

# THE FEDERAL PAROLE DECISION AND THE DISCRETIONARY FUNCTION EXCEPTION

Every day, the Federal Parole Board must decide whether to parole prisoners whose records reveal a history of mental or emotional disturbance and involvement in violent crime.<sup>1</sup> The Board's decision to release such individuals sometimes has disastrous consequences. The United States Court of Appeals for the Fifth Circuit, in *Payton v. United States*,<sup>2</sup> recently decided whether the Federal Tort Claims Act<sup>3</sup> (FTCA) requires the federal government to pay for the consequences of an improvidently granted parole.<sup>4</sup> The *Payton* court, sitting en banc, reversed a previous panel decision<sup>5</sup> and held that the decision to grant parole fell within the "discretionary function" exception<sup>6</sup> of the FTCA. This decision divests federal courts of jurisdiction to review a Federal Parole Board decision even if it can be shown to be arbitrary or capricious or to constitute an abuse of discretion.

*Payton* is the only decision that has addressed the question whether the federal parole decision comes within the discretionary function exception to the FTCA.<sup>7</sup> Since the parole decision in *Payton*,

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1. The Parole Board's authorization to make parole decisions is embodied in 18 U.S.C. § 4206 (1982).

2. 679 F.2d 475 (5th Cir. 1982).

3. 28 U.S.C. § 1346(b) (1976).

4. The facts in *Payton* are as follows. In 1966, following a conviction arising from the brutal beating of a servicewoman, for assault with intent to murder, Thomas Warren Whisenant was sentenced to 20 years in prison. In 1970, Whisenant's sentence was reduced to 10 years, and in 1973 Whisenant was released on parole. Within three years of his release, Whisenant brutally beat, murdered, and mutilated three women. *Payton*, 679 F.2d at 477-78. The Federal Parole Board released Whisenant within seven years of his initial incarceration, despite the fact that his record revealed a long history of violent behavior. Whisenant's record included an arrest when he was in high school for purse snatching, a charge for the assault with intent to ravish a 14 year old girl in 1963, the possible involvement in the murder of a 70 year old woman, the assault of the servicewoman for which he was serving time, and a threat to kill a prison employee. Brief for Appellants at xi, *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982). In addition, Whisenant's unstable mental condition was well-documented. Prison psychiatrists had described Whisenant as "psychotic," and suffering from "schizophrenia and a paranoid type," and Whisenant's condition as "aggressive, chronic, severe, manifested by brutality and assaultive behavior." *Id.* In 1968, two years before his sentence was cut in half, one prison psychiatrist stated that Whisenant was in "dire need of long term psychiatric treatment." *Id.* He never received such treatment.

5. *Payton v. United States*, 636 F.2d 132 (5th Cir. 1981).

6. 28 U.S.C. § 2680(a) (1976).

7. The discretionary function exception has been discussed extensively by commentators. See, e.g., Harris & Schepper, *Federal Tort Claims Act: Discretionary Function Revisited*, 31 U.

however, two important changes have taken place in the area of parole decisions which arguably affect the applicability of *Payton* to present parole decisions. First, the Parole Board implemented "Guidelines"<sup>8</sup> in 1973, which are intended to reduce unexplained disparities in the granting of parole. Significantly, the United States Court of Appeals for the Fifth Circuit panel, which held that the parole decision was not a discretionary function, and therefore was subject to judicial review, incorrectly assumed that the Parole Board had used the Guidelines to make the parole decision in *Payton*.<sup>9</sup> Second, Congress amended the parole statute after *Payton* and deleted the word "discretion" from the statute's reference to the Parole Board's decision-making function.<sup>10</sup>

This note discusses the basis of the *Payton* court's holding that the parole decision falls within the discretionary function exception. It presumes that the parole decision, as it existed in *Payton*, was a discretionary function, but examines whether the parole decision still falls within that exception. The note first reviews the legislative history and the courts' historical treatment of the discretionary function exception.<sup>11</sup> The note then analyzes the reasoning behind the en banc and panel opinions in light of this history.<sup>12</sup> The note concludes that the parole decision is still a discretionary function, although for reasons other than those advanced by the en banc court.<sup>13</sup>

## I. THE HISTORY OF THE DISCRETIONARY FUNCTION EXCEPTION

The FTCA provides that the federal courts have jurisdiction over claims against the United States for the negligent acts or omissions of its employees.<sup>14</sup> Before Congress passed the Federal Tort Claims Act in 1946,<sup>15</sup> the only means of obtaining redress for the tortious actions of

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MIAMI L. REV. 161 (1976); *Developments in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 892 (1967) [hereinafter cited as *Developments in the Law*]; Note, *The Discretionary Function Exception to the Federal Tort Claims Act*, 42 ALB. L. REV. 721 (1978); Comment, *Scope of the Discretionary Function Exception under the Federal Tort Claims Act*, 67 GEO. L.J. 879 (1979). In addition, the issue of whether parole board members are immune from review under the Civil Rights Act, 42 U.S.C. § 1981 (1976), has been heavily litigated. Courts uniformly agree that parole board members enjoy some immunity from suit, although they disagree on the extent of that immunity. See *infra* note 42.

8. See 28 C.F.R. § 2.20-21 (1983).

9. *Payton*, 636 F.2d at 139-43.

10. Compare 18 U.S.C. § 4203(a) (1970) with 18 U.S.C. § 4206 (1982).

11. See *infra* notes 14-40 and accompanying text.

12. See *infra* notes 41-87 and accompanying text.

13. See *infra* notes 53-87 and accompanying text.

14. 28 U.S.C. § 1346(b) (1976).

15. The Federal Tort Claims Act was finally incorporated into Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 842 (codified at 28 U.S.C. § 1346(b) (1976)), 30 years after incorporation was initially proposed.

government employees was relief granted through a private bill passed by Congress.<sup>16</sup> Although the FTCA's grant of jurisdiction is broad, it is not without exceptions. Among the exceptions is section 2680(a), the "discretionary function" exception, which provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to - (a) Any claim based upon an act or omission of an employee of the Government . . . based upon the exercise of performance or failure to perform a *discretionary function* . . . whether or not the discretion involved be abused.<sup>17</sup>

The legislative history of the discretionary function exception, and the case law interpreting it, clarify the scope of this exception.

