on to list eighteen enumerated defenses that are subject to its pleading requirements.<sup>187</sup> Rule 8(c) embodies the drafters’ conscious effort to avoid debate over the question of what constitutes an affirmative defense.<sup>188</sup> Although not expressly listed in Rule 8(c), various jurisdictions have treated the DFE as an affirmative defense.<sup>189</sup>

### III. DISCUSSION

A few years ago, Justice Thomas wrote: “Our recent cases evince a marked desire to curtail . . . ‘drive-by jurisdictional rulings,’ which too easily can miss the ‘critical difference[s]’ between true jurisdictional conditions and nonjurisdictional limitations on causes of action.”<sup>190</sup> Every current member of the Court has similarly derogated these “drive-by jurisdictional rulings.”<sup>191</sup> Despite the high Court’s cautionary tone, some lower courts have hopped in the car and cruised right by statutory provisions, slapping the “jurisdictional” label on them in brief passing. This has happened with the discretionary function exception (DFE). The *Aragon*-following courts (and scholars) that place the burden of proving the DFE on plaintiffs have based their reasoning on an erroneous jurisdictional reading of the DFE.

This Discussion begins by dislodging the frequently used argument that sovereign immunity is inherently jurisdictional.<sup>192</sup> Second, this Discussion applies the Supreme Court’s jurisdictional framework—the clear-statement principle—to the DFE. Under the clear-statement principle, the DFE is far from

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185. FED. R. CIV. P. 8(c)(1).

186. *Id.*

187. *Id.* This list of defenses includes fraud, duress, and contributory negligence.

188. 5 WRIGHT ET AL., *supra* note 61, § 1270.

189. See *supra* Part II.C.2 for a description of some courts’ treatment of the DFE as an affirmative defense.

190. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (second alteration in original) (first quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998); then quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

191. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (opinion of Ginsburg, J.) (calling “drive-by jurisdictional rulings” “unrefined dispositions” that should have absolutely “no precedential effect” (quoting *Citizens for a Better Env’t*, 523 U.S. at 91 (opinion of Scalia, J.)); see also *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (opinion of Sotomayor, J., joined by Roberts, C.J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ.) (professing the Court’s desire to “‘bring some discipline’ to the use of the word ‘jurisdictional’” because of the Court’s “less than meticulous” prior use of the term (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011))).

192. See *infra* Part III.A for a discussion of the sovereign immunity doctrine and its nonjurisdictional origins.

jurisdictional.<sup>193</sup> For these reasons, this Comment criticizes the characterization of the DFE as a “jurisdictional prerequisite to suit” because this characterization relies on a flawed premise.

This Discussion goes on to closely examine the DFE’s legislative history, case law, scholarship, and Federal Tort Claims Act (FTCA) litigants’ pleadings, which reveal that the DFE is an “affirmative defense.”<sup>194</sup> This examination also reveals that sovereign immunity has historically been treated as an affirmative defense in international, federal, and state contexts.<sup>195</sup> Next, this Discussion criticizes the view that *United States v. Gaubert* was a case about burden of proof.<sup>196</sup> Lastly, this Discussion compares the FTCA’s statutory scheme to that of the Foreign Sovereign Immunities Act (FSIA) and the Class Action Fairness Act (CAFA).<sup>197</sup> This comparison makes clear that neither Congress nor courts ordinarily consider subject matter jurisdiction when assigning the burden of proving statutory exceptions. This Discussion ends by explaining why amending Rule 8(c) to include the DFE would be beneficial.<sup>198</sup> In doing so, it offers several cases whereby FTCA plaintiffs have been deprived of their day in court due to the very “drive-by jurisdictional rulings” that the Supreme Court has admonished.<sup>199</sup> It then explains how Rule 8(c) offers an opportunity to correct this problem by providing bright-line guidance for courts.

#### A. *Sovereign Immunity Is Not Jurisdictional in Nature*

The FTCA relates to the sovereign immunity doctrine. Judges and scholars disagree about the nature and origin of this doctrine in American law.<sup>200</sup> One position maintains that sovereign immunity is inherently jurisdictional.<sup>201</sup> Another theory proposes that sovereign immunity is an absolute right that the government enjoys simply by way of its status as a sovereign entity.<sup>202</sup> Still others believe that sovereign immunity is a common law doctrine derived from English

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193. See *infra* Part III.B for an application of the Supreme Court’s clear-statement principle to the DFE.

194. See *infra* Part III.C for a summary of cases, scholarly articles, pleadings, and legislative history, all of which indicate that the DFE is an affirmative defense.

195. See *infra* notes 271–73 and accompanying text for a sample of state and federal courts that have concluded that sovereign immunity is an affirmative defense.

196. See *infra* Part III.D for an analysis of *Gaubert* and a critique of those who have interpreted the Court’s ruling as placing the burden of proving the DFE on plaintiffs.

197. See *infra* Part III.E for a discussion of the deficiency of the *Aragon* approach to the FTCA when compared to judicial assessments of the FSIA and CAFA.

198. See *infra* Part III.F for the rationale behind amending Rule 8(c)(1) to include the DFE.

199. See *infra* notes 421–34 and accompanying text for a discussion of these cases and the fundamental unfairness that accompanies faulty interpretations of jurisdiction and burden of proof.

200. See *supra* Part II.A for a summary of competing theories regarding the origin of sovereign immunity.

201. *E.g.*, *Henderson v. United States*, 517 U.S. 654, 675 (1996) (Thomas, J., dissenting) (opining that “[s]overeign immunity is by nature jurisdictional”).

202. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 713–15 (1999).

law.<sup>203</sup> Under any of these approaches, however, sovereign immunity is not jurisdictional.

A quick examination of the Supreme Court’s treatment of sovereign immunity should be enough to debunk the jurisdictional treatment of the doctrine. For example, it is well established that a state may waive its sovereign immunity.<sup>204</sup> As explained in *Lapides v. Board of Regents of University System of Georgia*,<sup>205</sup> when a state consents to removal to federal court, the court will treat that state’s immunity as forfeited.<sup>206</sup> Thus, sovereign immunity cannot be jurisdictional in the very least because rules affecting subject matter jurisdiction can never be waived.<sup>207</sup> Courts are *required* to raise jurisdictional issues sua sponte.<sup>208</sup> This becomes particularly relevant when looking at two FTCA cases: *Block v. Neal*<sup>209</sup> and *Indian Towing Co. v. United States*.<sup>210</sup> In both of these FTCA cases, the Supreme Court recognized that the United States had conceded the DFE did not apply to the case at bar.<sup>211</sup> However, the Court did not address the issue sua sponte, as would be mandated were the DFE truly a jurisdictional prerequisite. Scholars have aptly criticized a jurisdictional reading of the DFE based on these two cases.<sup>212</sup>

Justice Kennedy again confirmed the notion that sovereign immunity is waivable in *Idaho v. Coeur d’Alene Tribe*.<sup>213</sup> In *Coeur d’Alene Tribe*, Justice Kennedy remarked that the Eleventh Amendment “enacts a sovereign immunity from suit, *rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction*.”<sup>214</sup> In other words, sovereign immunity simply prevents a claim from going forward, but not because the claim lacks subject matter jurisdiction. Despite the clarity of these statements, some members of the Court still cling to the idea that sovereign immunity is jurisdictional.

For example, in *Henderson v. United States*,<sup>215</sup> Justice Thomas—along with former Chief Justice Rehnquist and Justice O’Connor—opined that “[s]overeign immunity is by nature jurisdictional.”<sup>216</sup> This point is not persuasive for at least three reasons. First, and most basically, the fact that it is a dissent indicates that the argument failed to garner support from a majority of the Court. Second,

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203. See *supra* notes 19–21 and accompanying text for a brief outline of this argument.

204. See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (holding that a state waives its sovereign immunity when it voluntarily invokes removal to federal court).

205. 535 U.S. 613 (2002).

206. *Lapides*, 535 U.S. at 620.

207. See *supra* notes 3–7 and accompanying text for this well-settled principle.

208. Sisk, *The Continuing Drift*, *supra* note 11, at 545.

209. 460 U.S. 289 (1983).

210. 350 U.S. 61 (1955).

211. *Block*, 460 U.S. at 294; *Indian Towing*, 350 U.S. at 64.

212. E.g., Sisk, *The Continuing Drift*, *supra* note 11, at 558.

213. 521 U.S. 261, 267 (1997).

214. *Coeur d’Alene Tribe*, 521 U.S. at 267 (emphasis added).

215. 517 U.S. 654 (1996).

216. *Henderson*, 517 U.S. at 675 (1996) (Thomas, J., dissenting) (citing *Fed. Deposit Ins. v. Meyer*, 510 U.S. 471, 475 (1994)).

Justice Thomas immediately contradicted his own reasoning by going on to describe sovereign immunity as a “right.”<sup>217</sup> Lastly, there is no basis in the Constitution for concluding that sovereign immunity is “by nature jurisdictional.”<sup>218</sup> This anti-textual argument proves to be all the more ironic when considering that its proponents tend to be strict adherents of the originalist approach.<sup>219</sup> Originalists maintain that constitutional rights should be found only when they are expressed in the text of the Constitution.<sup>220</sup> However, the text of the Constitution says absolutely nothing about sovereign immunity. For whatever reason, this has not prevented the Court’s originalists from attempting to ascribe a textual basis for sovereign immunity.<sup>221</sup> In *Alden v. Maine*, Justice Kennedy, a nonoriginalist, wrote that the Constitution “specifically recognizes the States as sovereign entities.”<sup>222</sup> But the mere fact that the Constitution refers to the states as “entities” is irrelevant as to whether or not those “entities” may be sued in court.

In sum, the scale weighs heavily in favor of finding that sovereign immunity is not a jurisdictional doctrine. The Constitution is silent on sovereign immunity, and use of the Eleventh Amendment to support sovereign immunity has emerged only through an obliteration of the plain meaning of the English language. Moreover, plenty of Supreme Court jurisprudence and scholarship supports a nonjurisdictional treatment of the doctrine. It is difficult to say whether sovereign immunity is a fundamental right of the government or a common law doctrine. Sovereign immunity could be viewed as a common law doctrine because the concept was adopted from Great Britain. Critics of this approach validly point out that American sovereign immunity could not truly be derived from English common law because our American system of government is materially different than the English feudal system. It is also difficult to label sovereign immunity jurisdictional because a common law origin would mean that sovereign immunity came before the constitutional source of original jurisdiction itself—Article III. And, to be sure, Article III in no way incorporated sovereign immunity on its face. The most realistic view of sovereign immunity suggests that the doctrine exists today as a judicially imposed right. Its foundational origin, outside of case law, is precarious at best.

