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IS THE IRS ABOVE THE LAW? POTENTIAL REMEDIES FOR TAXPAYERS DAMAGED BY UNLAWFUL IRS CONDUCT

James T. Towe

I. INTRODUCTION

Melvin Morris, a plumber and contractor, bought eighteen substandard buildings in San Francisco to renovate and sell. Morris relied on credit from lenders, subcontractors, and suppliers to finance the building projects. After Morris began refurbishing investment properties, a union representative told Morris that since Morris did not employ union labor he should expect to hear from the Internal Revenue Service (IRS). Shortly thereafter, the IRS investigated and audited Morris and his wife. The IRS concluded that the couple owed back taxes for excess depreciation deductions taken on the buildings. While investigating Morris, the IRS informed Morris’s creditors of his tax liability and told creditors that Morris would become insolvent. Creditors refused to further support the venture, and Morris lost his business.¹

During their investigation, IRS agents harassed and intimidated Morris and his wife. To collect amounts owed for back taxes, the IRS unlawfully seized and levied upon the Morrises’ property. After investigating and auditing the Morrises for several years and collecting part of the alleged deficiency, the IRS realized that the Morrises had properly computed and paid their taxes. The IRS conceded that the deficiency determination was an error and returned the wrongfully seized property. The Morrises sued for, among other things, lost business opportunity, but their claims failed because of sovereign immunity. This fact pattern is the modus operandi of the IRS,² as evidenced by its agents in Morris v. United States.³

The question that arises is how can a claimant re-

¹. Morris v. United States, 521 F.2d 872, 873-74 (9th Cir. 1975).
². This Comment focuses on the IRS because, as at least one commentator contends, it is the world’s most powerful bureaucracy. The IRS is five times the size of the FBI, employs over 123,000 people, obtains more information than any other agency, and can assess civil penalties in a process that requires a taxpayer to prove his or her innocence. See David Burnham, A Law unto Itself, Power, Politics, and the IRS 16-18 (1989).
³. Morris, 521 F.2d at 873-74; see discussion infra notes 90-96 and accompanying text.
cover damages for unlawful or tortious conduct committed by IRS officials?.

Today a claimant's ability to recover damages is increasingly important because of the size, strength, and growth of the federal government. Federal officials already possess powers, privileges, information, and resources unavailable to the general public. Also, government officials may be tempted to abuse their powers since they remain generally immune from lawsuits. Federal officials who benefit from additional powers should bear the responsibility for harms caused by their negligent or intentional acts. As civil suits deter private citizens' illegal conduct, civil suits against the government could alter the government's illegal conduct as well. Currently, however, sovereign immunity severely limits the possibility of successfully suing the government. Claims must be based on the limited waivers of sovereign immunity that frequently restrict recovery or have broad exceptions.

This Comment explores the Federal Tort Claims Act (FTCA) as a waiver of sovereign immunity, its application in IRS cases,
and, where relevant, provides suggestions to future claimants litigating with the IRS. This Comment also focuses on the FTCA's exceptions which nearly swallow the general rule, referring to the FTCA's waiver of sovereign immunity for torts committed by government officials as the general rule. Part II addresses the doctrine of sovereign immunity. Part III explores the general purposes, functions, and operational structure of the FTCA. Part IV briefly discusses the discretionary exception to the FTCA. Part V describes the tax assessment and collection exception central to claims against the IRS. Part VI presents a recent application of the FTCA in Johnson v. Sawyer and discusses the implications of that case. Finally, Part VII suggests other potential remedies for taxpayers.

II. SOVEREIGN IMMUNITY

The doctrine of sovereign immunity is based on the English maxim that “[t]he king can do no wrong.” This maxim is an outgrowth of the feudal notion that the lord of a manor could not be sued in his own courts, and that the king, as the highest lord, enjoyed total immunity. Why and to what extent America adopted sovereign immunity is unclear, and sovereign immunity's exact origins, as applied to claims against the federal government are uncertain. The ancient maxim, however, has established that the United States cannot be sued without its consent. This doctrine often impedes claims for tortious IRS conduct because, absent a

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7. 28 U.S.C. § 2680(a) (1988). The discretionary function exception (discretionary exception) is important in claims against government agencies and nearly swallows the general rule. The discretionary exception alone warrants a separate article; the cases mentioned provide only a general background.


9. 980 F.2d 1490 (5th Cir. 1992), modified and reh'g en banc granted, 4 F.3d 369 (5th Cir. 1993). Johnson involves the wrongful disclosure of tax return information and is a good example of the FTCA's operational structure, including the exceptions the IRS relies on in avoiding the FTCA's waiver of sovereign immunity.

10. 1 WILLIAM BLACKSTONE, COMMENTARIES *246.

11. See Edwin M. Borchard, Government Liability in Tort, 34 YALE L.J. 1, 2 (1924). Borchard notes that "the King can do no wrong" was misinterpreted by early scholars because it actually meant that "the King was not privileged to do wrong." Id. at 2 n.2; see also Edwin M. Borchard, Governmental Responsibility in Tort, VI, 36 YALE L.J. 1, 17-41 (1926) (discussing the history and misconceptions about sovereign immunity).