#### A. *The Legislative History of the Discretionary Function Exception.*

The legislative history of the discretionary function exception is sparse. Congress held no hearings relevant to the discretionary function exception in the year prior to adoption of the FTCA,<sup>18</sup> but did conduct hearings four years earlier on a proposed bill identical to the one eventually passed.<sup>19</sup> These hearings illuminate the underlying legal history and the broad parameters of the exception.

The discretionary function exception had its origins in English common law, which granted immunity to officials performing judicial or quasi-judicial tasks.<sup>20</sup> The historical reasons for granting such officials immunity from judicial review were to avoid "stultifying" administrative decisions, to aid the efficiency of such decisions, and to avoid judicial scrutiny of essentially legislative functions.<sup>21</sup> Testimony before Congress indicated that even if the discretionary function exception had not been included in the Act, courts would have refrained from reviewing such official actions because of their long history of doing so.<sup>22</sup>

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16. Indeed, the volume of bills before Congress was the primary impetus for the passage of the Federal Tort Claims Act. In the two years prior to the passage of the Act, over 2000 claims were introduced before Congress with over 1000 receiving approval. *Dalehite v. United States*, 346 U.S. 15, 25 n.9 (1953).

17. 28 U.S.C. § 2680(a) (1976) (emphasis added).

18. *Dalehite v. United States*, 346 U.S. 15, 26 (1953).

19. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 before the House Comm. on the Judiciary, 77th Cong., 2d Sess. (1942)* [hereinafter cited as *Hearings*].

20. See *Dalehite v. United States*, 346 U.S. 15, 34 n.30 (1953) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131 (1940); *Louisiana v. McAdoo*, 234 U.S. 627, 633 (1914); *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); see also *Developments in the Law*, *supra* note 7, at 892.

21. *Developments in the Law*, *supra* note 7, at 892.

22. *Hearings*, *supra* note 19, at 29 (Remarks of Assistant Attorney General Francis M. Shea); see also *Dalehite v. United States*, 346 U.S. 15, 34 (1953) (recognizing the principle embodied in

The purpose of the discretionary function exception was to compensate persons injured by the ordinary common law torts of government employees—such as the negligent operation of a motor vehicle<sup>23</sup>—while barring the courts from reviewing so-called “discretionary” activities. Congress gave as an example of discretionary activity the exercise of authority by an official of the Federal Trade Commission or the Securities and Exchange Commission.<sup>24</sup> Congress left it to the courts to determine which official actions falling between these two extremes come within the ambit of the discretionary function exception.

### B. *Judicial Treatment of the Discretionary Function Exception.*

The first major decision in which the Supreme Court interpreted the discretionary function exception was *Dalehite v. United States*.<sup>25</sup> In *Dalehite*, citizens of Texas City, Texas sued the government for negligently manufacturing and transporting fertilizer that exploded and levelled the entire city. The Court held that the government’s actions fell within the discretionary function exception to the FTCA<sup>26</sup> because the decisions were made at the *planning* level rather than the *operational* level.<sup>27</sup> The Court found that the key factor which distinguished a planning level decision from an operational decision was the presence of policy considerations; the Court stated that “where there is room for policy judgment and decision, there is room for discretion.”<sup>28</sup>

Later courts that relied on the “planning-operational” distinction as the basis for applying the discretionary function exception did little to develop a set of factors to determine when government officials are

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the discretionary function exception as a “concept of substantial historic ancestry in American Law”).

23. See H.R. REP. NO. 1287, 79th Cong., 1st Sess. 5-6 (1945); H.R. REP. NO. 2245, 77th Cong., 2d Sess. 10 (1942); S. REP. NO. 1196, 77th Cong., 2d Sess. 7 (1942).

24. See H.R. REP. NO. 1287, 79th Cong., 1st Sess. 5-6 (1945); H.R. REP. NO. 2245, 77th Cong., 2d Sess. 10 (1942); S. REP. NO. 1196, 77th Cong., 2d Sess. 7 (1942).

25. 346 U.S. 15 (1953).

26. *Id.* at 33.

27. *Id.* at 42.

28. *Id.* at 36. The Court also held that “acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.” *Id.* It was necessary to protect these activities from review to prevent litigants from side-stepping the exception by simply suing the government for the ministerial execution of planning level decisions. The same principle is found in Civil Rights Act litigation where the acts of public officials pursuant to judicial directive are granted immunity from suit. Such immunity is called “derivative immunity” because the official’s immunity is derived from the judicial immunity of the judge. *McCray v. Maryland*, 456 F.2d 1, 5 n.11 (4th Cir. 1972); see *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir.), *cert. denied*, 396 U.S. 941 (1969).

making a planning level decision, which is immune from review.<sup>29</sup> The court in *Swanson v. United States*<sup>30</sup> made perhaps the best attempt to clarify the planning-operational distinction when it stated:

In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion. The planning level notion refers to decisions involving questions of policy, that is, the evaluating of factors such as the *financial, political, economic* and *social* effects of a given plan or policy.<sup>31</sup>

Beginning in the 1960's, the courts rejected the planning-operational distinction as being either too conclusory<sup>32</sup> or as focusing too narrowly on the level of the government official who made the decision<sup>33</sup> and began instead to concentrate their focus on the "nature and quality" of the disputed actions themselves.<sup>34</sup> Although the factors ex-

29. *See, e.g.*, *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956) (government liable for damage caused when government pilots flew too low to the ground, because flying planes close to the ground was not necessary to the completion of the project, but was result of carelessness); *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62, 73-78 (D.C. Cir. 1955) (government liable for negligent instructions of air traffic controllers which caused planes to collide because, air traffic controller's job does not entail considerations important to the practicability of the government's program of controlling air traffic).

30. 229 F. Supp. 217 (N.D. Cal. 1964). In *Swanson*, the court held that the discretionary function exception did not cover the negligent modification of an elevator mechanism in an airplane where such modification was not part of the agency decision to develop fail-safe modifications.

31. *Id.* at 219-20 (emphasis added). Other cases have emphasized that in order to find that a discretionary function exists, more than mere choice must be exercised by a government official. Instead, the discretionary function exception encompasses choices which entail a consideration of various *policy* factors. *See, e.g.*, *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974); *Mayer v. Martin Marietta Corp.*, 481 F.2d 585, 594-98 (5th Cir. 1973); *J.H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97, 99 (5th Cir. 1971); *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.) ("Most conscious acts of any person . . . involve choice. Unless government officials . . . make their choices by flipping coins, their acts involve discretion."), *cert. denied*, 389 U.S. 841 (1967).