*B. Congress Has Not Clearly Stated that the DFE Is Jurisdictional*

The DFE is not jurisdictional when applied to the Supreme Court’s jurisdictional precedent. As previously discussed, the Supreme Court now applies the clear-statement principle in deciding whether statutory provisions are

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217. *Id.* at 676.

218. *Id.* at 675.

219. See Chemerinsky, *supra* note 19, at 1204–05 (criticizing certain Justices for abandoning their originalist interpretation in the context of sovereign immunity).

220. *Id.* at 1205.

221. *Id.* at 1206.

222. *Alden v. Maine*, 527 U.S. 706, 713 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)).

jurisdictional.<sup>223</sup> Under this framework, it is highly unlikely that the Court would find the DFE to be jurisdictional. To recap, the clear-statement inquiry asks whether Congress has clearly stated that a particular provision or rule is jurisdictional.<sup>224</sup> If Congress has not, the Court presumes that the provision is nonjurisdictional.<sup>225</sup> In assessing Congress’s intent, the Court considers its own interpretations of “similar provisions” in the past.<sup>226</sup> The Court’s recent jurisdictional jurisprudence reveals a staunch reluctance to label provisions as jurisdictional.

Congress has never stated—let alone *clearly* stated—that the DFE is jurisdictional. Just like the Title VII provision at issue in *Arbaugh v. Y & H Corp.*, the DFE provision does not include the words “jurisdiction” or “jurisdictional.”<sup>227</sup> Since this absence of language was relevant to the Court’s nonjurisdictional finding in *Arbaugh*, it is likely that the Court would consider this absence in the DFE as indicative of the DFE’s nonjurisdictional makeup. Central to the Court’s holding in *Arbaugh* was that the provision at issue was located separately from Title VII’s jurisdiction-granting provision.<sup>228</sup> This exact phenomenon is also present with respect to the DFE. The FTCA’s jurisdiction-granting provision, section 1346(b), is in Chapter 85 of Title 28 of the United States Code.<sup>229</sup> Chapter 85 is titled “District Courts; Jurisdiction.”<sup>230</sup> On the contrary, the DFE is located in an entirely different chapter—Chapter 171—which is titled “Tort Claims Procedure.”<sup>231</sup> It was this precise statutory placement—outside of Chapter 85, the “District Courts; Jurisdiction” chapter—that led the Court in *Arbaugh* to conclude that the Title VII provision “does not speak in jurisdictional terms.”<sup>232</sup> Other Justices followed this same line of reasoning in *Reed Elsevier, Inc. v. Muchnick* to find a provision of the Copyright Act nonjurisdictional.<sup>233</sup>

For the same reasons, *Henderson v. Shinseki* also supports a finding that the DFE is not jurisdictional.<sup>234</sup> In *Shinseki*, Justice Alito held that the 120-day limit to appeal a decision of the Department of Veterans Affairs was not jurisdictional.<sup>235</sup> Like the majorities in *Reed Elsevier* and *Arbaugh*, Justice Alito focused on Congress’s placement of the provision within the statute.<sup>236</sup>

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223. See *supra* Part II.D for a discussion of the Court’s jurisdictional jurisprudence.

224. *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S.Ct. 817, 824 (2013).

225. *Id.*

226. *Id.* (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010)).

227. 28 U.S.C. § 2680 (2012).

228. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–15 (2006).

229. 28 U.S.C. § 1346(b)(1).

230. *Id.* §§ 1330–1369.

231. *Id.* §§ 2671–2680.

232. *Arbaugh*, 546 U.S. at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

233. *Reed Elsevier*, 559 U.S. at 164–65.

234. *Henderson v. Shinseki*, 562 U.S. 428 (2011).

235. *Id.* at 441.

236. *Id.* at 438–39.

Specifically, he noted that Congress chose to place the day-limit provision in a subchapter titled “Procedure.”<sup>237</sup> In the same vein, Justice Alito based his decision on Congress’s decision not to place the provision in the section of the statute governing jurisdiction.<sup>238</sup> Applying this analysis to the FTCA’s DFE would yield the same result—nonjurisdictional. Just like the day-limit provision considered in *Shinseki*, the DFE is located in a subchapter titled “Tort Claims Procedure.”<sup>239</sup> Also similar to *Shinseki*, Congress elected not to place the DFE in the FTCA’s jurisdiction-granting provision. In sum, the Court has given great weight to Congress’s placement of rules outside of statutes’ jurisdiction-granting provisions in concluding that those rules were not jurisdictional.<sup>240</sup> Therefore, the DFE’s similar location would very likely lead the Court to label it nonjurisdictional.

Even more indicative of the DFE’s nonjurisdictional nature is Justice Thomas’s statutory interpretation in *Reed Elsevier*.<sup>241</sup> In that case, the Court held that Congress did not “clearly state[]” that a provision of the Copyright Act was jurisdictional, despite the provision’s inclusion of the word “jurisdiction.”<sup>242</sup> Justice Thomas wrote for the majority and reached this conclusion after reviewing the Copyright Act’s legislative history.<sup>243</sup> After dissecting legislative history, Justice Thomas concluded that Congress did not intend the word “jurisdiction” to relate to *subject matter* jurisdiction.<sup>244</sup> Therefore, he reasoned, the provision was not truly jurisdictional.<sup>245</sup> Based on this critical analysis, it is doubtful the Court would label the DFE—which does not contain any jurisdictional buzzwords—jurisdictional.

Some lower courts have opined that the DFE is jurisdictional because the DFE refers back to the FTCA’s jurisdiction-granting provision.<sup>246</sup> The DFE begins: “The provisions of this chapter and section 1346(b) of this title shall not apply to—[listing exceptions].”<sup>247</sup> However, the Supreme Court has flatly rejected this type of relation-back rationale in determining a provision’s

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237. *Id.* at 439.

238. *Id.* at 439–40.

239. 28 U.S.C. §§ 2671–2680 (2012) (emphasis added).

240. *See* *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015) (very recently holding that the FTCA’s statute of limitations is not jurisdictional, in relevant part, because of the provision’s placement apart from the FTCA’s “jurisdictional grant” (citing *Henderson*, 562 U.S. at 439–40; then citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164–65 (2010); then citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006); and then citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–94 (1982))).

241. 559 U.S. 154 (2010).

242. *Reed Elsevier*, 559 U.S. at 163 (citing 17 U.S.C. § 411(a) (2006)).

243. *Id.* at 163–64.

244. *Id.* at 164–65.

245. *Id.* at 166.

246. *See, e.g.,* *Abreu v. United States*, 468 F.3d 20, 25 (1st Cir. 2006) (reasoning that the DFE is jurisdictional because, if the DFE applied, then “the jurisdictional grant of section 1346(b) [would] not”).

247. 28 U.S.C. § 2680 (2012).

jurisdictionality.<sup>248</sup> In *Gonzalez v. Thaler*,<sup>249</sup> the government urged the Court to interpret a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) as jurisdictional because it cross-referenced the AEDPA’s jurisdictional provision.<sup>250</sup> Justice Sotomayor, along with all but one member of the current Court, dismissed this argument as lacking any merit.<sup>251</sup>

Despite the FTCA’s utter lack of a clear textual statement, proponents of a jurisdictional reading might argue that the Court may look beyond the text of the statute in its jurisdictional inquiry.<sup>252</sup> Indeed, in *Sebelius v. Auburn Regional Medical Center*,<sup>253</sup> the Court made clear that it may consider “context, including th[e] Court’s interpretations of similar provisions in many years past.”<sup>254</sup> While this is certainly true, considering “context” beyond the text of the FTCA would not transform the DFE into a jurisdictional rule. In fact, for several reasons, it would have the opposite effect. Unlike the common law origin of the statute of limitations rule in *Auburn Regional*, the Court would not be able to locate past treatment of the DFE in other contexts because the DFE is wholly unique to the FTCA. Moreover, the Court’s prior treatment of the DFE only strengthens the DFE’s nonjurisdictional characterization. In particular, consider *Indian Towing* and *Block*, where the Court acquiesced in the waivability of the DFE.<sup>255</sup> Based on *Indian Towing* and *Block*, the Court would be hard pressed to label the DFE jurisdictional because the Court failed to raise the DFE sua sponte in both of those cases.<sup>256</sup>

Beyond its general analysis of jurisdictionality, the Court’s construction of the FTCA further reveals that the DFE is nonjurisdictional. Some academics claim that the FTCA must be construed strictly because the FTCA is a waiver of sovereign immunity.<sup>257</sup> However, this argument grossly oversimplifies the Court’s recent interpretive approach to waiver statutes. Specifically, the Court has drawn a dichotomy between the broad question of whether a statute has unequivocally waived sovereign immunity,<sup>258</sup> and the more narrow question of

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248. *Gonzalez v. Thaler*, 132 S. Ct. 641, 650–51 (2012).

249. 132 S. Ct. 641 (2012).

250. *Gonzalez*, 132 S. Ct. at 651.

251. *Id.* at 650–51. *But see id.* at 656–65 (Scalia, J., dissenting).

252. *Cf. Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (clarifying that, in addition to the language of the statute, the Court may consider its past interpretations of “similar provisions” (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010))).

253. 133 S. Ct. 817 (2013).

254. *Auburn Regional*, 133 S. Ct. at 824 (quoting *Reed Elsevier*, 559 U.S. at 168).

255. See *supra* notes 169–73 and accompanying text for a discussion of these cases.

256. See *supra* notes 4–5 and accompanying text for the rule that judges are required to raise jurisdictional issues sua sponte.

257. See, e.g., *Colella & Bain*, *supra* note 69, at 2890 (applying the general notion that statutory waivers of sovereign immunity must be strictly construed to the FTCA’s exceptions).