13. Id.
statutory waiver of sovereign immunity, courts dismiss plaintiffs’ claims as jurisdictionally flawed.14

In current claims against the United States, the government may argue several historical justifications in support of sovereign immunity. First, the doctrine is legitimate because one cannot have a legal right against the body responsible for making the law from which a legal right arises.15 Second, taxpayers benefit from the doctrine by not having to fund damage awards.16 Third, sovereign immunity is appropriate because allowing courts to grant relief interferes with the executive branch, overstepping the separation of powers.17 Finally, imposing liability on the United States is contrary to the notion of supreme executive power and interferes with the government’s performance of public duties.18

Nevertheless, commentators have attacked sovereign immunity as both senseless and unjustifiable in a democratic nation.19 Some scholars believe that when balancing sovereign immunity’s justifications against the strong interest of providing remedies to parties injured by tortious actions of government officials, the latter interest should prevail.20 Courts have applied the doctrine, however, to deny recovery in numerous cases.21 Although sovereign

14. See Rivera v. United States, 924 F.2d 948, 951-52 (9th Cir. 1991); see also Kronish, supra note 12, at 116. The FTCA and other statutes limit sovereign immunity, allowing claimants to overcome jurisdictional defects. However, the limited waivers often do not provide claimants sufficient avenues of redress. As a result, the government’s tortious and unconstitutional actions can leave a plaintiff twice wronged.


16. See Kutzman, supra note 15, at 531 (citing Russell v. Men of Devon, 100 Eng. Rep. 359, 362 (1788) (stating a preference that an individual should suffer an injury rather than the public suffer an inconvenience)).

17. See Kronish, supra note 12, at 119; see also Kutzman, supra note 15, at 531.


19. See Roger C. Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387, 419 (1970) (stating that for many years no scholar has had a good word about sovereign immunity); see also Kenneth C. Davis, Sovereign Immunity Must Go, 22 Admin. L. Rev. 383, 384 (1970) (stating that the only justification is the four-horse team: historical accident, habit, a tendency to favor the familiar, and inertia; nothing else supports sovereign immunity); Kronish, supra note 12, at 119-120.

20. See, e.g., Block, supra note 15, at 1062. Block adds that sovereign immunity forces the courts to use legal fictions and, more importantly, believes that “relief has been denied against unconstitutional and unauthorized official action on formalistic and technical grounds.” Block, supra note 15, at 1060; see also Davis, supra note 19, at 384 (opposing the view that courts should not interfere with government operations, Davis suggests courts should address the issues confronting them, especially in cases where federal officers act illegally).

Immunity exists in a pervasive form, claimants should challenge the doctrine’s applicability in modern cases. Since sovereign immunity remains the law, claimants must rely on limited waivers like the FTCA.

III. The Federal Tort Claims Act

A. Background

Congress enacted the FTCA for several reasons. First, the FTCA waives sovereign immunity by providing remedies for persons injured by the federal government’s tortious acts. The FTCA provides a previously unavailable avenue of recovery. Second, the FTCA effectively eliminates or reduces the use of private claim bills that, prior to the FTCA’s enactment in 1946, provided the only avenue of redress for governmental torts. Since private claim bills unduly burdened Congress, it believed that a statutory waiver of sovereign immunity would provide a more effective avenue of redress for injured parties. Finally, the FTCA preserves government officials’ individual immunity by imposing liability on the United States. Under the FTCA, one who is harmed by a government official’s negligent or wrongful conduct can sue the United States instead of the official. The FTCA, therefore, employs legal mechanisms similar to respondeat superior.

F.2d 654 (5th Cir. 1981); Morris v. United States, 521 F.2d 872 (9th Cir. 1975). The doctrine’s application in modern society raises several troubling questions. Does allowing the United States to escape liability weaken our system of checks and balances? Would government agencies operate more efficiently with the threat of liability? Is the federal purse too small to pay damage claims? Should a plaintiff damaged by government agents be denied recovery, essentially suffering two wrongs? Is it too burdensome to expect government officials, agents, and employees to live and abide by the same constitutional requirements and standards of care imposed on the private citizenry? These and other questions abound in this Comment and in any case where a claimant is injured by the government.

22. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694 § 2, 102 Stat. 4564 (1988) (stating that for more than 40 years, the FTCA has been the legal mechanism by which persons injured by negligent or wrongful acts of federal employees may seek recovery) (codified at 28 U.S.C. § 2671 (1988)).


26. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (providing that an employer...
B. Specific Provisions of the Federal Tort Claims Act

The FTCA’s waiver of sovereign immunity authorizes suits against the United States for negligent or wrongful acts of government agents, officials, or employees acting within the scope of their employment.\(^{27}\) The FTCA requires that claims be based on the state law where the act or omission occurred.\(^{28}\) Further, the United States will be liable “in the same manner and to the same extent as a private individual under like circumstances.”\(^{29}\)

Congress also imposed several statutory restrictions. First, Congress mandated that federal district courts have exclusive jurisdiction over FTCA claims.\(^{30}\) Second, the FTCA is an exclusive remedy.\(^{31}\) In other words, the FTCA precludes liability against the individual agent for negligent or wrongful conduct that is the basis of the federal tort claim.\(^{32}\) However, a claimant may pursue claims against the individual involved for constitutional violations\(^{33}\) or for federal statutory violations if the statute violated expressly provides a remedy against the individual.\(^{34}\)

A claimant must overcome several hurdles in an FTCA claim for IRS torts. For instance, a claimant should follow several important procedural guidelines before filing in federal district court.\(^{35}\) In addition to these procedural requirements, the FTCA contains numerous exceptions that eliminate the Act’s waiver of sovereign immunity.\(^{36}\) The two key exceptions in IRS cases are the discre-

\(^{28}\) 28 U.S.C. § 1346(b).
\(^{29}\) 28 U.S.C. § 2674 (1988). This section also provides that the United States is not liable for pre-judgment interest or punitive damages and that the United States reserves the right to assert a blanket or qualified immunity defense. In many cases, federal officials can assert individual qualified immunity, which is beyond the scope of this Comment.
\(^{30}\) 28 U.S.C. § 1346(b).
\(^{33}\) Presumably one would file a *Bivens* constitutional tort claim against the individual agent. See infra notes 202-06 and accompanying text.
\(^{34}\) 28 U.S.C. § 2679(b)(2)(A), (B).
\(^{35}\) 28 U.S.C § 2675 (1988). A claim must first be presented to the appropriate agency and be denied in writing. If the agency does not respond within six months, the claim is deemed denied. In addition, damages requested from the district court cannot exceed the amounts alleged in the claim presented to the appropriate agency unless there is newly discovered evidence that was not reasonably discoverable or one is alleging or proving intervening facts. 28 U.S.C. § 2675.
\(^{36}\) See 28 U.S.C. § 2680(a)-(h) (1988). One exception broadly excludes claims of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h). However, claims are allowed for damage caused by investigative or law enforcement officers.
tionary exception\textsuperscript{37} and the tax assessment and collection exception.\textsuperscript{38} The IRS primarily relies on these two exceptions to avoid liability under the FTCA. Generally courts have broadly construed both exceptions in favor of the United States, which minimizes a claimant’s chance of recovering.\textsuperscript{39} Also, courts often defer to agency expertise, refusing to second-guess agency decisions, thereby making claims involving the IRS even more difficult.\textsuperscript{40}

The first and foremost hurdle in an FTCA claim is overcoming sovereign immunity. Otherwise, federal district courts lack subject matter jurisdiction over claims brought against the United States for constitutional or tortious violations committed by agency officials and employees.\textsuperscript{41} The exceptions, if applicable, prevent federal district courts from hearing the claims. Despite the Act’s requirement, the United States is not always treated as a private individual under state law where the act or omission occurred.\textsuperscript{42}

Background case law illustrates how courts interpret the FTCA and the exceptions. Often a court’s application of the FTCA to tort claims against the IRS demonstrates how the exceptions have swallowed the general rule.\textsuperscript{43}

\begin{itemize}
\item of the United States for assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. 28 U.S.C. § 2680(h).
\item 37. 28 U.S.C. § 2680(a). The discretionary exception excludes:
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. 28 U.S.C. § 2680(a).
\item 38. 28 U.S.C. § 2680(c) (excluding “any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by an officer of customs or excise or any other law enforcement officer”). 28 U.S.C. § 2680(c).
\item 39. In an FTCA claim, the United States is actually the defendant. This Comment uses the terms “government,” “IRS,” and “United States” interchangeably to mean the United States when discussing liability under the FTCA. Note that naming the IRS as the defendant does not negate sovereign immunity, as the agents’ acts still fall within the tax exception. Spilman v. Crebo, 561 F. Supp. 652, 654-55 (D. Mont. 1982).
\item 40. Goldman, supra note 23, at 852-53 (adding that another purpose of the FTCA’s exceptions is to uphold the separation of powers).
\item 41. See Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991) (stating that courts do not have subject matter jurisdiction for constitutional damage claims against the United States because the United States has not waived sovereign immunity) (citations omitted).
\item 42. See infra parts IV-VI.
\item 43. As one United States Supreme Court Justice stated, it may be that the “ancient and discredited doctrine that ‘The King can do no wrong’ has not been uprooted; it has merely been amended to read, ‘The King can do only little wrongs.’” Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting) (criticizing the discretionary exception as barring relief except in minor cases).
\end{itemize}
IV. THE DISCRETIONARY EXCEPTION

The discretionary exception retains the United States sovereign immunity for "[a]ny claim . . . based upon the exercise or performance or the failure to 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." Courts often apply the discretionary exception to deny a plaintiff's claims against the United States and commonly grant the government's motion to dismiss. Although frequently applied, federal courts have repeatedly struggled with interpreting the discretionary exception and have not yet concisely defined it. Since the discretionary exception has been explored elsewhere, this Comment focuses only briefly on cases favorable to claimants and cases favorable to the IRS.

