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**Civil Liability of U.S. Government  
Under the Federal Tort Claims Act  
For Actions of Federal Law Enforcement Officers**

*Part 1 (This Month)*

- Introduction
- Provisions of Statute
- Discretionary Function Exception
- Excluded Torts and Law Enforcement Exception
- Detention of Goods Exception

*Part 2 (Next Month)*

- Scope of Employment
- Judgment Bar Rule
- Procedural Requirements
- Damages Available
- Attorneys' Fees
- Resources and References

❖ **Introduction**

The **Federal Tort Claims Act** (FTCA), [28 U.S.C. Secs. 2671-2680](#). is a statute that allows private individuals who believe that they have been harmed by wrongful acts (torts) of federal employees, including law enforcement officers to sue the U.S. government, although not individual federal employees-- in federal court forer liability. It is a limited waiver of federal sovereign immunity. Federal district courts, concurrently with the U.S. Court of Federal Claims are given original jurisdiction over such cases by [28 U.S.C. Sec 1346](#). Remarkably, this law extends liability beyond the intentional misconduct covered by other federal civil rights statutes and court created causes of action to encompass even liability for negligent acts allowed under state law.

Part 1 of this two-part article examines the major provisions of the core of the statute, as well as its exception for discretionary acts, the exclusion of liability for enumerated intentional torts and an exception to that exclusion for law enforcement officers, and an exception to liability for claims involving forfeiture and the detention of goods.

Part two of this article, appearing next month, takes a look at scope of employment issues, as well as a judgment bar rule contained in the law, procedural requirements, the mandate that the FTCA be the exclusive remedy for claims of this nature, what damages are available under the law, and attorneys' fees issues. At the end of Part two, there is a list of relevant and useful resources and references.

Federal civil rights claims brought directly against individual federal employees under [Bivens v. Six Unknown Fed. Narcotics Agents](#), #301, 403 U.S. 388 (1971) are not discussed in this article, except tangentially as they relate to FTCA liability.

#### ❖ Provisions of Statute

The FTCA in Sec. 2674 provides that “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances...”

**The law of the place where the wrongful act allegedly occurred applies, so liability is possible for the negligent acts of federal employees, including law enforcement officers.** In [Lee v. U.S.A.](#), #06-2184, 570 F. Supp. 2d 142 (D. Ok. 2008), the U.S. government was sued under the Federal Tort Claims Act for the allegedly negligent actions of a capitol police officer in attempting a traffic stop, followed by a high-speed chase of a stolen car, ending in a crash. A car crash victim and the father of a deceased victim of the crash claimed that the victims had accepted a ride in the stolen vehicle unknowingly, shortly after it had been acquired in an armed carjacking.

The court held that the applicable standard under the FTCA was local laws concerning vehicular negligence applying to private citizens, not to government employees, and that, under that standard, the plaintiffs had alleged sufficient facts to state a claim for negligence under District of Columbia law.

**If the alleged wrongful acts of a federal employee would not impose liability under state law on a private citizen who engaged in the same conduct, the U.S.**

**government cannot be held liable under the FTCA.** In [Gray v. Dept. of Justice](#), #07-35171, 275 Fed. Appx. 679, 2008 U.S. App. Lexis 9597 (Unpub. 9th Cir.), an FBI agent who turned over potentially exculpatory evidence to a prosecutor fulfilled her non-discretionary duty in doing so, and the federal government could not be held liable under the Federal Tort Claims Act, 28 U.S.C. Secs. 1346(b)(1) and 2671 et seq. for alleged wrongful prosecution of the plaintiff for engaging in a sexual act with a person under the age of twelve on an Indian reservation.

The plaintiff's conviction for the offense was overturned based on the prosecutor's failure to turn that exculpatory evidence over to the defense. Once the FBI agent presented the exculpatory evidence to the prosecutor, however, her actions satisfied due process. Further, a private party in Montana, the location of the case, who acted as the FBI agent did, would not have been liable for the prosecutor's subsequent failure to turn over the material to the defense.