258. See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992) (applying the principle of strict construction to determine whether the Bankruptcy Code unequivocally waives the government’s sovereign immunity).

how particular provisions within that statute should be construed.<sup>259</sup> This is particularly true in the context of the FTCA, where the Court has been unwilling to strictly construe the FTCA's exceptions.<sup>260</sup>

In *Dolan v. United States Postal Service*,<sup>261</sup> Justice Kennedy, writing for the majority, flatly rejected the government's assertion that courts should strictly construe the FTCA's exceptions.<sup>262</sup> Of particular concern to Justice Kennedy was the possibility that strict construction of the FTCA's exceptions would undermine Congress's clear intent to broadly waive immunity under the FTCA.<sup>263</sup> Though the Court strictly construed the FTCA's waiver provision,<sup>264</sup> it did not strictly construe the exceptions.<sup>265</sup> In the same vein, the Court has also reserved its jurisdictional analysis to 28 U.S.C. § 1346(b)(1)—the FTCA's waiver provision.<sup>266</sup> In *Federal Deposit Insurance Corp. v. Meyer*,<sup>267</sup> the Court examined subsection 1346(b)(1).<sup>268</sup> In doing so, the Court held that an FTCA claim establishes jurisdiction as long as it satisfies the six elements of subsection 1346(b)(1).<sup>269</sup> Notably, the Court did not extend its jurisdictional analysis beyond subsection 1346(b)(1). The *Meyer* decision is harmonious with earlier Supreme Court interpretations of the FTCA that date back to 1950. In *Feres v. United States*,<sup>270</sup> one of the Court's earliest FTCA cases, the majority declared that the FTCA's waiver provision provides the sole jurisdictional hurdle to the FTCA.<sup>271</sup> The Court reasoned that deciding whether statutory exceptions apply would fall within courts' exercise of this jurisdiction.<sup>272</sup> But these exceptions are not jurisdictional in and of themselves. Simply put, once a plaintiff satisfies subsection 1346(b)(1), the jurisdictional inquiry is over. An analysis of FTCA exceptions are necessarily performed *pursuant to* a court's jurisdiction, but it does not follow that these exceptions *are* jurisdictional.

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259. See, e.g., *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491–92 (2006) (refusing to apply the principle of strict construction because “[a]s *Kosak* explains, this principle is ‘unhelpful’ in the FTCA context, where ‘unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute’” (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984))).

260. *Id.*

261. 546 U.S. 481 (2006).

262. *Dolan*, 546 U.S. at 491–92.

263. *Id.* at 492.

264. *Id.* at 484. Unlike the FTCA's exceptions, this waiver provision does speak in jurisdictional terms. Compare 28 U.S.C. § 1346(b)(1) (2012) (stating “the district courts . . . shall have *exclusive jurisdiction* of civil actions on claims against the United States” (emphasis added)), with 28 U.S.C. § 2680 (stating simply that the FTCA “shall not apply” if an exception is validly present).

265. *Dolan*, 546 U.S. at 492.

266. E.g., *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475–86 (1994).

267. 510 U.S. 471 (1994).

268. *Meyer*, 510 U.S. at 477.

269. *Id.*

270. 340 U.S. 135 (1950).

271. *Feres*, 340 U.S. at 141.

272. *Id.*

C. *The United States Should Bear the Burden of Proving the DFE Because the DFE Was Initially Considered an Affirmative Defense*

As established, sovereign immunity is not jurisdictional for two reasons.<sup>273</sup> First, American law has consistently allowed Congress and the states to waive federal and state sovereign immunity.<sup>274</sup> In fact, the FTCA itself is a *waiver* of sovereign immunity. This very waivability is antithetical to a jurisdictional characterization. Second, any plausible reading of the text of the Constitution makes plain that sovereign immunity was not given jurisdictional status. Thus, the doctrine has no constitutional basis.

Even if sovereign immunity were jurisdictional—which it is not—the current Supreme Court would almost certainly find the DFE to be nonjurisdictional. There is neither a clear statement from Congress that the DFE is jurisdictional nor any supportive context that indicates the same. Moreover, the Court has refrained from subjecting the FTCA’s exceptions to strict construction or categorizing them as per se jurisdictional. For all these reasons, the rationale of those courts that treat the DFE as a “jurisdictional prerequisite to suit”<sup>275</sup> is irreconcilable with the current state of the law. Apart from these jurisdictional considerations, other sources by their own force prove that the DFE is an affirmative defense. An examination of the FTCA’s legislative history, as well as judges’, lawyers’, and scholars’ treatment of the DFE, makes this abundantly clear.

1. The Legislative History of the DFE, Although Sparse, Supports Allocating the Burden to the United States

The sparse legislative history of the DFE seemingly provides very little aid to interpreting burden of proof or jurisdictionality.<sup>276</sup> This legislative history nonetheless evidences Congress’s intent to place the burden of proving the DFE on the United States.<sup>277</sup> The language used by former Assistant Attorney General Francis Shea refers to the DFE both as an “exception” and as an “exemption” to the FTCA.<sup>278</sup> The use of such language implies that Congress placed the burden on the government because, traditionally, parties relying on statutory “exceptions” have the burden of proving that their cases fall within

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273. See *supra* Part III.A for a discussion of sovereign immunity’s nonjurisdictional status.

274. See *supra* Part II.A for a discussion of states waiving their sovereign immunity. See also Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 922 (2010) (acknowledging that Congress has waived sovereign immunity in some fashion in “most substantive areas of law”).

275. *E.g.*, *Aragon v. United States*, 146 F.3d 819, 823, 827 (10th Cir. 1998).

276. See Zillman, *supra* note 58, at 691 (arguing that because “there is so little legislative history as to the meaning of the discretionary function exception,” judges could not possibly decide FTCA cases that implicate the DFE based upon this legislative history).

277. See *supra* Part II.C.1 for a description of the legislative history of the DFE.

278. See Zillman, *supra* note 58, at 706–07 (discussing the 1942 congressional hearings on the DFE); see also 28 U.S.C. § 2680 (2012) (tinting this provision “Exceptions”).

such exceptions.<sup>279</sup> Similarly, parties relying on “exemptions” to general rules of law or statutes bear the burden of proving the applicability of exemptions.<sup>280</sup> Certainly, one could argue that such a focus on two words is petty. Congress’s naming section 2680 of the FTCA “Exceptions,”<sup>281</sup> and Francis Shea’s use of the words “exception” and “exemption” in his congressional testimony, do not conclusively demonstrate that the government bears the burden of proving the DFE.<sup>282</sup> Even so, it is difficult to ignore that a majority of courts—both state and federal—have held that these specific words mandate allocating the burden of proof to the party who would benefit from the exception or exemption.<sup>283</sup> Surveying judicial interpretations of the DFE only strengthens this notion.

## 2. Following Enactment of the FTCA, Early Courts Consistently Treated the DFE as an Affirmative Defense

Black’s Law Dictionary defines an affirmative defense as a “defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.”<sup>284</sup> The definition continues, stating, “The defendant bears the burden of proving an affirmative defense.”<sup>285</sup> Affirmative defenses are raised in many different areas

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279. 25 AM. JUR. 2D *Evidence* § 176, Westlaw (database updated May 2015); see also *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007) (holding that class-action plaintiffs bear the burden of proving that their case meets one of the exceptions to CAFA); *Evans v. Walters Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) (“[W]hen a party seeks to avail itself of an express statutory exception to federal jurisdiction . . . we hold that the party seeking [that exception] bears the burden of proof . . . .”); *In re Gamble*, 143 F.3d 223, 226 (5th Cir. 1998) (holding that a party that seeks to enjoy an exception to the Bankruptcy Code bears the burden of proving the applicability of that exception because such a framework “accords with traditional notions of the prima facie case and affirmative defense”); Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 418 (2008) (recognizing that courts uniformly place the burden of proving one of CAFA’s jurisdictional exceptions to federal subject matter jurisdiction on the party that is arguing for the applicability of such exception).

280. See, e.g., *Hydaburg Coop. Ass’n v. Hydaburg Fisheries*, 826 P.2d 751, 757 (Alaska 1992) (holding that Indian tribes claiming their tribal assets were exempt from collection under the Indian Reorganization Act bore the burden of proving that exemption); Cal Hoovestol, *North Dakota Securities Law*, 72 N.D. L. REV. 55, 65 n.93 (1996) (noting that defendants bear the burden of proving the “exemptions” to federal securities law). The *Hydaburg* case is especially helpful because it illustrates the notion that “exemptions”—like exceptions—are akin to affirmative defenses. *Hydaburg*, 826 P.2d at 757. The *Hydaburg* majority eloquently proves this point by citing examples from various areas of substantive law, all of which place the burden of proving exemptions on the party seeking enjoyment of the exemption: Native American sovereign immunity, Wyoming contract law, and general common law. *Id.*

281. 28 U.S.C. § 2680.

282. See Hoffman, *supra* note 279, at 418, 431 (criticizing these arguments for assuming that because Congress expressly labeled a provision as an “exception,” the party seeking to benefit from this exception bears the burden of proving it).

283. See *supra* notes 285–86 and accompanying text for a sample of such cases.

284. *Affirmative Defense*, BLACK’S LAW DICTIONARY (9th ed. 2009).

285. *Id.* It is a commonly accepted doctrine that parties asserting affirmative defenses—usually defendants—bear the burden of proving them. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 38, 65, at 239, 451 (5th ed. 1984) (discussing the burdens of proof for

of substantive law.<sup>286</sup> Some examples, which were adopted from the common law, can be found in Rule 8: assumption of risk, fraud, and duress.<sup>287</sup> Historically, sovereign immunity has been treated as an affirmative defense, whether in an international,<sup>288</sup> state,<sup>289</sup> or federal<sup>290</sup> context.

Given that neither the FTCA’s legislative history nor the statute itself mentions burden of proof or the term “affirmative defense,”<sup>291</sup> the first judges presiding over FTCA cases were left to define and apply the FTCA exceptions on a case-by-case basis.<sup>292</sup> The earliest courts were much more interested in defining the substantive scope of the DFE than determining the procedural nature of the DFE.<sup>293</sup> Nevertheless, early cases that did address the DFE’s

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plaintiffs and defendants in tort litigation); William V. Dorsaneo III & C. Paul Rogers III, *The Flawed Nexus Between Contract Law and the Rules of Procedure: Why Rules 8 and 9 Must Be Changed*, 31 REV. LITIG. 233, 244 (2012) (noting the idea that a defendant is the party who bears the burden of proving an affirmative defense is a “traditional concept”); *see also* Thompson v. Hall, No. 3:11-cv-1232, 2012 WL 3241686, at \*2 (M.D. Tenn. Aug. 7, 2012) (specifically mandating that the defendant prove the applicability of a statute of limitations *because* the statute of limitations is an affirmative defense).