32. *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

33. *See* Comment, *supra* note 7, and cases cited therein. This commentator criticizes the "planning-operation" approach as including too much within the discretionary function exception and the "good samaritan" approach, *see infra* note 34, as including too little.

34. Shortly after the Supreme Court's decision in *Dalehite*, and before the "nature and quality" cases, a line of cases labelled the "good samaritan" cases was decided. The "good samaritan" cases hold that once a government project is undertaken the government is liable for any damage caused by negligent action in the undertaking. *See, e.g.*, *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *Indian Towing, Inc. v. United States*, 350 U.S. 61, 69 (1955); *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951). These cases have been interpreted as cutting back the *Dalehite* Court's interpretation of the scope of the discretionary function exception, and the Court's holding that the execution of planning level decisions is protected from review by the discretionary function exception. *See, e.g.*, *J. H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97, 99 (5th Cir. 1975) (rejecting an "absolutist interpretation" of *Dalehite*); *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

Although the "good samaritan" cases may at first blush appear to restrict the *Dalehite* decision, an examination of the cases reveals that they leave *Dalehite* intact. Although the *Dalehite*

aminated by the courts vary depending on the factual situation, the "nature and quality" test is simply a reaffirmation of the *Dalehite* Court's characterization of discretionary functions as decisions that require the balancing of various policy factors.

Two recent cases illustrate the courts' current approach to the discretionary function exception. In *Gray v. United States*,<sup>35</sup> the court held that a Food and Drug Administration decision to release a drug without an accompanying warning was a discretionary function because of the policy considerations to be weighed—the risk of release against the benefits of use<sup>36</sup>—and because the exercise of such judgment had not been removed by the presence in the authorizing statute or regulations of a "scientific test or measuring stick" by which a decision could be mechanically produced.<sup>37</sup> Similarly, in *Smith v. United*

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Court held that the execution of planning level decisions, "in accordance with official directions," is immune from review, even though those actions might be conducted exclusively at the operational level, it did not hold that the *negligent* execution of such decisions is immune from review when such activities are conducted exclusively at the operational level. For instance, it has not been asserted that *Dalehite* meant to protect from review the negligent operation of an motor vehicle even though a government employee might be driving that vehicle as part of a planning level decision.

Furthermore, none of the "good samaritan" cases hold that the negligent execution of planning level decisions, which itself involves planning level decisions, is actionable. Although the activities found to be actionable in the "good samaritan" cases involved the *execution* of planning level decisions, none of these executions contained actual planning level decisions. *See, e.g.,* *Rayomier v. United States*, 352 U.S. 315 (1958) (negligent failure of government firefighters to extinguish fire held actionable); *Indian Towing v. United States*, 350 U.S. 61 (1955) (failure to properly maintain a lighthouse including failure to check the electrical system, properly examine connections, repair lights and give notice to passing vessels that lights were not functioning held actionable); *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951) (failure to properly mark sunken ship was actionable although the initial decision to mark sunken ships was held to be a discretionary function). Indeed, many courts compared the activities under review to the negligent operation of an automobile, the very type of common law tort the FTCA was intended to encompass. *See, e.g.,* *Dahlstrom v. United States*, 228 F.2d 819, 822 (8th Cir. 1956); *Eastern Air Lines v. United Trust Co.*, 221 F.2d 62, 78 (D.C. Cir. 1955). Thus, even if the present parole decision is found to be an execution of a planning level decision, if the execution itself requires planning level decisions or if it is conducted strictly in accordance with official directions, it is immune from review under both *Dalehite* and the "good samaritan" line of cases.

35. 445 F. Supp. 337 (S.D. Tex. 1978).

36. *Id.* at 340-41. This type of decision should be contrasted to decisions that, although involving the weighing of several conflicting factors, do not involve the weighing of conflicting *policy* factors. The *Gray* court gave as an example of such a decision *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974). In *Griffin* the plaintiff sued the government for releasing a vaccine from which she contracted polio. The court held that the decision to release was not a discretionary function because the government only had to weigh five criteria to determine whether specific neurovirulence standards had been met. This was a purely scientific judgment which could be scrutinized under standards applied to professional negligence. *Id.* at 1067-69.

37. 445 F. Supp. at 340. Compare *First Nat'l Bank v. United States*, 552 F.2d 370, 376 (10th Cir. 1977) (government performing a discretionary function when labelling fertilizers with warnings because the only direction given by the authorizing statutes was that warnings be "adequate for the protection of the public"), *cert. denied*, 434 U.S. 835 (1978) with *Duncan v. United States*,

*States*,<sup>38</sup> the court held that the decision to prosecute was a discretionary function because that decision involved the weighing of policy factors—the rights of the accused against the welfare of society<sup>39</sup>—and, harking back to the origins of the discretionary function exception, because the decision was quasi-judicial in nature in that it involved a government official legally binding one or many persons in a way no private individual could.<sup>40</sup>

## II. THE DECISIONS IN *PAYTON V. UNITED STATES*

The court of appeals panel in *Payton* held that the parole decision was not a discretionary function. A major distinction between the en banc opinion and the panel opinion is that the panel opinion incorrectly assumed that the parole board used the 1973 Guidelines when making the parole decision in *Payton*.<sup>41</sup> Despite this mistake, the panel decision is valuable because it is the only judicial decision to date to examine the parole decision as it now functions under the 1973 Guidelines.

The court of appeals panel relied heavily on interpretation of the parole statute to arrive at its conclusion. The parole statute in force at the time the parole decision in *Payton* was made provided:

If it appears to the Board of Parole . . . that there is a reasonable probability that such a prisoner will live and remain at liberty without violating the law, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board, may, in its

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355 F. Supp. 1167, 1170 (D.D.C. 1973) (refusal to certify pilot for duty was actionable because decision to certify involved nothing more than application of specific facts to an existing rule) and *Hendry v. United States*, 418 F.2d 774, 782-83 (2d Cir. 1969) (negligent determination that a seaman was unfit for sea duty was actionable because determination involved nothing more than the application of specific facts to an existing rule).

38. 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

39. Specifically, the court noted that a prosecutor must consider "the likelihood of conviction, . . . the degree of criminality, the weight of evidence, . . . precedent, *policy*, *the climate of public opinion*, *timing*, and *the relative gravity of the offense*." *Smith*, 375 F.2d at 247 (emphasis added) (citing *Pugacli v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961)); *see also* *Kiiskila v. United States*, 466 F.2d 626, 628 (7th Cir. 1972) (decision to discharge employee from a United States military post was a discretionary function because it was analogous to the decision whether to prosecute in that it involved considerations of security, discipline, and morale).