See also [Bolduc v. U.S.](#), # 03-2081, 402 F.3d 50 (1st Cir. 2005), ruling that the Federal Tort Claims Act did not provide jurisdiction for a claim, by subsequently exonerated arrestees initially convicted of bank robberies, that FBI agents negligently failed to properly file and disclose conflicting eyewitness identifications of other suspects, resulting in their wrongful conviction. Wisconsin state law would not impose liability for negligence on private persons in similar circumstances, so there could not be liability for the U.S. government.

**Defenses available to private persons are also available to the U.S. government under the FTCA.** In [Jones v. U.S.](#), #CV-04-1276, 408 F. Supp. 2d 107 (E.D.N.Y. 2006), in a negligence claim brought by a driver under Federal Tort Claims Act for injuries allegedly suffered during an accident involving a car driven by an FBI agent, the driver did not suffer "serious" injury as required for recovery under New York's No-Fault Insurance Law. The driver had pre-existing cervical and spinal damage and permanent injuries already in existence at the time of a car accident did not qualify as "serious injuries" under New York law applicable to FTCA lawsuit.

A postal inspector's undercover vehicle qualified as a "police vehicle" under a New York statute granting qualified exemptions from traffic laws from traffic laws when engaged in emergency operations. The defendant inspector did not act in "reckless

disregard” of others’ safety in following a person under surveillance through a red light. The U.S. government was not, therefore, liable under the Federal Tort Claims Act, 28 U.S.C. Sec. 2671 et seq., for injuries to another motorist in an ensuing traffic accident. [Hodder v. United States](#), 328 F. Supp. 335 (S.D.N.Y. 2004). [N/R]

### ❖ **Discretionary Function Exception**

28 U.S.C. Sec. 2680(a) of the FTCA provides that:

“Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance 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.”

The first part of the paragraph appears to establish that non-negligent acts or omissions in carrying out a law or regulation cannot be the basis for liability, i.e., no strict liability offenses. **The second portion establishes the “discretionary function” exception to liability** Illustrating this, in [Gonzalez v. United States](#), #13-15218, 814 F.3d 1022 (9th Cir. 2016), three masked intruders who invaded a family home shot and killed the husband and daughter and shot the wife in the arm. The wife sued the federal government under the FTCA, claiming that the FBI had possessed information about the impending home invasion but had failed to disclose it to local law enforcement. She argued that such a disclosure might have prevented the crime.

The federal appeals court upheld the dismissal of the lawsuit, agreeing that the FBI’s decision as to whether to disclose such information was the type of decision that Congress intended to shield from liability under the statute and was covered by the discretionary function exception to liability. The decision involved policy judgments about the reliability of the information, the relative importance of the crime, and the FBI’s mission and resources.

Similarly, in [Tsolmon v. United States](#), #15-20609, 841 F.3d 378 (5th Cir. 2016), Customs and Border Protection agents in Louisiana boarded a Greyhound bus and

performed a routine check of passengers' immigration status. A Mongolian citizen in the U.S. on an H-1B temporary worker visa was unable to produce his immigration papers despite a law requiring him to carry them. He was therefore arrested when the agents were unable to verify his status, pursuant to the agency's policy requiring detention under these circumstances.

He sued the U.S. government, claiming false arrest and imprisonment under Louisiana law, as provided by the Federal Tort Claims Act's waiver of sovereign immunity by the federal government. The claim was rejected under the discretionary function exception to the Federal Tort Claims Act. The court concluded that an investigation into a person's immigration status is considered discretionary when that investigation culminates in a detention mandated by an agency policy.

In [\*Campos v. U.S.\*](#), #16-61476, 888 F.3d 724 (5th Cir. 2018), a woman sued the U.S. government under the FTCA for false arrest and imprisonment by Customs and Border Protection (CBP) officers because the officers detained her after she presented them with an Employment Authorization Document (EAD), which she argued conclusively showed her right to remain in the United States.

A federal appeals court ruled that the discretionary function exception to the FTCA applied in this case where the officers enforced a removal order. The court ruled that, what the plaintiff insisted was certain from the EAD and removed all discretion was, in reality, sufficiently uncertain as to leave discretion in the hands of the officers.