286. *E.g.*, Patterson v. New York, 432 U.S. 197, 205–06 (1977) (criminal law); BMI Salvage Corp. v. Fed. Aviation Admin., 272 F. App’x 842, 852 (11th Cir. 2008) (aviation law); Branch Banking & Trust Co. v. R & T Rentals, L.L.C., No. 10–0518–KD–N, 2012 WL 2872447, at \*5 (S.D. Ala. July 12, 2012) (contract law).

287. FED. R. CIV. P. 8(c)(1).

288. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 n.20 (1983) (stating that “sovereign immunity is an affirmative defense” (quoting H.R. REP. NO. 94-1487, at 17 (1976))).

289. *See* Sea Hawk Seafoods, Inc. v. State, 215 P.3d 333, 337–38 (Alaska 2009) (discussing the majority of states that treat state sovereign immunity as an affirmative defense).

290. *E.g.*, Parrett v. Se. Boll Weevil Eradication Found., Inc., 155 Fed. App’x 188, 190 (6th Cir. 2005) (stating that federal sovereign immunity is “like any other defense” and therefore “must be proved by the party that asserts it and would benefit from its acceptance”).

291. *See generally* Irvin M. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946). This article, which was published only three months after the FTCA was passed, appears to be the first law review article discussing the FTCA. The author of this article painstakingly discussed each and every nook and cranny of the FTCA’s legislative history, provision by provision. *Id.* Not once in his discussion of the DFE does the author mention affirmative defenses or burdens of proof.

292. *See* Jefferson v. United States, 74 F. Supp. 209, 211 (D. Md. 1947) (commenting that “counsel have not been able to refer me to any particular legislative history of the Act . . . which thrown any floodlight upon the question now presented”). In *Englehardt v. United States*, 69 F. Supp. 451 (D. Md. 1947), which the presiding judge recognized as “the first [FTCA case] [brought] in [the District Court for the District Maryland],” *id.* at 451, the court noted that counsel for both the plaintiff and defendant stipulated that “there is an absence of any helpful legislative history for the construction and application of the [FTCA],” *id.* at 452.

293. *See, e.g.*, Griggs v. United States, 178 F.2d 1, 3 (10th Cir. 1949); United States v. Brooks, 169 F.2d 840, 848 n.4 (4th Cir. 1948) (Parker, C.J., dissenting); Jones v. United States, 89 F. Supp. 980, 981 (S.D. Iowa 1949); Kendrick v. United States, 82 F. Supp. 430, 431–32 (N.D. Alaska 1949); Thomas v. United States, 81 F. Supp. 881, 881–82 (W.D. Mo. 1949).

procedural role either labeled the exception generally a “defense,”<sup>294</sup> or specifically mandated that it be treated as an affirmative defense.<sup>295</sup>

For example, in *Boyce v. United States*,<sup>296</sup> Iowa residents sued the United States for property damage resulting from dynamite-blasting operations conducted in the Mississippi River.<sup>297</sup> In describing the United States’ answer and defenses,<sup>298</sup> the judge noted that two of the government’s “defenses” were that “the actions complained of involved the exercise or performance of a discretionary function.”<sup>299</sup> The court went on to declare: “Unless the pleadings show upon their face the applicability of the [DFE] . . . the [DFE] *must be raised by way of an affirmative defense and the burden therefore devolves upon the Government to establish its applicability.*”<sup>300</sup> Ultimately, the court dismissed the complaint, holding that the DFE applied.<sup>301</sup> Arguably, *Boyce* could be cast aside as an outlier district court case. That is, if the Seventh Circuit<sup>302</sup> and Supreme Court had not subsequently followed its holding.<sup>303</sup>

In *Stewart v. United States*, the government appealed a district court judgment in favor of FTCA plaintiffs on the ground that the district court lacked subject matter jurisdiction.<sup>304</sup> The previously mentioned *Stewart* appeal came after the suit was already adjudicated by the United States District Court for the Northern District of Illinois, the Seventh Circuit, and the Supreme Court.<sup>305</sup> The

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294. *E.g.*, *Bulloch v. United States*, 133 F. Supp. 885, 887 (D. Utah 1955); *F & M Schaefer Brewing Co. v. United States*, 121 F. Supp. 322, 323 (E.D.N.Y. 1954).

295. *Dalehite v. United States*, 346 U.S. 15, 34 n.29, 36 n.32 (1953); *Builders Corp. of Am. v. United States*, 259 F.2d 766, 771 (9th Cir. 1958); *Stewart v. United States*, 199 F.2d 517, 518–20 (7th Cir. 1952); *Boyce v. United States*, 93 F. Supp. 866, 868 (S.D. Iowa 1950).

296. 93 F. Supp. 866 (S.D. Iowa 1950).

297. The blasting operations were conducted for the purpose of deepening the river channel, so that ships could better navigate the river. *Boyce*, 93 F. Supp. at 867.

298. *Id.*

299. *Id.* at 867.

300. *Id.* at 868 (emphasis added).

301. *Id.* at 868–69.

302. *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952).

303. *Dalehite v. United States*, 346 U.S. 15, 34 n.29, 36 n.32 (1953).

304. *Stewart*, 199 F.2d at 518.

305. The original claim was filed December 27, 1948 in the United States District Court for the Northern District of Illinois. *Id.* at 517. After the court found for the government, the plaintiffs appealed to the Seventh Circuit. *Stewart v. United States*, 186 F.2d 627, 627 (7th Cir. 1951). The Seventh Circuit reversed, entered judgment in favor of the plaintiffs, and remanded the case for a calculation of damages. *Id.* at 634. During both of these proceedings—in the district court and appellate court—the United States never invoked the DFE. *Stewart*, 199 F.2d at 518. Having lost in the Seventh Circuit, the government petitioned the Supreme Court for a writ of certiorari, which was denied. *United States v. Stewart*, 341 U.S. 940 (1951). In its petition to the Supreme Court, the DFE issue was raised for the first time. *Stewart*, 199 F.2d at 518. After the Supreme Court denied certiorari, the government was permitted to amend its original answer, which it presented to the district court upon remand. *Id.* In its amended answer, the United States raised the DFE. *Id.* The district court refused to entertain the DFE issue—treating it as waived—and entered judgment for the plaintiff after determining damages. *Id.* The government then appealed. *Id.* Thus, the question presented to the Seventh Circuit, the second time around, was whether the DFE is a purely jurisdictional issue and,

*Stewart* opinion, written by former Seventh Circuit Chief Judge Major, began by discussing the FTCA’s general grant of jurisdiction.<sup>306</sup> Chief Judge Major wrote, “In our view, Sec[ti]on 1346(b) conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven.”<sup>307</sup> Not remarkably, this notion—that the DFE is an affirmative defense—comports with the Supreme Court’s jurisdictional analysis of 1346(b) in *Meyer* and *Feres*.<sup>308</sup> The *Stewart* court went on to concede that its position had yet to gather much direct support, but cited *Boyce*.<sup>309</sup> This lack of support should not be taken as a sign that the *Stewart* court’s position lacks merit. Rather, it illustrates the practical reality that in 1952, only a few years after the FTCA had been passed, circuit courts had not been presented with the issue of whether the DFE constitutes an affirmative defense.

Most importantly, the *Stewart* court distinguished between the blanket categorization of the DFE as “jurisdictional,”<sup>310</sup> and the actual practice of courts and lawyers to treat the DFE as an affirmative defense.<sup>311</sup> Chief Judge Major criticized the government’s position—that the DFE is purely jurisdictional—and listed the various negative results such a position would produce.<sup>312</sup> These included (1) eliminating certainty in the finality of FTCA litigation; (2) allowing the government, at any time, to use the DFE to undermine an otherwise meritorious claim; and (3) unfairly requiring FTCA plaintiffs to affirmatively negate, in their complaints, every one of the FTCA’s enumerated exceptions.<sup>313</sup> Despite *Stewart*’s thoughtful and thorough discussion of the dangers of oversimplifying the word “jurisdiction,” some scholars have done just that.<sup>314</sup>

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therefore, may be raised by the government at any time, or, if the DFE is an affirmative defense that had been waived by the government’s failure to raise it in the initial litigation. *Id.* at 518–19.

306. *Stewart*, 199 F.2d at 518–19.

307. *Id.* at 519.

308. See *supra* notes 261–72 and accompanying text for a discussion of the Supreme Court’s dichotomization of subsection 1346(b) and the rest of the FTCA statute.

309. *Stewart*, 199 F.2d at 519 (“[T]he [DFE] must be raised by way of an affirmative defense and the burden therefore devolves upon the Government to establish its applicability.” (quoting *Boyce v. United States*, 93 F. Supp. 866, 868 (S.D. Iowa 1950))).

310. *Id.* (recognizing that the “word ‘jurisdiction’ is an illusive and uncertain characterization, depending upon the environment in which it is employed”).

311. *Id.* at 519–20 (“In all of the cases, so far as we are aware, the [DFE] was aptly raised either by a motion to dismiss or by answer. . . . [T]here is no case where such an issue was raised after the mandate of a reviewing court or even after trial.”).

312. *Id.* at 520.

313. *Id.*

314. See, e.g., Colella & Bain, *supra* note 69, at 2862–63 (arguing that the *Stewart* court’s position—that defendants should bear the burden of proving FTCA exceptions—turns the principle that “federal courts are courts of limited jurisdiction . . . on its head”). Courts have also misapplied this argument. See, e.g., *Estate of Smith ex rel. Richardson v. United States*, No. 3:10-cv-00651-CRS, 2011 WL 3880935, at \*4 (W.D. Ky. Sept. 2, 2011) (citing the “universal rule” that plaintiffs must establish subject matter jurisdiction to support its position that the United States does not bear the burden of proving the DFE (quoting *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir.1982))).

This argument lacks merit in the FTCA context for many reasons.<sup>315</sup> Foremost, it assumes that the word “jurisdiction” has one universal meaning when it certainly does not.