A. Discretionary Exception Cases Favorable to Claimants

Historically, the United States Supreme Court ruled that the discretionary exception does not apply in every case. Courts must examine the level at which the government's decision was made to determine whether the exception revokes the FTCA's waiver of sovereign immunity. For instance, the plaintiff in Indian Towing Co. v. United States sued the United States when his tugboat ran aground, claiming that the Coast Guard failed to properly operate and maintain a lighthouse. The Supreme Court held the government liable and stated that agency actions at an operational level are subject to suit. The Court noted the importance of the FTCA: the Act should compensate victims of negligence by government

45. Goldman, supra note 23, at 839 n.8 (noting that the discretionary exception has nearly swallowed the rule and has been criticized by other authors).
46. See FDIC v. Irwin, 916 F.2d 1051, 1053 (5th Cir. 1990) (noting that the legislative history does not define the discretionary exception and decades of litigation have not clearly distinguished between actionable torts and immune discretion); see also Trevino v. General Dynamics, 865 F.2d 1474, 1484 (6th Cir. 1989) (stating courts have found it impossible to "define with precision every contour of the discretionary function exception") (quoting United States v. S.A. Empresa De Viacao Aerea Rio Grandense, 467 U.S. 797, 813 (1984)) [hereinafter Varig Airlines].
49. Id. at 64, 69.
50. Id. (relying on Dalehite v. United States, 346 U.S. 15 (1953), which established the planning and operational level distinction). But see United States v. Gaubert, 499 U.S. 315 (1991), more fully discussed infra notes 57-65 and accompanying text.
officials in situations where a private person would be liable. The Court reasoned that the Coast Guard did not have to undertake the lighthouse service, but once it did, it was obligated to use due care to ensure that the lighthouse worked properly. Based on Indian Towing and Dalehite v. United States, a distinction exists between planning and operational activity. A claimant suing the IRS should argue that the tortious act or decision was made at the operational level and, consequently, is not protected by the discretionary exception.

An alternative view of the discretionary exception, in some cases, may also favor claimants. Where specific statutes or regulatory guidelines require government officials to act or to not act in a certain way, the discretionary exception should not apply. In Berkovitz v. United States, the plaintiff contracted polio from a vaccine approved by the National Institute of Health and released by the Food and Drug Administration (FDA), even though the vaccine did not satisfy FDA standards. The Court recognized that FDA policies and directives established a required course of conduct and held the discretionary function exception inapplicable where officials neglect specific guidelines. The discretionary exception only applies when officials implementing a policy may exercise independent policy judgment. Thus, in a case where specific statutory or regulatory directives regarding the IRS exist, and officials ignore the directives, a court should find the discretionary exception inapplicable.

B. Discretionary Exception Cases Favorable to the IRS

In United States v. Gaubert, the United States Supreme Court used broad language favoring the discretionary exception and disallowed a waiver of sovereign immunity. Although Gaubert did not involve the IRS, the IRS relies on Gaubert for the proposition that any agent's tortious conduct falls within the discretionary exception; hence, the United States is immune from tort claims. The analysis of Gaubert focuses on the Court's reasoning regarding the discretionary exception. In Gaubert, a former
owner (Gaubert) of Independent American Savings Association (IASA) brought an FTCA claim for negligent supervision. The federal government, acting under the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas, took over the bank's operation and requested that Gaubert resign from managing IASA. The government also required Gaubert to post a $25 million interest in real property for security and as a personal guarantee that IASA's net worth would exceed required minimums. IASA complied with the government's regulations, resulting in a negative net worth and liabilities exceeding $400 million. Gaubert filed an FTCA claim against the United States for negligence in appointing new officers and directors and for negligent daily management of IASA.

Although the Fifth Circuit decided in Gaubert's favor, the United States Supreme Court reversed and held that the discretionary exception protected the regulators' conduct and involvement regarding IASA. Despite its prior interpretation in Indian Towing recognizing a distinction between planning and operational level decisions, the Court reasoned that: "A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. . . . Discretionary conduct is not confined to the policy or planning level." The IRS relies heavily on Gaubert in proposing that the exception covers all acts "discretionary in nature . . . which involve an element of judgment or choice, and which are based on considerations of public policy, whether or not they were negligently performed."

60. Concerned about Gaubert's financial dealings, the government requested that he resign and appointed government officials to manage the bank. Id. at 319.
61. Gaubert v. United States, 885 F.2d 1284, 1286 (5th Cir. 1989). IASA estimated its net worth at positive $74 million preceding the takeover. Id. Gaubert personally lost the $25 million guarantee and an additional $75 million. Id. at 1292.
64. Gaubert, 499 U.S. at 325.
65. Brief for Appellant at 31, Johnson v. Sawyer, 980 F.2d 1490 (5th Cir. 1992) (No. 91-2763) [hereinafter Appellant's Brief]. In addition to Gaubert's broad holding, claimants should be aware of previous United States Supreme Court cases that interpret the discretionary exception to bar recovery. See, e.g., Varig Airlines, 467 U.S. 797 (1984) (barring claims of wrongful death against the United States after the Federal Aviation Administration allegedly improperly certified airplanes that crashed); Dalehite v. United States, 346 U.S. 15 (1953) (denying claims although hundreds of people were killed or injured from an explosion caused by the government's negligent handling of ammonium nitrate).
Like the discretionary exception, the tax assessment and collection exception negates the FTCA’s waiver of sovereign immunity. In cases where IRS conduct harms someone, the IRS argues that the tax exception protects the government from suit. Therefore, analysis of the tax exception is crucial to an attorney pursuing a tort claim for IRS wrongful conduct under the FTCA. Statutorily, the tax exception bars “[a]ny claim arising in respect of the assessment or collection of any tax.” Generally, the government asserts a strong interest in assuring timely assessment and collection of taxes. Because Congress passed the tax exception, the IRS contends that courts should broadly interpret it. Courts have broadly construed the tax exception’s language to nearly eliminate the FTCA’s waiver of sovereign immunity in claims involving the IRS.