In another case, [\*Bryan v. U.S.\*](#), #17-1519, 913 F.3d 356 (3d Cir. 2019), in 2008, three people (one man and two women) took a Caribbean cruise which stopped at several foreign ports before returning to the U.S. A number of the foreign ports were known sources of narcotics. When reboarding the ship in Puerto Rico, a can of shaving powder in the man's bag spilled on a U.S. Customs and Border Protection (CBP) officer. The plaintiff travelers later claimed that officers' subsequent actions were retaliation for them laughing at the incident. Their bags were searched and nothing unlawful was found, but a notation was made in the Treasury Enforcement Communications System (TECS) database that the man whose shaving powder had spilled had appeared "disoriented and nervous" and that it took him "some time" to state his employment when asked.

The database already had entries from 2000, 2004, and 2006 linking the travelers to suspicions of engaging in drug smuggling. Their cabins were then searched, but no

contraband was found. The three plaintiff travelers asserted claims against the officers under [\*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics\*](#), #301, 403 U.S. 388 (1971) for allegedly violating their Fourth Amendment rights and tort claims against the federal government under the Federal Tort Claims Act (FTCA).

A federal appeals court upheld summary judgment in favor of the officers and the government. The officers were entitled to qualified immunity because, while the United States Court of Appeals for the Third Circuit had ruled on September 4, 2008 that a search of a cruise ship cabin at the border had to be supported by reasonable suspicion, that standard could not be said to have been clearly established in the Third Circuit or the First Circuit on September 5 and 6, 2008, when the searches took place, as the officers could not reasonably be expected to have learned of this development within one or two days. That legal standard was therefore not “clearly established at the time. Further, the U.S. government was shielded from liability under the FTCA’s discretionary function exception, as the agents exercised discretion in making entries into the database and carrying out the searches.

In another case, [\*Gordo-Gonzalez v. U.S.\*](#), #16-2276, 873 F.3d 32 (1st Cir. 2017).the court appeared to put the burden on the plaintiff to show that the conduct at issue did ***not*** involve a discretionary function. In that case, a woman claimed that the Federal Bureau of Investigation (FBI) negligently supervised the use of its surveillance equipment to keep tabs on her by her then-husband, an FBI agent.

A federal appeals court upheld the dismissal of her lawsuit against the U.S. government under the Federal Tort Claims Act (FTCA), holding that because the plaintiff did not plead sufficient specific facts to show that the challenged conduct in supervising did not involve a discretionary function she was not entitled to the FTCA’s waiver of sovereign immunity.

***State law may determine what is a discretionary function.*** In [\*Sorace v. United States\*](#), #14-2683, 788 F.3d 758 (8th Cir. 2015), the estates of two people killed in a drunk driving accident on a Native American reservation sued the federal government under the FTCA, arguing that tribal police were negligent in failing to locate and arrest the drunk driver prior to the accident.

A federal appeals court upheld the dismissal of the claim, finding that, under South Dakota law, applicable to the defendant under the FTCA, there was no mandatory

duty on police to protect a particular person or class of people absent a special relationship. The tribal police in this case did nothing that increased the risk of harm to the decedents by failing to arrest the drunk driver after his erratic driving was reported.

In [\*Milligan v. United States\*](#), # 10-5615, 670 F.3d 686 (6th Cir. 2012), U.S. Marshals teamed up with local police to conduct a roundup of fugitives in 24 states that resulted in 10,733 arrests. One of the arrestees turned out not to be the arrestee sought, but someone else with the same name, due to a clerical error by a city's police department. That arrestee's lawsuit against the U.S. government was barred under the discretionary function exception to the FTCA.

Officers making the arrest did not have the arrest warrant in their possession at the time the arrest was made, and were not required to have it under the city's existing arrest policy. The plaintiffs also failed to produce any evidence that the officers intended to falsely arrest the arrestee, so a law enforcement exception to the intentional tort exception of the FTCA (discussed in the next section of this article) did not apply.