In *Dalehite v. United States*,<sup>316</sup> the Supreme Court, for the first time, interpreted the DFE.<sup>317</sup> Although the Court discussed primarily the substantive scope of the DFE, it endorsed the position of prior courts—such as *Boyce* and *Stewart*—that the DFE is an affirmative defense.<sup>318</sup> It did this by citing *Boyce* in support of its holding that FTCA exceptions barred recovery even when there was negligence.<sup>319</sup> In doing so, the Court directly stated that the DFE is a “confession and avoidance plea.”<sup>320</sup> As previously mentioned, a “confession and avoidance plea” was the common law term for what we now call an “affirmative defense.”<sup>321</sup> Later in the opinion, the Court expressly labeled the DFE an affirmative defense.<sup>322</sup> Despite *Dalehite*’s declaration that the DFE is an affirmative defense, subsequent courts failed (or refused) to take notice of this,<sup>323</sup> which has further confused other courts confronted with the DFE.<sup>324</sup>

### 3. The First Lawyers to Use the DFE Treated It as an Affirmative Defense

While the early practice of courts firmly indicates that the DFE is an affirmative defense, an examination of the actual pleadings used by the first lawyers to litigate the FTCA further confirms this.<sup>325</sup> In 1957, William B. Wright, former Chief of the Subrogation Branch of the Solicitor General, published a

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315. See *supra* Parts II.D and III.B for a discussion of the oversimplification of the word “jurisdiction” that has plagued courts and consequently motivated the Supreme Court to refine its analytical framework of jurisdictional issues.

316. 346 U.S. 15 (1953).

317. *Dalehite*, 346 U.S. at 26–38.

318. See *id.* at 34 n.29, 36 n.32.

319. *Id.* at 34 n.29. It is important to note that this concept—admitting negligence but denying liability—is the essence of what an affirmative defense is. See Hon. Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 152, 158 (2013) (“[A]n ‘affirmative defense is one that admits the allegations in the complaint, but seeks to avoid liability . . . by new allegations of excuse, justification, or other negating matter.” (quoting *Riemer v. Chase Bank USA, N.A.*, 274 F.R.D. 637, 639 (N.D. Ill. 2011))).

320. *Dalehite*, 346 U.S. at 34 n.29.

321. See *supra* notes 181–84 and accompanying text for a discussion of confession and avoidance pleas.

322. *Dalehite*, 346 U.S. at 36 n.32 (stating that, in *Boyce*, the United States raised the DFE “by way of *affirmative defense*” (emphasis added)).

323. See *Blessing v. United States*, 447 F. Supp. 1160, 1167 n.6 (E.D. Pa. 1978) (misinterpreting *Dalehite* as supporting the view that the DFE is solely a jurisdictional issue, not an affirmative defense).

324. See, e.g., *Anderson v. Bailar*, 459 F. Supp. 792, 794 (M.D. Fla. 1978) (citing *Blessing*, 447 F. Supp. at 1167). *But see* S.R.P. *ex rel. Abunabba v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012) (casting doubt on the validity of the *Blessing* approach by citing the Third Circuit’s longstanding belief that the DFE “is analogous to an affirmative defense”).

325. WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT 195 (1957).

book examining how the FTCA had been applied in its first ten years.<sup>326</sup> Part of Wright’s book consists of a compilation of lawyers’ pleadings (complaints and answers) in FTCA litigation.<sup>327</sup> Wright took pleadings from nine FTCA cases consisting of various negligence claims.<sup>328</sup> These pleadings—namely, those of the United States as defendant—reveal that parties to FTCA litigation were raising the DFE as an affirmative defense.<sup>329</sup>

For example, in *Union Trust Co. v. United States*,<sup>330</sup> plaintiffs filed a wrongful death action under the FTCA on behalf of decedents, Mildred and Ralph Miller, who died when their plane collided with a Bolivian military plane while descending into the Ronald Reagan Washington National Airport.<sup>331</sup> Although the plaintiffs never raised the DFE, their complaint supports the proposition that, in order to successfully invoke jurisdiction under the FTCA, plaintiffs need to allege only that the United States would be liable if it were a private person.<sup>332</sup>

In *Bernhardt v. United States*,<sup>333</sup> a minor sued the United States after a mailbox the child was playing with detached from its base and injured the child.<sup>334</sup> In paragraph four of the defendant’s answer, the defendant invoked the DFE: “Defendant affirmatively states that the failure to permanently attach or affix the mail box in question to the ground was due to the compliance by the Defendant with a valid municipal ordinance and policy . . . and said compliance cannot constitute negligence.”<sup>335</sup> Although this language does not expressly declare invocation of the DFE, the phrase “compliance . . . with a valid . . . ordinance and policy” was clearly used to invoke the DFE.<sup>336</sup> In addition, the government’s choice to include the word “affirmatively” in its answer implies its knowledge that the DFE must be raised as an affirmative defense.

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326. *Id.*

327. *Id.*

328. *Id.* at 176–229.

329. *Id.*

330. 113 F. Supp. 80 (D.D.C. 1953).

331. *Union Trust*, 113 F. Supp. at 81.

332. See *supra* notes 67–72 and accompanying text for an explanation of the FTCA’s jurisdictional test.

333. See WRIGHT, *supra* note 325, at 190–97 (providing the complaint, answer, and judgment of the court in *Bernhardt v. United States*, decided in the U.S. District Court for the Eastern District of Texas, Beaumont Division).

334. *Id.* at 190.

335. *Id.* at 195.

336. See 28 U.S.C. § 2680(a) (2012) (excepting claims based on the government’s “execution of a statute or regulation”).

#### 4. The First Scholars to Examine the DFE Treated It as an Affirmative Defense

Soon after the FTCA was enacted, scholars also seemed to understand and agree that the DFE is an affirmative defense.<sup>337</sup> One of the clearest explanations of this doctrine can be found in a 1954 note published in the *Harvard Law Review*:

Although [placing the burden of proving the FTCA's exceptions on the United States] would be inappropriate in the case of a true jurisdictional requirement, it has the practical merit of freeing a plaintiff from the seemingly unreasonable burden of showing that his claim falls within none of the twelve statutory exceptions.<sup>338</sup>

This note adequately justified the DFE's application as an affirmative defense because the word "jurisdiction" in an FTCA context is not "tru[ly] jurisdictional" in the traditional sense of the word.<sup>339</sup> Further, the author acknowledged the novelty of this approach by labeling it the "*Stewart doctrine*."<sup>340</sup>

A 1954 *Stanford Law Review* comment echoed the sentiments of this *Harvard Law Review* note.<sup>341</sup> The comment questioned the practice of courts that failed to treat the DFE as an affirmative defense.<sup>342</sup> Citing *Stewart* and *Boyce*, the comment restated the rule that "unless the pleadings show the applicability of the [DFE] on their face, it must be raised as an affirmative defense."<sup>343</sup> The comment stated, "[T]he burden is on the Government to establish its applicability."<sup>344</sup>

Just like the *Harvard Law Review* note and *Stanford Law Review* comment, author William B. Wright appeared to accept the *Stewart doctrine* as settled law.<sup>345</sup> Wright wrote, "It is incumbent upon the plaintiff to establish in his complaint a clear right to recover and defenses of the Government are available only when aptly pleaded and proven."<sup>346</sup> From the 1960s through the 1980s, the

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337. See, e.g., WRIGHT, note 329, at 90 (recognizing that FTCA exceptions apply "only when aptly pleaded and proven" by the government (citing *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952))); Recent Case, *Torts—Federal Tort Claims Act—Accident Held to Be Within Discretionary Function Exception Without Proof Where Government Claims Military Secrecy*, 67 HARV. L. REV. 1279, 1280 (1954) (same); see also Cornelius J. Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433, 441 n.36 (1957) (expressing suspicion of oversimplifying the word "jurisdiction" in the context of the FTCA, going so far as to surround the word "jurisdiction" in quotation marks three times).

338. Recent Case, *supra* note 337, at 1280.

339. *Id.*

340. *Id.*

341. Comment, *Federal Tort Liability for Experimental Liability*, 6 STAN. L. REV. 734, 737 n.20 (1954).

342. *Id.*

343. *Id.*

344. *Id.* (citing *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952); *Boyce v. United States*, 93 F. Supp. 866 (S.D. Iowa 1950)).

345. WRIGHT, *supra* note 325, at 90.

346. *Id.* (footnote omitted) (citing *Stewart*, 199 F.2d at 517).

acceptance of *Stewart* as settled law slowly lost its footing as a result of confusion regarding jurisdiction under the FTCA.<sup>347</sup> This confusion was only exacerbated by the *Gaubert* decision.<sup>348</sup>

D. *Gaubert—Misunderstanding and Misapplication*

Due to the highly contextual and unprecedented nature of the FTCA, it is easy to see how courts and lawyers could convolute the jurisdictional framework of the statute’s exceptions. Despite the acceptance of the DFE as an affirmative defense in early FTCA jurisprudence,<sup>349</sup> it took only a few courts haphazardly slapping on the “jurisdiction” label to disrupt this doctrine.<sup>350</sup> Once this happened, numerous federal courts began expressing confusion as to the true procedural operation of the DFE.<sup>351</sup>

Unfortunately, this confusion was only made worse after the Supreme Court decided *Gaubert*.<sup>352</sup> In a three-sentence paragraph, Justice White briefly stated that FTCA plaintiffs must plead facts in their complaints that would “support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.”<sup>353</sup> Nowhere did Justice White discuss burdens of proof, the jurisdictional nature of the DFE, or the propriety of treating it as an affirmative defense. *Gaubert* was a case concerned solely with the substantive scope of the DFE.<sup>354</sup> At most, Justice White’s iteration was a reminder to plaintiffs like *Gaubert*—who deal in industries highly regulated by federal agencies—that their complaints ought to allege conduct that would not obviously be captured by said agencies’ regulations and statutes. Such a reminder is useful in a case involving a highly regulated industry, such as mortgage lending, but much less needed in a run-of-

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347. See Kathleen M. Dorr, Annotation, *Federal Tort Claims Act: Liability of United States for Injury or Death Resulting from Condition of Premises*, 91 A.L.R. FED. 16, § 2(b) (1989) (recognizing that courts had begun to disagree over whether to classify the FTCA exceptions as jurisdictional or as affirmative defenses with the burden on the government).

348. See *Sharp v. United States*, 401 F.3d 440, 443 n.1 (6th Cir. 2005) (discussing the confusion *Gaubert* produced amongst subsequent courts regarding the DFE and burden of proof); *Milligan v. United States*, Nos. 3:07-1053, 3:08-0380, 2009 WL 2905782, at \*8 n.7 (M.D. Tenn. Sept. 4, 2009) (same).