Several courts have broadly interpreted the tax exception to insulate the United States from tort liability. For example, the Fifth Circuit has found the tax exception applicable to “all tax-related claims.” In Interfirst Bank of Dallas, N.A. v. United States, Interfirst Bank of Dallas (Interfirst) sued the United States and the IRS under the FTCA, arguing that the IRS, when collecting Condor Drilling Company’s taxes, “wrongfully levied upon property in which Interfirst had a perfected security interest.” The Fifth Circuit held that the government was immune from suit. Although recognizing that the doctrine of sovereign immunity is often criticized and misinterpreted, the court felt obligated to apply it because of United States Supreme Court decisions. The court said that the first step in a claim against the government is to determine whether an enumerated waiver of sovereign immunity applies; if not, the government retains sovereign immunity and the

66. See infra notes 70-105 and accompanying text.
67. 28 U.S.C. § 2680(c).
68. See, e.g., Bull v. United States, 295 U.S. 247, 259-60 (1935) (stating “taxes are the lifeblood of government”).
69. Appellant’s Brief, supra note 65, at 24.
71. Id. at 302. Interfirst loaned money to the Condor holding company which defaulted on its loan. Unbeknownst to Interfirst, Condor failed to pay withholding tax; therefore, when the collateral was auctioned to repay Interfirst, the IRS levied on the property for Condor’s delinquent withholding tax. When Condor filed for bankruptcy, its obligations to Interfirst were not fully paid. Id.
72. Id. at 303 (stating the doctrine has been decried as irrational and immoral, criticized on historical grounds, and “recognized by all to have little doctrinal coherence.” Nonetheless, the doctrine is endorsed by the Supreme Court and Congress) (citations omitted).
The Fifth Circuit focused partly on the FTCA’s applicability to Interfirst’s conversion claim. The court stated that to sustain its argument, Interfirst must overcome a “formidable obstacle”—the tax assessment and collection exception. The court found that the statute plainly prohibited any claim relating to the assessment or collection of any tax and that it applied to all tax-related claims. The IRS levies were, the court found, within the scope of tax assessment and collection; accordingly, Interfirst could not sue under the FTCA. Interfirst provides little guidance for claimants, except it indicates that courts broadly construe the tax exception to deny relief. However, the Interfirst court, in dicta, criticized sovereign immunity, evidencing a sense of frustration with the discretion and power it allows the federal government. A claimant should pay careful attention to the dicta and argue that sovereign immunity denies legitimate claims to deserving parties. In Capozzoli v. Tracey, the Fifth Circuit again broadly interpreted the tax exception finding that the IRS could commit torts and escape liability so long as the tortious conduct coincided with revenue-raising activity. In Capozzoli, defendant Tracey, an IRS engineer, was assigned to inspect some land the Capozzolis claimed had suffered a flood casualty loss. Tracey entered the Capozzolis’ property without prior notice or permission and took photographs of the home when Mrs. Capozzoli was home alone “clad only in her nightclothes.”

The Capozzolis sued the United States for damages based on claims for trespass and invasion of privacy. The district court granted the government’s motion for summary judgment based on the tax exception, and the Fifth Circuit affirmed. The Capozzolis argued that the agent’s activity was unrelated to the assessment or

73. Id. (citing United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586-88 (1941)).
74. The court also considered Interfirst’s wrongful levy claim. Id. at 304-06. However, that claim is beyond the scope of this Comment.
75. Id. at 306.
76. Id. at 307 (relying on Broadway Open Air Theatre v. United States, 208 F.2d 257, 259 (4th Cir. 1953)).
77. Id. at 308.
78. Id. at 306-08. The court added that even the United States Constitution does not waive sovereign immunity in a damage suit. Id. at 309.
79. Id. at 310 (stating, “The doctrine of sovereign immunity bars suit by the innocent and the guilty alike. The doctrine is often harsh and makes little sense in cases like the one before us here. But it remains the law.”).
80. 663 F.2d 654, 657-58 (5th Cir. 1981).
81. Capozzoli v. Tracey, 663 F.2d at 656.
collection of any tax; therefore, the exception should not apply.\textsuperscript{82} Disagreeing, the Fifth Circuit stated that Congress intended the tax exception to protect the IRS from "liability stemming from any of its revenue-raising activities."\textsuperscript{83} The court interpreted the tax assessment and collection exception to include the agent's conduct, even though he was not inspecting the land.\textsuperscript{84}