40. *Smith*, 375 F.2d at 248. The court cautioned against shifting control of such decision-making from the hands of officials, to the hands of individuals through private damage suits, a result that would be contrary to the purpose of the FTCA to spread the monetary loss of injury, not to distribute political responsibility to private individuals.

41. Whisenant was granted parole on November 28, 1973. Petition for Panel Rehearing at 3-5, *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982). The Guidelines were first tested regionally in 1972, 38 Fed. Reg. 26,652-57 (1973), and were not adopted nationwide until November 19, 1973, 38 Fed. Reg. 31,942 (1973), well after Whisenant's parole was processed. The Guidelines are presently codified, in slightly different form, at 28 C.F.R. § 2.20 (1983).

*discretion*, authorize the release of such prisoner on parole.<sup>42</sup>

42. 18 U.S.C. § 4203 (1970) (emphasis added). The regulations accompanying this statute provided that

the granting of parole rests in the discretion of the Board of Parole. The Board may parole a prisoner who is otherwise eligible if (a) he has observed substantially the rules of the institution in which he is confined; (b) there is a reasonable probability that he will live and remain at liberty without violating the laws; and (c) in the opinion of the Board such release is not incompatible with the welfare of society.

28 C.F.R. § 2.2 (1973). Other than this authorization there were no formally articulated criteria or policies to guide the parole decisions. One court in reviewing a prisoner's complaint brought under the Civil Rights Act, 42 U.S.C. § 1983 (1976), for denial of parole noted that a number of factors might be taken into account when making a parole decision, such as the length and seriousness of the prisoner's prior criminal record, his family history, and his marital situation, but emphasized that the weight accorded to any of these factors was completely within the discretion of the board. *Scarpa v. United States Bd. of Parole*, 477 F.2d 278, 281 (5th Cir.) (en banc), *vacated as moot*, 414 U.S. 809 (1973).

Although all cases brought under the Civil Rights Act grant Parole Board decisions immunity, courts disagree about the extent of the immunity. Cases granting Parole Board decisions absolute immunity (not subject to review even if arbitrary, capricious, or an abuse of discretion) include: *Sellars v. Procunier*, 641 F.2d 1295, 1303 (9th Cir.), *cert. denied*, 454 U.S. 402 (1981); *Buchanan v. Clark*, 441 F.2d 1379 (5th Cir. 1971); *Tarlton v. Clark*, 441 F.2d 384, 385 (5th Cir.), *cert. denied*, 403 U.S. 934 (1971); *Hiatt v. Compagna*, 178 F.2d 42, 45 (5th Cir. 1949) (the parole function "bristl[es]" with discretion); *Bricker v. Michigan Parole Bd.*, 405 F. Supp. 1340, 1345 (E.D. Mich. 1975). The United States Court of Appeals for the Fifth Circuit, however, appears to be retreating from the position that parole board members enjoy absolute immunity. A number of recent cases have held that parole decisions enjoy only qualified immunity—they are not subject to review if merely negligent, but they are reviewable if arbitrary, capricious, or constituting an abuse of discretion. *See, e.g.*, *Shahid v. Crawford*, 599 F.2d 666, 670 (5th Cir. 1979); *Brown v. Lundgren*, 528 F.2d 1050, 1054 (5th Cir. 1976); *Calabro v. United States Bd. of Parole*, 525 F.2d 660, 661 (5th Cir. 1975); *Thompkins v. United States Bd. of Parole*, 427 F.2d 222, 223 (5th Cir. 1970). These courts, however, cited as support for their decisions the cases cited above that have found the parole decision to be absolutely immune from review. In addition to the Court of Appeals for the Fifth Circuit, several other courts, construing the Civil Rights Act or a similar state statute, have held that parole boards and parole officials enjoy only qualified immunity. *See, e.g.*, *Fitzgerald v. Procunier*, 393 F. Supp. 335, 343 (N.D. Cal. 1978); *Joyce v. Gilligan*, 383 F. Supp. 1028, 1031 (N.D. Ohio 1974), *aff'd*, 510 F.2d 973 (6th Cir. 1975); *Grimm v. Arizona Bd. of Pardons and Parole*, 115 Ariz. 260, 265, 564 P.2d 1227, 1232 (1972).

The basis for the disagreement as to the extent of immunity to be accorded parole officials under the Civil Rights Act appears to stem from the application of common law judicial and quasi-judicial immunity to various tasks performed by government officials. Unlike the FTCA, the Civil Rights Act did not explicitly exempt "discretionary" activities from review. The Civil Rights Act, however, was not intended to override the common law doctrine of judicial and quasi-judicial immunity. *See, e.g.*, *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972). Thus, the decisions of judges cannot be attacked under the Civil Rights Act. The courts that have granted parole officials absolute immunity from judicial review have relied on *Butz v. Economou*, 438 U.S. 478 (1978), for support. In *Butz* the Court examined the *functional similarity* between the activity of a judge and an administrative official to determine whether the latter should enjoy absolute immunity from review. The court in *Sellars*, 641 F.2d at 1303, and *Bricker*, 405 F. Supp. at 1345, employed the *Butz* analysis and concluded that parole board members should be accorded absolute immunity because the decision made by a parole board was sufficiently similar to decisions made by judges. Most courts holding that parole board members enjoy only partial immunity have not been explicit about the basis for their position. Presumably, they believe that, although the parole decision entails the use of some amount of discretion, it is too dissimilar in function to that of judges to accord it absolute immunity. The court in *Grimm v. Arizona Bd. of*

Examining this statute, the court of appeals panel held that the "discretion" of the parole board was not absolute, but bounded by the limitations that there be a "reasonable probability that such prisoner will live and remain at liberty without violating the laws" and that "such a release . . . not [be] incompatible with the welfare of society."<sup>43</sup> The court of appeals panel in *Payton* also found that the parole decision had become a largely "fixed and mechanical" process since the 1973 Guidelines were instituted and, therefore, judicial review of parole decisions would further the policies of the FTCA.<sup>44</sup>

In support of the panel's position, appellants before the en banc court attempted to draw an analogy between the parole decision and

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Pardons and Parole, 115 Ariz. 260, 564 P.2d 1227 (1972), however, was explicit. It found that the role of a parole board member under Arizona law was not sufficiently similar to that of a judge to justify absolute immunity. *Id.* at 265, 564 P.2d at 1232. It found most significant the fact that parole decisions, unlike judicial decisions, were not subject to appellate review. *Id.* It should be noted, however, that the present federal parole decision is subject to review by the National Appeals Board. *See infra* note 56.