349. See *supra* Parts III.C.2, III.C.3, and III.C.4 for a discussion of the early adoption of the *Stewart* approach by courts, scholars, and lawyers.

350. See *supra* notes 323–24 and accompanying text for an example of this type of interplay between different jurisdictions.

351. See *Schindler v. United States*, 661 F.2d 552, 555 n.4 (6th Cir. 1981) (recognizing that “most courts” consider the DFE a “jurisdictional” issue and treat it as an “affirmative defense”); *Allen v. United States*, 527 F. Supp. 476, 486 (D. Utah 1981) (acknowledging that “[a]nalytically, and as a practical matter, the [DFE] operates more as an affirmative defense than as a bar to jurisdiction,” but deeming the DFE a “jurisdictional issue”).

352. *United States v. Gaubert*, 499 U.S. 315 (1991).

353. *Id.* at 324–25.

354. See *supra* Part II.C.2.b for a brief summary of the facts and issues presented in *Gaubert*.

the-mill personal injury case, where the conduct alleged is not likely to invoke a federal “regulatory regime.”<sup>355</sup>

After *Gaubert*, Judge Norris of the Ninth Circuit, in an attempt at clarification, wrote: “*Gaubert*, of course, did not deal with the burden of proof question.”<sup>356</sup> Although more courts have begun to subscribe to Judge Norris’s rationale,<sup>357</sup> others have continued to rubber-stamp “*Gaubert*” as support for their position that plaintiffs bear the burden of proving the DFE.<sup>358</sup> In sum, *Gaubert* has been misinterpreted and misapplied as a case that speaks to the burden of proving the DFE. This misapplication has contributed to the creation of a strain of decisions and scholarship that has drastically departed from the original understanding and practice of judges, lawyers, and scholars: that the DFE is an affirmative defense that the United States bears the burden of proving.

*E. Statutory Interpretations of the FSIA and CAFA: A Comparison*

Surveying other statutory schemes casts even more doubt on the presumption that FTCA plaintiffs bear the burden of proving the DFE. As discussed, several courts—and scholars—have erroneously treated the DFE as a “jurisdictional prerequisite to suit.”<sup>359</sup> Based on this faulty assumption, courts have placed the burden on FTCA plaintiffs to prove the inapplicability of the DFE as a part of their overall burden of proving subject matter jurisdiction.<sup>360</sup> This position finds no support in other statutory schemes.<sup>361</sup> CAFA and the FSIA illustrate this lack of support.

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355. *Gaubert*, 499 U.S. at 325. This “regulatory regime” that Justice White wrote about was the Home Owners’ Loan Act of 1933. The statute vests the Federal Home Loan Bank Board with the authority to prescribe rules and regulations governing the savings and loan industry. 12 U.S.C. § 1464 (2012). A Westlaw search reveals that, as of September 2015, 2,872 regulations have been enacted pursuant to § 1464—hence, Justice White’s “regime” language.

356. *Prescott v. United States*, 973 F.2d 696, 702 n.4 (9th Cir. 1992).

357. See, e.g., *S.R.P. ex rel Abunabba v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012); see *Parrott v. United States*, 536 F.3d 629, 634–35 (7th Cir. 2008); *Sharp v. United States*, 401 F.3d 440, 443 n.1 (6th Cir. 2005); *Chess v. United States*, 836 F. Supp. 2d 742, 746 (N.D. Ill. 2011).

358. See e.g., *Autery v. United States*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) (hypothesizing that “[*Gaubert*] appeared to impose the burden on the . . . plaintiff,” but declining to rule on that question).

359. E.g., *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175 (10th Cir. 2008); *Claypool v. United States*, 103 F. Supp. 2d 899, 902–03 (S.D. W. Va. 2000); *Colella & Bain*, *supra* note 69, at 2891 (conflating burden of proof and subject matter jurisdiction by claiming that placing the ultimate burden on plaintiffs “fits hand-in-glove” with the FTCA’s “jurisdictional conditions”).

360. E.g., *Garcia*, 533 F.3d at 1175.

361. See *infra* Part III.E.1 for an explanation that the FSIA places the burden of proving one of its exceptions on the defendant—not the party who must establish jurisdiction. See also *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021–22 (9th Cir. 2007) (holding that the burden of proving an exception to CAFA is not on the party who must establish subject matter jurisdiction).

1. Who Must Prove Subject Matter Jurisdiction Is Irrelevant to Who Must Prove an Exception to the FSIA

Comparing the FSIA to the FTCA reveals very strong support for placing the burden of proving the DFE on the United States. The FSIA gave district courts original jurisdiction to decide civil cases filed against foreign states.<sup>362</sup> The FSIA begins from a presumption that foreign countries are immune from suit in the United States.<sup>363</sup> However, like the FTCA, the FSIA contains exceptions.<sup>364</sup> In fact, one of these exceptions mirrors the FTCA’s DFE.<sup>365</sup> Once a plaintiff sues a foreign country, that country can challenge subject matter jurisdiction by presenting a prima facie case that it is in fact a “foreign sovereign” under the FSIA.<sup>366</sup> In response, a plaintiff may invoke an exception.<sup>367</sup> If an exception applies, then a foreign defendant is no longer immune.<sup>368</sup> Importantly, a foreign defendant seeking immunity “retain[s] the ultimate burden of persuasion” in challenging a court’s subject matter jurisdiction.<sup>369</sup>

This burden-shifting approach lends support to the *United States v. Prescott* approach<sup>370</sup> to the FTCA (that the United States bears the ultimate burden of proving the DFE) for many reasons. First and foremost, the FSIA places the burden of proving an exception on the foreign defendant—the party seeking to enjoy immunity. This foreign defendant is not the same party who must prove subject matter jurisdiction.<sup>371</sup> This fundamentally weakens the holdings of those FTCA cases that have correlated subject matter jurisdiction with burden of proof under the FTCA. Along with the judiciary, Congress expressly stated that it intended the FSIA’s statutory exceptions to “correspond to” the FTCA’s DFE.<sup>372</sup> The legislative report accompanying the FSIA also explicitly stated that “sovereign immunity is an affirmative defense which must be specially pleaded . . . . The ultimate burden of proving immunity would rest with the foreign state.”<sup>373</sup> In reaching this conclusion, the report noted that the chapter

362. 28 U.S.C. § 1330(a) (2012).

363. *See id.*

364. *Id.* § 1605.

365. *See id.* § 1605(a)(5)(A).

366. *E.g., In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 782 (S.D.N.Y. 2005).

367. *Id.*; 28 U.S.C. § 1605.

368. 28 U.S.C. § 1605(a).

369. *In re Terrorist Attacks*, 349 F. Supp. 2d at 782; *accord Phx. Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (noting that the “defendant bears the burden of proving that the plaintiff’s allegations do not bring its case within an statutory exception to immunity” under the FSIA); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992) (same); *Gerding v. Republic of France*, 943 F.2d 521, 525–26 (4th Cir. 1991) (same); *Belhas v. Ya’Alon*, 466 F. Supp. 2d 127, 130 (D.D.C. 2006) (same).

370. *See supra* notes 132–39 and accompanying text for a discussion of the rationale of *Prescott*.

371. *See supra* notes 128–31 and accompanying text for the applicable standard for which a party must prove subject matter jurisdiction. *But cf. Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175 (10th Cir. 2008) (plaintiffs must prove FTCA exceptions because plaintiffs must prove subject matter jurisdiction).

372. H.R. REP. NO. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620.

373. *Id.* at 17.

was written “in a manner consistent with the way in which the law of sovereign immunity has developed.”<sup>374</sup> Thus, the policy behind both the FSIA burden-shifting framework and the *Prescott* approach to the FTCA is that the party seeking the benefit of sovereign immunity bears the ultimate burden of persuasion.<sup>375</sup>

The FSIA undermines the argument that plaintiffs should bear the burden of proving the DFE as part of plaintiffs’ overall burden to establish subject matter jurisdiction. Under the FSIA, courts have placed the burden on the party *seeking to enjoy an exception to it*, not the party who must establish subject matter jurisdiction. This burden allocation supports congressional intent. Congress explicitly stated in a House of Representatives report regarding the FSIA: “[S]overeign immunity is an affirmative defense . . . [and] the burden will remain on the foreign state . . . [seeking] immunity.”<sup>376</sup> Very notably, Congress attributed this burden to the FTCA’s DFE.<sup>377</sup> If burden allocation were truly dependent upon which party must establish subject matter jurisdiction, then Congress would have placed the burden on FSIA plaintiffs. But it did not. Instead, it followed the rationale of *Stewart* and *Prescott* by placing the burden of proof on the party seeking to benefit from the affirmative defense of sovereign immunity—the defendant.

Nevertheless, those who endorse placing the burden on FTCA plaintiffs have attempted to circumvent the direct support the FSIA’s legislative history lends to the *Prescott* approach.<sup>378</sup> For example, Ugo Colella and Adam Bain have curiously argued that “courts should not look to the FSIA[’s]” treatment of burden of proof to resolve burden of proof issues under the FTCA “[b]ecause this scheme was articulated thirty years after the FTCA was passed.”<sup>379</sup> Colella and Bain continued, “Unlike the FSIA, Congress has not explicitly prescribed a method of burden allocation in the text of or in the legislative history accompanying the FTCA.”<sup>380</sup>

Such an argument is self-defeating for two major reasons. First, the burden-shifting framework found in the FSIA’s legislative history evinces congressional recognition that parties seeking the benefits of sovereign immunity bear the burden of proving it as an affirmative defense.<sup>381</sup> Second, the FSIA’s legislative history *expressly indicates* that portions of the FSIA were modeled after the

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374. *Id.*

375. This concept is also echoed by the courts. *See, e.g., Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987) (noting that “the party claiming immunity bears the burden of proving . . . that the exception does not apply”).

376. H.R. REP. NO. 94-1487, at 17.

377. *Id.* at 21.

378. *See, e.g., Colella & Bain, supra* note 69, at 2906 (arguing that the legislative history of the FSIA does not support the view that the United States bears the burden of proving the FTCA’s exceptions).

379. *Id.*

380. *Id.*

381. H.R. REP. NO. 94-1487, at 17.

FTCA.<sup>382</sup> Thus, courts should view the FSIA’s burden-shifting scheme as instructive in properly allocating the burden of proving the DFE.