Illustrating the court's broad interpretation in the government's favor, the court reasoned: "Congress retained the United States sovereign immunity for any claim \textit{in respect of} the assessment or collection of taxes. This language is broad enough to encompass any activities of an IRS agent even remotely related to his or her official duties."\textsuperscript{85} The Fifth Circuit held that:

even if Agent Tracey was not authorized to photograph the Capozzolis' residence in connection with his investigation of plaintiffs' casualty loss claim, and even if taking pictures of the residence was a tortious invasion of plaintiffs' privacy, any claim against the United States arising out of this incident is foreclosed by 28 U.S.C. § 2680(c) [the tax exception].\textsuperscript{86}

Despite such broad construction, the court concluded with significant dicta indicating its intent not to insulate the government from tort liability for any and all transgressions committed by the IRS.\textsuperscript{87} The court stated that when an IRS employee engages in tortious conduct wholly unrelated to the official duties of assessing or collecting taxes, the tax exception does not apply.\textsuperscript{88}

Like the Fifth Circuit, the Ninth Circuit has broadly interpreted the tax assessment and collection exception.\textsuperscript{89} In \textit{Morris v. United States}, Morris lost his business after the IRS informed his creditors that due to tax liability, Morris would become insolvent. Subsequently, the IRS discovered its initial deficiency determina-

82. \textit{Id.} at 657.
83. \textit{Id.} The court added that the tax exception demonstrates the "government's strong interest in protecting the administration of its tax system from the burden of constant litigation." \textit{Id.}
84. \textit{Id.} at 657-58.
85. \textit{Id.} at 658.
86. \textit{Id.}
87. \textit{Id.}
88. \textit{Id.} The court mentioned a caveat that torts wholly unrelated to an IRS agent's official duties may be beyond the scope of employment, thus precluding vicarious liability on the United States. Finally, the court stated that an IRS agent could conceivably commit a tort sufficiently removed from assessing and collecting taxes to be beyond the tax exception yet within the scope of employment to allow a cause of action (via the FTCA) against the United States. \textit{Id.}
89. \textit{Morris v. United States}, 521 F.2d 872 (9th Cir. 1975).
The Morrises sued the United States for damages under the
FTCA. The district court dismissed, and the Ninth Circuit af-
firmed, focusing heavily on the fact that the tax exception denied
the court subject matter jurisdiction to hear the claim. In ad-
dressing the Morrises' claims, the court stated that the FTCA's ex-
ceptions severely limit the waiver of sovereign immunity. The
Ninth Circuit reasoned, "Even assuming arguendo that the Inter-
nal Revenue agents' collection activity was beyond the normal
scope of authority and amounted to tortious conduct, we find that
the claim falls squarely within the exempted group of tort claims
arising out of tax collection efforts." However, the court seemed
frustrated when stating that even though the IRS agents' conduct
was deplorable, the court lacked power to grant the Morrises
relief.

Note, however, that the Morrises may have failed to allege a
state tort cause of action as the FTCA requires. The Ninth Circuit
hinted at this in stating that the FTCA does not create a federal
cause of action. Thus, potential claimants must remember to base
their claims on torts as defined by the law of the state where the
act or omission occurred.

In 1983, the Ninth Circuit again addressed the question of
whether the tax exception barred a plaintiff's claim in Wright v.
United States. That case involved a malicious prosecution claim
brought against the United States and individual IRS defendants.
In 1980, Wright was indicted for failing to file tax returns and fal-
sifying information on his returns. Wright sued, alleging that the
indictments and IRS agent Fletcher's conduct constituted mali-
cious prosecution. Consistent with other cases, the Ninth Circuit

90. Id. at 873-74. The Ninth Circuit assumed that the allegations in the appellants' complaint were true since it was reviewing an appeal of a motion to dismiss granted in favor of the United States. Id. at 873.
91. Id. at 874.
92. Id. (citing Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972)).
93. Id. (citations omitted).
94. Id. (holding the claims against the individuals were barred as well because the FTCA did not create a federal cause of action for torts committed by federal employees). For claims against individuals, a claimant must plead independent jurisdictional grounds. Id.
95. Id.
96. Wright v. United States, 719 F.2d 1032 (9th Cir. 1983).
97. Id. at 1033. A subsequent indictment was filed, charging Wright with making false statements on his 1973 and 1974 tax returns. Later, the indictments were dismissed, and the prosecution was dropped. Id.
98. Id. Wright sued the United States, IRS agent Fletcher, an assistant United States Attorney, and the 23 grand jurors who issued the indictment. Id. The district court dis-

https://scholarship.law.umt.edu/mlr/vol55/iss2/11
reasoned that if a claim falls within one of the listed exceptions, the court lacks subject matter jurisdiction. However, the court found that neither the malicious prosecution nor the discretionary exception applied. Also, the court held that the tax exception did not bar Wright’s claim insofar as he stated a claim of malicious prosecution that was specifically authorized by the FTCA. Agent Fletcher’s conduct in prosecuting Wright did not arise “in respect of the assessment or collection of any tax.” The prosecution was to criminally punish Wright, not collect his taxes.