In [\*McCloskey v. Mueller\*](#), #04-CV-11015, 385 F. Supp. 2d 74 (D. Mass. 2005), affirmed, [\*McCloskey v. Mueller\*](#), 446 F.3d 262 (1st Cir. 2006), the court ruled that the FBI and its personnel were not liable for the death of murder victim killed after a self-proclaimed bank robber called FBI offering to turn himself in, and allegedly killed the victim the following day after his call was purportedly ignored. Liability was barred under the discretionary function exception to the FTCA, as the decision as to how to respond to the phone call was discretionary.

In [\*Litif v. U.S.\*](#), #02-11791, 682 F. Supp. 2d 602 (D. Mass. 2010), **the discretionary function exception was found not to apply because the conduct alleged was criminal.** In that case, FBI agents allegedly protected a group of murderers, referred to as the "Bulger gang," against apprehension and prosecution, in order to use them as informants against La Cosa Nostra. This allegedly continued for over twenty years, despite notice that the informants were killers and would continue to commit murders. The estates of three persons allegedly killed by the informants sued the FBI, FBI agents, and the informants.

The U.S. government was liable for the death of a man killed after an FBI agent allegedly leaked his intent to incriminate an informant, making it foreseeable that the

informant would try to murder him. The government was also liable for the deaths of an informant's former girlfriend and her daughter, because a federal agent created an unreasonable risk of harm to them by helping the informants avoid arrest. The federal agents' conduct was within the scope of their employment, given that their superiors agreed to their actions to protect the informants.

The court rejected, however, claims by the decedents' families for intentional infliction of emotional distress because they lacked "contemporaneous" knowledge of the murders. An exception to liability under the FTCA for discretionary functions did not apply, as the conduct of the FBI was found to be criminal and in violation of the agency's guidelines. One family was awarded a total of \$1,150,000, a second family received a total of \$1,352,005, and a third received \$219,795.

**Knowing submission of false affidavits were not within the protection of the discretionary function exception.** In [Reynolds v. U.S.](#), #08-1634, 549 F.3d 1108 (7th Cir. 2008), the court ruled that the U.S. government could be sued under the Federal Tort Claims Act for the actions of Federal Protective Services agents in instigating an alleged malicious prosecution of a security company employee for false (incomplete) reporting concerning an incident in which a security company employee locked out on the roof of a federal building was purportedly naked. The agents, in encouraging the prosecution of the plaintiff, allegedly falsely indicated that she knew of the nudity, but failed to include it in her report.

This, if true, fell outside the scope of the agents' performance of a discretionary function, an exception to liability, since it involved the alleged knowing submission of false affidavits to the prosecutor and, ultimately, the state court in an "effort to corrupt the fairness of the prosecution." The fact that no search, seizure, or arrest was involved did not alter the result

**Existing agency regulations or policies may limit the choices an employee may make under specified circumstances, making it clear that they have little or no discretion.** In [Rakes v. United States](#), #02-10480, 352 F. Supp. 2d 47 (D. Mass. 2005), liquor store owners stated a viable possible claim under the FTCA, based on alleged conduct of FBI agents who allegedly passed their names on to racketeers after they reported to police that they were victims of extortion by the racketeers, resulting in damage to their businesses. The racketeers were allegedly being



protected by the FBI agents as confidential informants, and the agents acted within the scope of their employment under the FTCA in taking their alleged actions.

The actions did not come within the “discretionary function” exemption to the FTCA, because the agents had “no room” for the exercise of discretion under extensive FBI regulations concerning how to handle confidential informants. The claims asserted, however, were time barred under the applicable statute of limitations, so the complaint was dismissed.

### ❖ **Excluded Torts and Law Enforcement Exception**

[28 U.S.C. Sec. 2680\(h\)](#) provides that the FTCA shall not apply to:

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.”