2. Who Must Prove Subject Matter Jurisdiction Is Irrelevant to Who Must Prove an Exception to CAFA

Like the FSIA, CAFA similarly whittles away at the notion that subject-matter-jurisdiction burdens govern statutory-exception burdens. CAFA provides federal jurisdiction over large class action lawsuits.<sup>383</sup> Ordinarily, CAFA is implicated after a group of plaintiffs file a class action in state court.<sup>384</sup> Following the filing of a complaint, a defendant may attempt to invoke CAFA by removing the case to federal court.<sup>385</sup> In order to establish subject matter jurisdiction under CAFA, the defendant bears the burden of proving that (1) the amount in controversy exceeds \$5 million, and (2) any class member is a citizen of a state different from any defendant.<sup>386</sup>

A plaintiff may invoke exceptions to CAFA in an attempt to preserve state court jurisdiction over the case.<sup>387</sup> If courts adjudicating disputes over CAFA subscribed to the *Aragon* position,<sup>388</sup> they would place the burden of proving an exception to CAFA on defendants seeking federal jurisdiction. But they do not. As with the FSIA, courts have placed the burden on plaintiffs—the party seeking to enjoy the benefit of the exception—to prove a CAFA exception.<sup>389</sup>

Analyzing the FSIA and CAFA’s exceptions affirms that neither Congress nor courts look to which party bears the burden of proving federal jurisdiction when assigning the burden of proving exceptions. Rather, the proper inquiry asks which party is seeking to enjoy the benefit of the exception to be proved. In the case of the FSIA, this rationale was evident in the statute’s legislative history. With CAFA, courts have echoed this same sentiment by placing the burden on non-jurisdiction-seeking plaintiffs. For these reasons alone, the *Aragon* approach to jurisdiction and burden of proof under the FTCA is misplaced.

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382. *Id.* at 21.

383. 28 U.S.C. § 1332(d)(2) (2012).

384. *E.g.*, *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1019 (9th Cir. 2007).

385. *Id.*

386. *Id.* at 1020–21 (citing 28 U.S.C. § 1332(d)(2)).

387. *Id.* at 1019.

388. The party bearing the burden of proving subject matter jurisdiction therefore bears the burden of proving the inapplicability of a statutory exception. *See, e.g.*, *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (applying this rationale to the DFE).

389. The conclusion that the burden of proving a CAFA exception rests with plaintiffs has found significant support in the circuit courts of appeals. *See Woods v. Standard Ins.*, 771 F.3d 1257, 1262 (10th Cir. 2014); *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011); *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 26 (2d Cir. 2010); *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 823 (8th Cir. 2010) *Kaufman v. Allstate N.J. Ins.*, 561 F.3d 144, 153 (3d Cir. 2009); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 680 (7th Cir. 2006); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006).

F. *Rule 8(c): An Actual Solution*

The remainder of this Comment will briefly explain how amending Rule 8(c) to include the DFE as one of the rule's enumerated affirmative defenses would drastically improve FTCA litigation. As preeminent civil procedure scholars Wright and Miller wrote, "[Rule 8(c)] obligates a defendant to plead affirmatively any of the nineteen listed defenses he or she wishes to assert."<sup>390</sup> Thus, including the DFE in Rule 8(c) would codify the idea that the United States bears the burden of proving the DFE in FTCA litigation. This codification would, for the first time, provide courts with clear guidance on how to apply the exception. Such clarification would, at the very least, save time and money, as well as prevent judges from becoming bogged down in satellite litigation. At most, it would remediate fundamental unfairness.

Opponents of this proposal are likely to raise the fact that the list of affirmative defenses in Rule 8(c)(1) has been amended only one time since it was enacted in 1938—in 2010, when the Supreme Court removed "discharge in bankruptcy" from the list.<sup>391</sup> However, the 2010 amendment demonstrates the Supreme Court's willingness to alter Rule 8(c)(1). Moreover, the Court explained that because a discharge in bankruptcy primarily "operates as an injunction . . . it is [therefore] confusing to describe discharge as an affirmative defense."<sup>392</sup> Thus, as with a "discharge in bankruptcy," the Court could explain in an advisory committee note that "it is confusing" to courts to apply the DFE without knowing whether it operates as a jurisdictional bar or an affirmative defense, and therefore, the DFE must be added to Rule 8(c)(1).

Opponents of this proposal are also likely to question a federal rule of civil procedure's ability to control the manner of applying the DFE. This potential concern is unfounded. It is absolutely possible for a federal rule of civil procedure to supersede a statute.<sup>393</sup> This is exactly what happened in *Henderson*.<sup>394</sup> In *Henderson*, the Court addressed whether the Suits in Admiralty Act (SAA) provision regarding the period of time allowed for service of process was superseded by Federal Rule of Civil Procedure 4.<sup>395</sup> Like the FTCA, the SAA is a statutory waiver of federal sovereign immunity.<sup>396</sup> Under the SAA, parties were required to provide service "forthwith."<sup>397</sup> By contrast, Federal Rule of Civil Procedure 4 allows 120 days to effect service.<sup>398</sup>

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390. 5 WRIGHT ET AL., *supra* note 61, § 1270.

391. Compare FED. R. CIV. P. 8(c)(1) (2007) (repealed 2010) (including "discharge in bankruptcy" in the list), with FED. R. CIV. P. 8(c)(1) (not including "discharge in bankruptcy").

392. FED. R. CIV. P. 8(c)(1) advisory committee's note to 2010 amendment.

393. See *Henderson v. United States*, 517 U.S. 654, 672 (1996) (holding that Federal Rule of Civil Procedure 4 controls service of process under the Suits in Admiralty Act, not the Act's own service provision).

394. *Id.*

395. *Id.* at 656.

396. 46 U.S.C. § 30903 (2012). As its title suggests, the SAA waives immunity for suits sounding in admiralty law.

397. 46 U.S.C. app. § 742 (1988), amended by 46 U.S.C. § 30903 (2006).

398. FED. R. CIV. P. 4(m).

Writing for the majority, Justice Ginsburg invoked the Rules Enabling Act (REA), which states that, in matters of “practice and procedure,” the Federal Rules of Civil Procedure govern any conflicting law.<sup>399</sup> Justice Ginsburg then found that the manner and timing of service of process is a “procedural” matter.<sup>400</sup> The government’s chief argument was that Federal Rule of Civil Procedure 4 could not supersede the SAA, a federal statute, because the SAA provision was “jurisdictional” and affected “substantive rights” by setting the terms on which the United States has waived its sovereign immunity.<sup>401</sup> Justice Ginsburg rejected this argument.<sup>402</sup> She clarified that simply because the SAA provision involved a “condition” on a statutory waiver of immunity did not mean that the “condition” was therefore “jurisdictional.”<sup>403</sup> Every current member of the Court, besides Justice Thomas, joined Justice Ginsburg.<sup>404</sup>

Like the SAA provision in *Henderson*, the DFE is a “condition” on the FTCA’s waiver of sovereign immunity. Thus, it is likely that the Court would be equally hesitant to label the DFE jurisdictional merely because of its conditional nature. Furthermore, later circuit courts have referred to the FTCA exceptions as “procedural,” which could support Justice Ginsburg’s analysis under the REA (if Rule 8(c) were amended to include the DFE).<sup>405</sup> Regardless, in *Henderson*, the Court held that a federal rule of civil procedure could override an explicit condition imposed by a statute waiving sovereign immunity. It follows that a federal rule of civil procedure could control adjudication of the DFE, which is also a condition on a statutory waiver of sovereign immunity.

However, unlike *Henderson*, where there were two conflicting statutes, the FTCA does not contain a provision that would conflict with Rule 8(c) if the DFE were a part of its list. The only authority that would conflict with the DFE in Rule 8(c) would be circuit court case law, such as *Aragon*.<sup>406</sup> This would raise the question whether conflicting “law” includes decisional law under the REA. Under the Erie doctrine, the word “laws”—with respect to state law—includes not only statutes but also case law.<sup>407</sup> This was the very gist of the *Erie Railroad Company v. Tompkins* decision.<sup>408</sup> It is difficult to see why the Court would

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399. *Henderson*, 517 U.S. at 656 (quoting 28 U.S.C. § 2072 (1994)).

400. *Id.* at 667–68.

401. *Id.* at 664.

402. *Id.* at 666.

403. *Id.* at 665–66.

404. *Id.* at 655.

405. See, e.g., *Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2011) (“The FTCA . . . is subject to both procedural and substantive exceptions . . . . One such exception is [the DFE].”); *O’Rourke v. Smithsonian Inst. Press*, 399 F.3d 113, 122 (2d Cir. 2005) (referring to various FTCA exceptions as “procedural requirements”); see also *Gil v. Reed*, 535 F.3d 551, 558 n.2 (7th Cir. 2008) (establishing that the Federal Rules of Civil Procedure “govern procedural matters” under the FTCA).

406. I am referring to the case law in jurisdictions that support the following view: The DFE is jurisdictional and therefore plaintiffs bear the burden of proving the DFE. See *supra* notes 128–31 and accompanying text.

407. *Id.* at 78–79.

408. *Id.*

depart from this understanding of the word “law.” The larger issue would be whether or not there is a true “conflict” between Rule 8(c) and the *Aragon* line of cases. Even if the Court found no conflict under the *Henderson* analysis, common sense dictates that the Court would nonetheless prevent case law from superseding a federal rule of civil procedure—a rule promulgated by the Court itself.

Putting aside the conflict-of-law issues related to Rule 8(c), amending Rule 8(c) to include the DFE comports with the Rules’ policy and purpose. In 1939, Charles E. Clark, former Reporter for the Advisory Committee on Civil Rules, Dean of Yale Law School, and Second Circuit judge, commented:

[Rule 8(c)] is an attempt to handle specifically a question which has raised a great deal of difficulty in pleading generally, and particularly in the codes of the country. It seems to be considered only fair that certain types of things which in common law pleading were matters in confession and avoidance—*i.e.*, matters which seemed more or less to admit the general complaint and yet to suggest some other reasons why there was no right—must be specifically pleaded in the answer, and that has been a general rule. Usually the codes say that the answer must set forth, in addition to denials and as special defenses, any new matter constituting a defense. Now we are trying to get away from that rather vague statement, which does not tell you very much as to detail and which has led to a great deal of litigation as to what it means, by listing a lot of matters to be specially pleaded thus making the rule quite definite and certain.<sup>409</sup>

Clark’s commentary on Rule 8(c) is instructive to modern judges and lawyers because it presents Rule 8(c) as one solution to legal issues—like the DFE—that “[raise] a great deal of difficulty in pleading . . . in the codes of the country.”<sup>410</sup> Defenses need not be included in Rule 8(c) to be affirmative,<sup>411</sup> and federal courts often aid in determining whether a particular defense is affirmative.<sup>412</sup> Thus, a defense does not need to be codified in Rule 8(c) in order to be an affirmative defense. However, the unique persistence and complexity of the DFE circuit split suggests that actual codification would be particularly helpful in resolving this uncertainty.