43. *Payton*, 636 F.2d at 139. Specifically, the panel court read the statute to mean that if the initial request, submitted by either the prisoner or the prison bureaucracy, showed that the prisoner was a "good risk," then the decision of the parole board was not reviewable. *Id.*

44. *Id.* at 146; *see infra* notes 79-87 and accompanying text. The court balked at the idea that if the parole decision fell within the discretionary function exception, the parole board could release Whisenant even if it *knew* he would "go on such a hideous rampage" and still be protected from review because the discretionary function exception protects even "abuse[s] of discretion." *Payton*, 636 F.2d at 146. The court contended that this could not be true, both because of the limitations on the board's function set forth in the parole statute, and because the Supreme Court, in *Hatahley v. United States*, 351 U.S. 173 (1956), allowed recovery against government officials who knowingly violated statutes under which they were authorized to act. *Payton*, 636 F.2d at 146. First, it should be noted that the plaintiff did not allege that the parole board had abused its discretion, although a finding that the parole decision was a discretionary function would protect such an abuse. Second, the court's use of *Hatahley v. United States* is inappropriate. The *Hatahley* decision held the government liable for taking horses from their owners because the government failed to give notice to the owners under a statute which required that before horses were removed, the owners must be given written notice. 351 U.S. at 178-80. This did not amount to an abuse of discretion because the giving of notice was a completely ministerial function not involving any discretion. *Id.* at 181.

The question remains, however, whether the parole board members' decision would be protected from review even if they knew Whisenant would kill three women after his release. What constitutes an "abuse of discretion" has been debated in the area of judicial review of administrative decisions. Section 701(a)(2) of the Administrative Procedure Act protects from review activities "committed to agency discretion by law." Administrative Procedure Act, 5 U.S.C. § 701 (1982). Two positions exist as to the scope of this protection. One position interprets this provision as protecting *all* decisions made by administrative officials empowered to make decisions that involve discretion. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16, at 80 (1958). A more recent position interprets this provision as protecting only those decisions in which discretion is exercised. In other words, the parole board would not be protected if it made its decision to release Whisenant by flipping coins. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 359 (1965). It would appear, under both of these positions, however, that if the parole board went through some decisionmaking process it would be immune from review.

"negligent release" cases.<sup>45</sup> In one such case, *Fair v. United States*,<sup>46</sup> a mentally disturbed Air Force officer who threatened to kill a woman was released from a military hospital despite the fact that Air Force physicians knew of such threats. The patient subsequently killed the woman and her bodyguards. The government argued that the physician's decision to release the patient came within the discretionary function exception. In rejecting this argument the *Fair* court held that although the initial decision to treat the patient was discretionary, any negligent treatment thereafter, including the decision to release, was actionable.<sup>47</sup>

The United States Court of Appeals for the Fifth Circuit ordered a rehearing en banc and reversed the panel decision in *Payton*. The en banc court held that the parole decision was a discretionary function and, therefore, was not subject to judicial review. The en banc court considered neither the effect of the 1973 Guidelines on parole decision-making<sup>48</sup> nor Congress's subsequent amendment of the parole statute.<sup>49</sup>

The en banc court initially reviewed the history of the discretionary function exception; its decision, however, rested exclusively on its interpretation of the parole statute.<sup>50</sup> It rejected the panel's interpretation of the statute as placing limitations on the parole board's discretion and held that the statute described the decision as wholly within the discretion of the parole board.<sup>51</sup> The court also rejected appellants' attempt to analogize the "negligent release" cases to the parole decision. In doing so, the court once again relied on the wording of the parole statute. The court stated that the *Fair* case was nothing more than a case of medical malpractice, "in no way analogous to the parole board, acting within the discretion granted by statute, deciding to release a prisoner on parole."<sup>52</sup>

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45. Supplemental Brief of Appellants for Rehearing En Banc at 35, *Payton v. United States*, 636 F.2d 132 (5th Cir. 1982).

46. 234 F.2d 288 (5th Cir. 1956).

47. *Id.* at 294, 296.

48. *See supra* note 41.

49. Whisenant was paroled in 1973. The present parole statute was enacted in 1976.

50. *Payton*, 679 F.2d at 480. The court stated: "The question thus becomes whether the decision by the parole board was a discretionary act. We need go no further than the statute in order to make this determination." *Id.*

51. The court gave no reason for disagreeing with the panel's interpretation other than stating: "[the panel's interpretation] is not, however, what the statute says." *Id.*

52. *Payton*, 679 F.2d at 481; *see also infra* note 78. Finally, the court dismissed appellants attempt to analogize *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966), to the facts of *Payton*. *Underwood* also involved the negligent release of a mental patient from a federal hospital. The action that was under attack, however, involved no weighing of policy factors. Rather, the physician had failed to provide his replacement with vital information about the patient's

III. IMPLICATIONS OF THE *PAYTON* DECISION

The en banc decision is not today, nor was it at the time it was written, a sufficient response to the arguments put forth by the court of appeals panel. The attempts by both the panel and the en banc court to construe the parole statute in order to determine whether a parole decision is a discretionary function are unsatisfactory. The wording of the parole statute is clearly ambiguous.<sup>53</sup> Yet, apparently neither the panel nor the en banc court made any attempt to resort to the legislative history for assistance. Moreover, the en banc court's complete reliance on the parole statute, particularly on the statute's description of the parole decision as "discretionary," is of little assistance in determining whether the current parole decision is a discretionary function because Congress has deleted the word "discretion" from the text of the present parole statute. Most important, however, the en banc court's complete reliance on the wording of the parole statute is misplaced because the judicial treatment of the discretionary function exception<sup>54</sup> makes it clear that the exercise of "discretion," by itself, will not protect a decision from judicial review. To be immune from review, a decision must entail a particular type of discretion: a quasi-judicial type of discretion that involves the weighing of policy factors.<sup>55</sup>

In order to determine whether the parole decision entails considerations of such policy factors, the courts should examine the parole decision in the context of the parole statute as a whole, the legislative history of the parole statute, and the procedure attendant to the parole decision.