After acknowledging the tax exception’s broad interpretation, the court said it was “disinclined to interpret the exception so generously, however, in the face of Congress’ action in passing the 1974 ‘malicious prosecution’ amendment to the FTCA.” Accordingly, the Ninth Circuit held that the United States was not immune from malicious prosecution claims involving agent Fletcher since he was an investigative or law enforcement officer. The court’s reasoning in Wright shows that courts do not always interpret the exceptions in the United States favor. The preceding overview of the FTCA and how courts interpret the discretionary and tax exceptions should assist the reader in understanding a recent Fifth Circuit decision. Johnson v. Sawyer, decided in the taxpayer’s favor, illustrates the court’s hesitancy to broadly interpret the exceptions. Johnson also illustrates the analytical method a

missed Wright’s complaint without leave to amend. Id. at 1034.

99. Id. at 1034. The court first examined the malicious prosecution exception under 28 U.S.C. § 2680(h), noting that malicious prosecution claims are disallowed except for malicious prosecution committed by investigative or law enforcement officers. Id.

100. Id. at 1035. Once the decision was made to prosecute Wright, the conduct of agent Fletcher implementing the decision did not fit within the discretionary exception. The court reasoned that “Unlike the decision to prosecute, an agent’s conduct, both before and after that decision is made, is susceptible to judicial evaluation.” Id. (citing Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975)).

101. Id.

102. Id. The court also stated that the tax assessment and collection exception has been broadly construed. The court felt it would be consistent with prior cases if it did find that agent Fletcher’s role prosecuting Wright fit within the tax exception, because pursuing individuals for criminal tax charges serves as a deterrent and facilitates the assessment or collection of taxes. Id.

103. Id. at 1035.

104. Id. at 1036.

105. 980 F.2d 1490 (5th Cir. 1992), modified and rehe’g en banc granted, 4 F.3d 369 (5th Cir. 1993). Johnson has an interesting case history. Summary judgment was decided in Johnson’s favor. 640 F. Supp. 1126 (S.D. Tex. 1986). After trial, the district court again decided for Johnson. 760 F. Supp. 1216 (S.D. Tex. 1991) (the trial court’s opinion is used to describe the facts). Finally, the Fifth Circuit affirmed and subsequently supplemented its original opinion. 980 F.2d 1490 (5th Cir. 1992), modified and rehe’g en banc granted, 4 F.3d 369 (5th Cir. 1993). Most recently, the Fifth Circuit modified its original holding and decided to rehear the case en banc.
court follows in deciding an FTCA claim.

VI. JOHNSON v. SAWYER

Mr. Johnson worked his way up the corporate ladder, was promoted to senior executive vice president of American National Life Insurance Company (American National), became the chief marketing officer, and was named to the board of directors. Johnson established himself as a reputable businessman, but his wife's accounting methods lead to trouble with the IRS.

Several instances of "eccentric" accounting ultimately led to the string of events resulting in Johnson's FTCA suit against the United States. Unfortunately, Mrs. Johnson's recording and reporting methods caused discrepancies between recorded business expenses and the expenses claimed as deductions.

In the late 1970s, the IRS began to examine Johnson's tax returns for 1972-75. Shortly thereafter, the IRS discovered discrepancies. Agent Stone was assigned to the case and recommended that Johnson be prosecuted for tax evasion. Trying to protect his wife from felony tax evasion charges, Johnson did not initially inform the IRS of his wife's involvement. Once her role was disclosed, Assistant United States Attorney Powers (Powers) offered them a plea bargain. If Mr. Johnson pleaded guilty to one count of

106. Johnson, 760 F. Supp. at 1218. Johnson was next in line to become CEO and chairman of the board. Id.

107. Every day when Johnson returned from work, he told his wife of his expenses, which she recorded in daily summaries. Mr. Johnson reviewed the summaries at the end of the week and copied them into a diary. At the end of every month, Mr. and Mrs. Johnson copied the diary book onto accounting spreadsheets, which had separate categories for each expense. An annual spreadsheet was tallied and given to their accountant at the end of the year. In addition, when Mr. Johnson returned home from business trips, he informed his wife of business expenses which were paid for by cash, check, or credit card and gave her all the receipts. Id. at 1219.

108. Id. at 1220. Nothing in the record showed that Mrs. Johnson was motivated by "duplicitous intent" or that Mr. Johnson knew of her recording methods before the IRS began investigating. Generally, Mrs. Johnson did three things wrong. First, when confused about how to account for cash disbursements, instead of listing the cash on the summary sheet, she listed an equal amount of a personal expense on a credit card. Second, she occasionally changed the numbers on a credit card receipt by increasing the amount to cover a cash disbursement she did not know how to record. Third, sometimes she arbitrarily allocated a cash disbursement to an expense category if she did not know how the money was spent. The result was that the Johnsons took some deductions for personal expenses. The court noted that Mrs. Johnson accurately reported amounts, but did not recognize the importance of attributing expenses to the proper source. Id.