***The actions of federal employees who are not law enforcement cannot be the basis for government liability for these enumerated intentional torts, but actions by law enforcement federal employees can.***

In [Lu v. Powell](#), #08-56421, 621 F.3d 944 (9th Cir.2010), a woman from China and her husband sued the federal government and a number of officials under the Federal Tort Claims Act, asserting that an asylum officer demanded sexual favors from her in return for assisting with her asylum application. He had the authority to grant her asylum request, eliminating the need for a formal hearing on it. When she refused to allow him to allegedly unzip and remove her pants, he denied her application

A federal appeals court upheld the dismissal of the lawsuit in part, as the plaintiff failed to establish that there was a specific duty violated under the Fifth Amendment

or any evidence that could establish the existence of an unconstitutional policy. It did, however, reinstate an emotional distress claim, and stated that emotional distress suffered from such a request for sexual favors could potentially be proven and constitute an injury separate and apart from battery. The U.S. government, however, is immune under the Federal Tort Claims Act from claims for battery committed by its non-law enforcement employees.

Similarly, in *Verran v. United States*, 305 F. Supp. 2d 765 (E.D. Mich. 2004). Woman's claim that she was raped by a military recruiter on U.S. government premises did not entitle her to pursue liability claims against the government under the FTCA. Claims for alleged negligent hiring and supervision of alleged assailant were barred because they arose from alleged intentional misconduct, coming within an "intentional tort" exclusion from the FTCA's waiver of governmental immunity.

A federal appeals court panel held that a trial court improperly dismissed, on sovereign immunity grounds, false arrest, false imprisonment, and malicious prosecution claims against a federal DEA agent, since Congress, under the Federal Tort Claims Act, waived sovereign immunity on such claims based on the actions of federal law enforcement or investigative officers. *Nguyen v. U.S.*, #07-12874, 556 F.3d 1244 (11th Cir. 2009).

### **Detention of Goods Exception**

28 U.S.C. Sec. 2680(c) states that the FTCA does not apply to "Any claim arising in respect of [...] the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if— (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense."

**For this exception to liability to apply, it must be shown what goods were detained.**

In *Davila v. United States*, #12-50044, 713 F.3d 248 (5th Cir. 2013), federal agents and deputy sheriffs carried out an inspection at a border checkpoint. A father and a number of others were detained when his son fled the checkpoint in a vehicle. Three

months after this incident, the father and a passenger in that vehicle were stopped while driving in a national park on the basis of a be-on-the-lookout (BOLO) report that had issued on the father's vehicle after the prior incident. Unlawful search and seizure claims were rejected because the rangers who stopped the vehicle had a reasonable suspicion that the vehicle might contain a fleeing felon or weapons.

The appeals court denied, however, federal agents' motion to throw out a false imprisonment claim under an exception to the Federal Tort Claims Act for claims arising from the detention of goods. No goods were then being detained after the son fled the checkpoint in the vehicle. The court also rejected excessive force claims against the rangers based on them drawing their weapons and handcuffing the father and his passenger during their traffic stop since they had reason to believe that those in the car might be dangerous.

In [\*Foster v. U.S.A.\*](#), #06-56843 522 F.3d 1071 (9th Cir.2008), the U.S. government was not liable for alleged damages to hundreds of handguns and long guns, as well as ammunition and packaging seized from a man's storage spaces by agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) under search warrants. A detention of goods exception to the waiver of sovereign immunity in the FTCA barred the claim. Also, another waiver of sovereign immunity in 28 U.S.C. Sec. 2680(c)(1)-(4) only applied to property seized solely for the purpose of forfeiture, and, in this case, while forfeiture was a possibility for some of the weapons, criminal investigation was also a legitimate purpose of the seizure of the guns.

Similarly, in [\*Perez v. U.S.\*](#), # 07-2701, 269 Fed. Appx. 207, 2008 U.S. App. Lexis 571 (3rd Cir.), Secret Service officers who stopped a motorist based on an outstanding arrest warrant, and seized a bag including four prescription eyeglasses from his vehicle were within the definition of "any other law enforcement officer" in 28 U.S.C. Sec. 2680(c) of the Federal Tort Claims Act. The U.S. government, therefore, was protected from liability by this statutory provision barring liability for "detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer," on the motorist's claim concerning the alleged failure of the Secret Service to subsequently return the eyeglasses.

## **AELE Monthly Law Journal**

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