The present parole statute provides:

If an eligible prisoner has substantially observed the rules of the institution . . . and . . . upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner [the Parole Board] determines . . . that release would not depreciate the seriousness of his offense or promote disrespect for the law [and] that release would not jeopardize the public welfare . . . such prisoner shall be released.<sup>56</sup>

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mental condition. It was this failure and not the decision to release that the court found reviewable because of its completely "operational" nature. *Payton*, 679 F.2d at 481.

53. Another court, construing a state parole statute very similar to the federal parole statute found, as did the panel court, that the board's discretion was bounded by judgmental limitations. *Grimm v. Arizona Bd. of Pardons and Parole*, 115 Ariz. 260, 564 P.2d 1227 (1972). *But see Joyce v. Gilligan*, 383 F. Supp. 1028, 1031 & n.1 (N.D. Ohio 1974) (court held that a similar parole statute gave parole board members immunity from review), *aff'd*, 510 F.2d 973 (6th Cir. 1975).

54. *See supra* note 31 and accompanying text.

55. *See supra* text accompanying notes 25-40.

56. 18 U.S.C. § 4206 (1982). The new parole statute was part of the Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 2, 90 Stat. 219, 219-31 (1976) (codified at 18 U.S.C.

A quick comparison of the present parole statute and the statute under review in *Payton*<sup>57</sup> demonstrates that the statute's description of the parole decision has not changed dramatically. The amount and type of "discretion" exercised by the Parole Board, however, remain unclear from a reading of the statute alone. This ambiguity is heightened by the fact that Congress deleted the word "discretion" from the text of the statute. Although this deletion should not be dispositive, it may indicate Congress's view on the type or breadth of discretion that the Parole Board exercises, particularly because Congress enacted the parole statute after it implemented the Guidelines, which Congress described as "structuring" the discretion of the Parole Board.<sup>58</sup>

The legislative history of the parole statute reveals that Congress did not intend the deletion of the word "discretion" from the statute to be significant. The legislative history states in several places that the parole decision remains a highly discretionary function.<sup>59</sup> Furthermore, the discretion to be exercised involves the weighing of various

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§§ 4201-4218 (1982)). The purpose of the Act was to clarify the procedural steps involved in the grant, denial and revocation of parole and to clarify the organizational structure of the parole decision-making body. Prior to the Act, the Parole Board was part of the Department of Justice, and had eight members who were appointed by the President with the advice and consent of the Senate. 18 U.S.C. § 4201 (1970). In 1976, the Board became a nine member independent agency. This agency is now known as the United States Parole Commission. 18 U.S.C. § 4202 (1982). (The Commission will continue to be referred to in this note as the Parole Board for the sake of simplicity). Prior to this structural change, all parole hearings and decisions were made by members of the Board or an authorized hearing examiner. Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 820 (1975). Under the present system, however, parole hearings are conducted by two hearing examiners. Their recommendations are then forwarded to regional commissioners who review their decisions. The National Appeals Board has final authority to review all parole decisions. 18 U.S.C. § 4203 (1982); see also S. REP. NO. 369, 94th Cong., 1st Sess. 14-15, 16-17, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 335, 336, 338-39.

57. See *supra* text accompanying note 42.

58. S. REP. NO. 369, 94th Cong., 1st Sess. 18-19, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 335, 340.

59. S. REP. NO. 369, 94th Cong., 1st Sess. 16, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 337 (the parole decision "remains a very subjective judgment"); H.R. REP. NO. 838, 94th Cong., 2d Sess. 21, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 351-353 (the criteria for parole decisions are "within the discretion of the agency"). Congress also stated that it affirmed the existing case law concerning judicial review of individual cases. H.R. REP. NO. 838, 94th Cong., 2d Sess. 21, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 353. The courts' positions on judicial review are not uniform. This statement does indicate, however, that the deletion of the word "discretion" was not intended to signal to the courts that the parole decisions were no longer "discretionary" or that they should alter their views on whether such decisions were a discretionary function under the FTCA. Furthermore, some parts of the Parole Commission and Reorganization Act make the discretionary nature of the parole decision more explicit. For example, 18 U.S.C. § 4218 (1982) provides that the parole decision shall not be subject to review under the Administrative Procedure Act; rather the parole decisions fall within the exception to that Act, 5 U.S.C. § 701(a)(2) (1982), which shields from review acts left to the "discretion" of an agency. In addition, the Parole Board previously was required to consider all reports assembled by all services active in a prisoner's case before making a parole decision. 28 C.F.R. § 2.14 (1973). The

policy considerations: the Board must consider financial and economic factors (the expense of incarceration),<sup>60</sup> social factors (the corrosive effect of continued incarceration on the prisoner's family and community ties),<sup>61</sup> and political factors (respect for the law and safety of the community).<sup>62</sup> Congress stated explicitly that the weight to be accorded to any of these factors was completely within the discretion of the Board.<sup>63</sup>

Moreover, Congress recognized that the parole function is quasi-judicial in nature when it stated:

From an historical perspective, parole originated as a form of clemency; to mitigate unusually harsh sentences, or to reward prison inmates for their exemplary behavior while incarcerated. Parole today, however, has taken a much broader goal in correctional policy, fulfilling different specific objectives of the correctional system. *Parole is an extension of the hearing process.*<sup>64</sup>

Thus, the parole decision as defined by the statute appears to closely resemble those decisions traditionally found to come within the discretionary function exception because the decision requires the balancing of numerous policy considerations and is quasi-judicial in nature.<sup>65</sup> Nevertheless, the parole decision is also bounded by the

recently amended parole statute provides that the Board need only consider information which is available and which it considers relevant. 18 U.S.C. § 4207 (1982).

60. H.R. REP. NO. 838, 94th Cong., 2d Sess. 20, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 351, 352.

61. H.R. REP. NO. 838, 94th Cong., 2d Sess. 26, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 358-59.

62. H.R. REP. NO. 838, 94th Cong., 2d Sess. 26, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 360.

63. H.R. REP. NO. 838, 94th Cong., 2d Sess. 28, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 360. The legislative history cites in support of this statement *Scarpa v. United States Bd. of Parole*, 477 F.2d 278 (5th Cir.), *vacated as moot*, 414 U.S. 809 (1973), which held that the parole decision was completely immune from review.