Including the DFE in Rule 8(c) would also complement the normative principles upon which the rule was created. For example, Charles Clark, in the *Handbook of the Law of Code Pleading*, offered sound reasons for including

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409. AM. BAR ASS’N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 49 (Edward H. Hammond ed., 1939) (statement of Hon. Charles Clark).

410. *Id.*

411. 5 WRIGHT ET AL., *supra* note 61, § 1271.

412. *Id.* § 1271 nn.41–62 (collecting cases).

some defenses in Rule 8(c) over others.<sup>413</sup> One of the reasons he offered was fairness:

In [some] cases the mere question of convenience may seem prominent, as in the case of payment, where the defendant can more easily show the affirmative payment at a certain time than the plaintiff can the negative of nonpayment over a period of time.<sup>414</sup>

Like this example of payment used by Clark, the DFE poses similar convenience and fairness issues. For instance, the very language of the DFE reveals that the government may invoke the exception any time one of its employees is acting pursuant to a “statute or regulation.”<sup>415</sup> The government necessarily has better access to these statutes and regulations than do plaintiffs.

The Supreme Court has broadly expanded the DFE’s substantive scope to apply to a federal “policy.”<sup>416</sup> Imagine for a moment the thousands of federal statutes or regulations—that only the government could possibly be aware of—that apply to any given factual scenario. Moreover, consider the myriad “policies” that have been promulgated by federal agencies within employee handbooks and internal memoranda. Given the fact that the majority of these policies are unavailable to laypersons or lawyers, the government is necessarily in a better position to determine whether such policies apply to a FTCA case. Therefore, misapplication of the DFE as anything other than an affirmative defense is the exact type of problem Clark’s Rule 8(c) fairness rationale is aimed toward correcting.

*Newsome v. United States*<sup>417</sup> provides one example of this unfairness. In *Newsome*, a federal prisoner filed a pro se FTCA complaint against the United States alleging negligence for exposing him to asbestos while in prison.<sup>418</sup> The United States moved to dismiss the complaint for lack of subject matter jurisdiction, in large part based upon the prison’s internal “policies with regard to controlling prisoners’ exposure to [histoplasmosis and asbestos].”<sup>419</sup> The district court granted the United States’ motion to dismiss.<sup>420</sup> In doing so, the court expressly credited the prison’s asbestos policy as a basis for dismissal.<sup>421</sup> The court, like other courts that have misconstrued the FTCA burden of proof analysis, noted that *Newsome* failed to plead facts sufficient to bring his claim outside the purview of the prison’s asbestos policy.<sup>422</sup> Given an honest appraisal,

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413. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 96, at 609–10 (2d ed. 1947).

414. *Id.*

415. 28 U.S.C. § 2680(a) (2012).

416. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (noting that a DFE inquiry looks to any relevant “statute, regulation, or policy” (emphasis added)).

417. No. 07-CV-250-KSF, 2008 WL 1026496 (E.D. Ky. Apr. 9, 2008).

418. *Newsome*, 2008 WL 1026496, at \*1.

419. *Id.* at \*2 (emphasis added).

420. *Id.* at \*5.

421. *Id.* at \*6 (concluding that the court lacked subject matter jurisdiction after “examin[ing] . . . the policies of the [Bureau of Prisons] for taking action”).

422. *Id.* at \*5.

it is very likely that the prison never notified Newsome of its policies.<sup>423</sup> Expecting Newsome, a pro se prisoner, to structure his complaint to account for an ambiguous policy that he did not even know existed borders on the absurd. Other courts have also relied on similar “policies” to dismiss FTCA cases under the DFE.<sup>424</sup>

In *Dichter-Mad Family Partners, LLP v. United States*,<sup>425</sup> a district court considered whether it should grant the plaintiffs’ motion for additional discovery.<sup>426</sup> The plaintiffs were a group of investors that had been defrauded by Bernie Madoff’s Ponzi scheme.<sup>427</sup> They filed suit against the SEC, claiming that the SEC’s negligence allowed the Madoff scheme to continue unabated.<sup>428</sup> In particular, the plaintiffs insisted that additional discovery might reveal yet-discovered internal policies or guidelines of the SEC.<sup>429</sup> In circular fashion, the court denied the plaintiffs’ motion for three reasons: (1) failing to allege any plausible facts suggesting that any internal policies existed, (2) failing to identify the specific types of policies likely to exist, and (3) failing to research the “voluminous public record” available to them.<sup>430</sup> This kind of naïve reasoning makes no sense. Like the court in *Newsome*, the *Dichter* court somehow expected the plaintiffs to be able to point to highly technical, yet-discovered, internal policies promulgated by one of the largest governmental agencies in the nation—the SEC. Such an expectation of private parties (to cite to policies unavailable to them) defies all logic or reason.

Fortunately, some judges have acknowledged—as this Comment argues—that it is unjust to require FTCA plaintiffs to plead facts in their complaints that fall outside policies of which they are completely unaware. Consider the following language from *McAllister v. United States*<sup>431</sup>:

[T]he Government—as the party asserting immunity under the exception—must identify the decision it contends is covered by the exception. Merely arguing that Plaintiff has failed to identify the maintenance plan or decision that forms the basis of her claim does not enable the Government to carry its burden in the first instance.<sup>432</sup>

This remark comports both with the *Stewart* and *Prescott* approach and general notions of fairness to litigants. These notions of fairness form the bedrock upon

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423. Nowhere in the court’s opinion does it indicate the United States notified Newsome, or any of its prisoners, of these “policies.”

424. See, e.g., *Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1051–53 (C.D. Cal. 2010) (denying victims of Bernie Madoff’s Ponzi scheme additional discovery to uncover SEC policies); *Parker v. Roeckman*, No. 13–cv–00820–GPM, 2013 WL 5201477, at \*2 (S.D. Ill. Sept. 13, 2013) (noting that the complaint failed to refer to a “relevant policy”).

425. 707 F. Supp. 2d 1016 (C.D. Cal. 2010).

426. *Dichter*, 707 F. Supp. 2d at 1051.

427. *Id.* at 1018.

428. *Id.*

429. *Id.* at 1051.

430. *Id.* at 1051–52.

431. No. C 11-03858 MEJ, 2013 WL 2551990 (N.D. Cal. June 10, 2013).

432. *McAllister*, 2013 WL 2551990, at \*5.

which the Federal Rules of Civil Procedure were initially built. Rule 8(c) could return the equity that the DFE has been lacking.

#### IV. CONCLUSION

Scholars and courts alike have blindly accepted the notion that the United States adopted Great Britain's version of sovereign immunity when it gained independence. This rigid view fails to find support in the text of the Constitution, the Eleventh Amendment, or common law. Nonetheless, adherents have clung to this conception of federal sovereign immunity with white knuckles. In turn, highly complex and modern statutory waivers of sovereign immunity have too often been construed strictly. Consequently, issues concerning sovereign immunity, jurisdiction, and burden of proof have plagued federal courts.

Luckily, the Supreme Court, in a line of recent decisions, has departed from a holistic view of such statutes. It has employed a refined jurisdictional analysis that takes into account the unfairness associated with—to use the Court's own words—"drive-by jurisdictional rulings." With specific regard to the FTCA, the Court has refrained from labeling every provision of the Act "jurisdictional" merely because the statute is a waiver of immunity. Rather, the Court has confined its jurisdictional analysis—and resultant strict construction—to the FTCA's core jurisdiction-granting provision, subsection 1346(b). This interpretive trend represents the Court's recognition of a more balanced sovereign immunity in the twenty-first century. Furthermore, the Court has expressly declared that strict construction of FTCA exceptions would undermine the purpose of the Act—to waive sovereign immunity for tort victims.

Caught in the middle of this quagmire lies the DFE. Unlike other common law defenses that have been codified (e.g., contributory negligence, duress, assumption of risk), the DFE was born in 1946. As a statutorily created exception, it is no surprise that courts and scholars have had difficulty defining the DFE. Unfortunately, the DFE's ambiguity has led to widespread confusion regarding which party bears the burden of proving it. Unable to point to any common law origin, many judges, lawyers, and academics have treated the DFE as an affirmative defense. This approach finds support in the early practices of lawyers, case law, and legislative history. On the contrary, others have mistakenly labeled the exception jurisdictional solely because of its presence in the FTCA—a waiver of sovereign immunity.

This jurisdictional obsession fails to consider the actual evolution of sovereign immunity, the Supreme Court's interpretive techniques, or early courts' treatment of the FTCA. Early courts' interpretations of the DFE are especially important because the DFE—unlike most codified rules—did not exist at common law. Thus, early judicial interpretation of the DFE should be regarded as highly precedential.

Given these unique considerations, amending Rule 8(c) to include the DFE makes sense. Federal litigants uniformly acknowledge that the parties raising a Rule 8(c) affirmative defense bear the burden of proving that defense. Thus, putting the DFE in Rule 8(c) would provide notice to the United States of its

obligation to plead and prove the DFE. It would also relieve plaintiffs of an impossible guessing game.<sup>433</sup> Of course, even if the DFE were included in Rule 8(c), courts could still choose not to treat it as an affirmative defense. This phenomenon is unlikely to materialize, especially considering the Court's willingness to hold that the Federal Rules of Civil Procedure can supersede federal statutes.<sup>434</sup>

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433. This "guessing game" refers to the unfortunate practice of FTCA plaintiffs in circuits that apply the jurisdictional approach to the DFE. These courts require plaintiffs to prove that their claims do not fall under the purview of some discretionary policy, even if that policy is unknown to the plaintiffs at the time the complaints are filed.

434. This Comment has not attempted to address this issue in its entirety. Doing so would require a separate discussion of the "substantive" versus "procedural" debate found in the Erie doctrine. It would also implicate interpretation of the REA of 1934.