64. S. REP. NO. 369, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 335, 337 (emphasis added). Courts have also recognized the similarity between the sentencing decision and the parole process. *See, e.g., Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 8 (1979) ("In parole releases, like its siblings, probation release and institutional rehabilitation, few certainties exist. . . . In each case . . . the choice involves a synthesis of record facts and personal observations filtered through the decisionmaker and leading to a predictive judgment."); *Sellars v. Procunier*, 641 F.2d 1295, 1303 (9th Cir. 1981) ([P]arole board officials perform functionally comparable tasks to judges. The daily task of both . . . is the adjudication of specific cases or controversies. Their duty is often the same: to render impartial decisions . . . . They face the same risk of constant unfounded suits by those disappointed by the parole board's decisions."); *Pate v. Alabama Bd. of Pardons & Parole*, 409 F. Supp. 478, 479 (M.D. Ala. 1976) ("the function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administrator"), *aff'd*, 548 F.2d 354 (5th Cir. 1977); *Bricker v. Michigan Parole Bd.*, 405 F. Supp. 1340, 1345 (E.D. Mich. 1975) (court characterized the parole board as the "arm of the sentencing judge").

65. *See supra* text accompanying note 31.

Guidelines. The critical question is whether the Guidelines provide a "scientific test or measuring stick" by which a parole board can make mechanical individual parole decisions without any weighing of policy considerations.<sup>66</sup>

The Guidelines consist of two indices—the "offense severity" rating and the "salient factor score."<sup>67</sup> The salient factor score is based on objective criteria, all of which are fixed at the time of sentencing.<sup>68</sup> The parole board does nothing more than compile the information and calculate a score. The offense severity rating, on the other hand, is a subjective evaluation, made by the parole examiner, of the severity of the prisoner's past criminal record. The rating is subjective for several reasons. First, the prisoner's past offenses do not always fall neatly into one of the offenses described in the ratings.<sup>69</sup> Therefore, the examiner has some discretion as to how to categorize past behavior. Second, the offense severity rating has no method for handling multiple instances of the same crime and the examiner, again, has the authority to choose whether to increase the severity rating.<sup>70</sup> Third, the parole examiner may take into account non-adjudicated facts, which may significantly affect the ultimate score, when compiling the offense severity rating.<sup>71</sup> Fourth, the parole examiner is in the position of assessing the prisoner's credibility, for the prisoner will often dispute facts on his record that the parole examiner may or may not choose to believe.<sup>72</sup> Finally, the Guidelines provide for a range of years of recommended incarceration, rather than a specific number of years.<sup>73</sup> The parole examiner must therefore determine how many years of incarceration within this range to recommend. Hence, the Guidelines leave much room for the parole examiner to make the policy judgments he is directed to make under the parole statute.

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66. See *supra* text accompanying note 37.

67. See 28 C.F.R. § 2.20 (1983).

68. This score is intended to predict the likelihood that the prisoner will remain on parole without violating the law. The factors that comprise this rating are (1) the number of prior convictions, (2) the number of prior incarcerations of more than 30 days, (3) age at commencement of current offense, (4) recency of prior commitment, (5) whether parole had ever been revoked before or the prisoner had committed a new offense while on parole or is a probation violator this time, and (6) whether a history of heroin or opiate dependence exists. *Id.*

69. The prisoner's past offenses do not always fall neatly into those offenses set forth in the "Offense Severity Rating" because the Rating was compiled from the offenses contained in the California Penal Code. As a result, many federal crimes are not listed. Project, *supra* note 56, at 823-24 & n.67.

70. 28 C.F.R. § 2.20(d)(1983).

71. See Project, *supra* note 56, at 835, n.114.

72. See *id.* at 836-37.

73. 28 C.F.R. § 2.20(b)(1983).

In addition to the discretion exercised pursuant to the Guidelines, the parole examiner makes policy judgments when he exercises the power granted under the regulations to make a parole decision outside the range of time calculated under the Guidelines.<sup>74</sup> The Guidelines allow such exceptions in order to be consistent with the reason for implementing the Guidelines—to structure discretion without removing individual considerations.<sup>75</sup> A number of factors, such as unusually good or bad behavior during incarceration,<sup>76</sup> may justify a decision outside the Guidelines. Consideration of this factor advances the policy objectives of rewarding prisoners who observe the rules of the institution, as well as protecting the public by keeping incarcerated those prisoners who demonstrate no signs of rehabilitation. Additional reasons for a decision outside the Guidelines include the presence of unusual emotional or health problems of the prisoner, and aggravating and mitigating circumstances surrounding the crime.<sup>77</sup> Consideration of these factors advances the policy objectives of maintaining family ties, releasing prisoners who are capable of being productive members of society, instilling respect for the law, and protecting the safety of the public. Thus, in addition to the discretion exercised in compiling the Guideline “score,” a parole examiner exercises discretion each time he makes a decision to recommend a length of incarceration within or outside the range of time calculated under the Guidelines.

The parole decision, therefore, continues to require the exercise of the type of discretion that involves the weighing of policy factors even at the individual parole decision level. It is this fact, rather than a statutory description of the parole decision as “discretionary,” that qualifies the parole decision as a discretionary function.<sup>78</sup> Furthermore, the purposes and policies behind the FTCA and the discretionary function

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74. 28 C.F.R. § 2.20(c) (1983).

75. *Id.* § 2.20(a). The number of decisions within the Guidelines ranged from approximately 88.4% to 91.7% from the period of October 1973 to March 1974. Project, *supra* note 56, at 825 n.75 (citing HOFFMAN & DEGOSTIN, *PAROLE DECISION-MAKING: STRUCTURING DISCRETION* 10 (1974)).

76. 28 C.F.R. § 2.20(c) (1983).

77. *Id.*

78. Furthermore, it is only when this thorough examination of the parole decision is completed that a satisfactory answer is found to the appellants' attempt to analogize the “negligent release” cases to the parole decision. See *supra* note 52 and accompanying text. Because the parole statute no longer spells out the parole decision as “discretionary,” the en banc court's distinction that physicians do not “[act] within the discretion granted . . . by statute” no longer suffices, if, indeed, it ever did. See *Payton*, 679 F.2d at 481. The better basis for distinguishing the “negligent release” cases from the parole decision is that although the “negligent release” cases involve the weighing of several conflicting factors, these factors are medically-based. They do not, as in the case of a parole decision, involve the weighing of several conflicting policy factors. This distinction has been recognized by several courts. See *Underwood v. United States*, 365 F.2d 92

exception are best served by a finding that the parole decision is a non-reviewable discretionary function. Because the court of appeals panel, in finding that the parole decision was not a discretionary function, based its opinion to a large extent on the FTCA's purposes and policies, its analysis will be examined in more detail below.

The court of appeals panel in *Payton* examined three purposes or policies behind the FTCA. First, it held that a finding that the parole decision was not a discretionary function best served the purpose of spreading the cost of injury among taxpayers.<sup>79</sup> The court believed that this purpose was especially important when the injury was as serious as it was in *Payton*. The court is correct that one purpose of the FTCA was to spread the cost of injury among the taxpayers,<sup>80</sup> but Congress, when it adopted the exception, recognized that this objective is less important than the interest in preserving independent, uninhibited decision-making when officials exercise a discretionary function. Thus, when a discretionary function exists, it is immune from review, regardless of the degree or nature of injury that results. Indeed, protection becomes more necessary as the potential injury from an official activity becomes greater. If minimal injury is the most that can result from a decision, decisionmakers will be less apt to be inhibited from acting according to their best judgment, even if their actions are subject to review. In fact, no court that has applied the discretionary function exception has weighed the degree or nature of the loss to determine whether the discretionary function exception should apply.<sup>81</sup>

The other policy considerations that the *Payton* panel addressed are the ability of the judiciary to adjudicate attacks on the parole deci-

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(5th Cir. 1966); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956); *Merchants Nat'l Bank & Trust Co. v. United States*, 272 F. Supp. 409 (D.N.D. 1967).

Finally, even if it is conceded, for the sake of argument, that the Guidelines, as the panel believed, allow the parole examiner no room for discretion, the parole decision would still be immune from judicial review. For then the parole examiner would simply plug the prisoner's individual characteristics into a pre-established formula (the Guidelines) to determine the number of years of required incarceration. This mechanical process of entering individual characteristics into a pre-established formula is exactly what the *Dalehite* Court spoke of when it held that the execution of planning level decisions "in accordance with official directions" was not actionable. *See supra* note 28. To find such execution actionable under the "good samaritan" line of cases, it would be necessary to show that the process had been performed negligently. This might occur, for instance, if a parole examiner plugged an incorrect number into the Guidelines. Such negligence was not alleged in *Payton*.

79. *Payton*, 636 F.2d at 144-45.

80. *See* H.R. REP. NO. 2245, 77th Cong., 2d Sess. 3 (1942); S. REP. NO. 1196, 77th Cong., 2d Sess. 2 (1942).

81. Indeed, in *Dalehite v. United States*, 346 U.S. 15 (1953), the government's activities resulted in far greater financial loss and bodily injury than in *Payton*, yet such loss and injury was not a consideration in the Court's decision whether the discretionary function exception should apply.

sion and the ability of the Parole Board to continue to carry out its function efficiently and effectively.<sup>82</sup> The panel court's conclusion that the judiciary is competent to review attacks on the parole decision, and that such review would not keep parole examiners from carrying out their function aggressively and efficiently, rested heavily on its characterization of the parole decision since the implementation of the Guidelines as a largely "fixed and mechanical" process.<sup>83</sup> This characterization is incorrect. The parole decision still entails the weighing of policy factors and is, therefore, essentially a legislative process.<sup>84</sup> Such legislative decisions do not easily lend themselves to an assessment of "fault" because the court has no objective standard against which to judge the decision; the decisions are, therefore, not proper subjects of review.<sup>85</sup>

The threat of judicial review would probably also make parole examiners excessively cautious in their parole decisions. Parole decisions adversely affect a large number of individuals, each a potential source of litigation.<sup>86</sup> The possibility that the government may be liable for significant damages because of a parole board's actions, or at the very least that it would spend significant amounts of money defending a parole board's actions, would inhibit parole examiners from acting as aggressively as they have in the past. Many prisoners capable of leading lawful, productive lives would remain in prison—a result never intended by Congress.

Finally, the constant review of parole decisions would significantly diminish the efficiency of the current parole system. The number of hearing examiners is already substantially below the number needed to conduct thorough reviews of the prisoners eligible for parole.<sup>87</sup> Requiring hearing examiners and parole board members to appear in

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82. *Payton*, 636 F.2d at 144, 145.

83. *Id.* at 146. The panel also buttressed its opinion by noting that the parole decision was made by "low level" officials. *Id.* This method of determining whether an activity is discretionary has been universally rejected. See *supra* note 33 and accompanying text.

84. See *supra* notes 67-77 and accompanying text.

85. See *Developments in the Law*, *supra* note 7, at 829 (citing K. DAVIS, ADMINISTRATIVE LAW § 153 (1951)).

86. See *Sellars v. Procunier*, 641 F.2d 1295, 1303 (5th Cir.), *cert. denied*, 454 U.S. 1102 (1981).

87. See Project, *supra* note 56, at 821 n.49 (noting that in 1970 there were eight board members and eight hearing examiners to conduct 12,000 hearings and review 5,000 progress reports); see also *Sellars v. Procunier*, 641 F.2d 1295, 1303 (5th Cir.), *cert. denied*, 454 U.S. 1102 (1981); *Payton*, 679 F.2d at 493 (Tjoflat, J., dissenting) (arguing that requiring parole officials to testify in court as to their decisions would "[threaten] substantial damage to our correctional system" and noting that in a twelve-month period ending June 30, 1981, 6,452 persons began a term of parole); H.R. REP. NO. 838, 94th Cong., 2d Sess. 20, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 351, 353 (Congress recognized of the "burgeoning caseload" of the Parole Board).

court and defend their actions would cripple an already overburdened process.

#### IV. CONCLUSION

The government, like private citizens, should generally be accountable for its actions, and immunity from judicial review should not be lightly granted. But certain decisions make judicial review at its worst, little more than a guessing game, and at its best, a second opinion. Such decisions involve the weighing of social, financial, economic and political factors. The parole decision, before the implementation of the Guidelines, was such a decision and it remains a highly discretionary decision today. The Guidelines, enacted with the intention of "guiding" the parole decision, do not perform the process that is the essence of every discretionary function—the *weighing* of policy factors. This weighing is still performed by the parole examiner, both when applying the Guidelines and when deciding whether a decision should be made outside the time range permissible under the Guidelines. Therefore, the parole decision falls within the discretionary function exception of the FTCA and should not be subject to judicial scrutiny.

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