109. Id. at 1220-21. While the IRS branch in Houston and the Washington, D.C. Department of Justice office investigated, Johnson passed two polygraphs. Nonetheless, the Department of Justice recommended prosecution for tax evasion for 1974 and 1975 under 26 U.S.C. § 7201. Id. at 1221.
tax evasion, the IRS would leave his wife alone; otherwise, both were subject to indictment.\textsuperscript{110}

Several elements of the plea bargain arrangement structured to protect Johnson's identity help in analyzing the reasons behind Johnson's FTCA claim.\textsuperscript{111} On arraignment and sentencing, everything went as planned, and Johnson pleaded guilty to a crime he did not commit to protect his wife and his career.\textsuperscript{112} A few days later, a journalist called American National inquiring about Johnson's conviction. The journalist had read about the conviction in an IRS press release.\textsuperscript{113} The news release contained several damaging items including: (1) Elvis E. Johnson, age 59, an insurance executive, pleaded guilty to tax evasion in Galveston; (2) Johnson's home address; (3) Johnson's position as executive vice president for American National Insurance Corporation; and (4) Johnson was charged with claiming false business deductions and altering documents for 1974 and 1975.\textsuperscript{114}

Johnson's attorney contacted Powers, who said he was unaware of any news release, but if the Johnsons were damaged, they should "sue the hell out of them [the IRS]."\textsuperscript{115} Johnson's attorney warned the IRS that the press release contained errors.\textsuperscript{116} The re-

\textsuperscript{110} The criminal information showed that Johnson understated his income and owed $21,849.47 in tax instead of $18,374.50 as reported. \emph{Id.} at 1221 n.13.

\textsuperscript{111} First, all papers in the case would use the name Elvis Johnson rather than E.E. "Johnny" Johnson as Mr. Johnson was commonly known. Second, court documents would list Johnson's address as that of his attorney rather than his home address. Third, the government would complete the pre-sentence investigation and inform the judge of the probation officer's recommendation before the information was filed. Fourth, the information would be filed late on a Friday afternoon and immediately brought before the judge so arraignment and sentencing could be completed that day and to avoid the media. Finally, the government would not publish a press release. \emph{Id.} at 1221.

\textsuperscript{112} \emph{Id.} at 1221-22.

\textsuperscript{113} \emph{Id.}

\textsuperscript{114} \emph{Id.} at 1222. An IRS memorandum stated that after litigation, the District of Public Affairs Officer (DPAO) typically will draft a news release based on information supplied by the investigating Special Agent. After legal action is complete, the Special Agent will phone the DPAO with additional information to complete the news release. \emph{Id.} at 1223 n.7. Special Agent Stone phoned Sassen (the public affairs officer in Austin) to give her the information for the news release. Sassen prepared the release and admitted she did not attempt to determine what information was in the public record or to check the accuracy of the information she received. \emph{Id.} at 1223-24. After Johnson's attorney complained about the first press release, another agent, Sawyer, received a recommendation from a Houston attorney that the press release be retracted. Despite this, the IRS issued a second press release. \emph{Id.} at 1224.

\textsuperscript{115} \emph{Id.} at 1222 (quoting Plaintiff's Exhibit 43, a tape of the phone conversation).

\textsuperscript{116} Other commentators have cited Johnson for the proposition that the IRS has uncontrolled discretion to issue press releases, suggesting that IRS agents are unaware of the proper procedures and often issue releases without verifying the information for accuracy. See Michael G. Little, \textit{Extra-Judicial Discussion of Taxpayer Information: The IRS Bully Is Still on the Block}, 43 FLA. L. REV. 1041, 1054 (1991).
lease falsely stated that Johnson pleaded guilty to offenses for 1974 and 1975 (the information mentioned only 1975) and implied that Johnson admitted to altering documents and falsifying deductions. 117 Despite warnings from Johnson’s attorney that another release would compound the IRS’s liability, the IRS issued a second press release, clarifying the previous release and eliminating mention of the 1974 return and statements that Johnson had falsified documents and taken false business deductions. 118 Shortly after the second press release, American National asked Johnson to resign from his position in Galveston. 119

Johnson sued the United States under the FTCA, claiming, among other things, public dissemination of private information by the IRS. The district court found for Johnson and awarded him $10,902,117 in damages. 120 The Fifth Circuit affirmed on liability and special damages with a modification of pension figures, but remanded to the district court for an explanation of how it determined emotional distress damages. 121 The IRS petitioned for a rehearing and a rehearing en banc in February 1993. In October 1993, the Fifth Circuit issued a supplement to its original opinion, reaffirming liability, clarifying its prior decision, and granting a rehearing en banc. 122 The following discussion first focuses on the Fifth Circuit’s initial opinion and then clarifies how the court amended its holding.

117. Johnson, 760 F. Supp. at 1222. Johnson pled guilty to one count of tax evasion for his wife’s accounting methods, but he did not admit to altering documents and falsifying deductions.

118. Id. at 1222, 1224. Johnson had previously informed high ranking officials at American National of his difficulties with the IRS. American National understood his tax troubles and said it would allow him to continue as long as there was not a public scandal. Id. at 1222-23.

119. Id. at 1223. The Johnsons sold their home and returned to Missouri where Johnson worked in a subordinate sales position. Since American National demoted him from an executive position, he was forced to retire at age 65 instead of 70. Id. at 1223 n.4.

120. Id. at 1233. The court awarded $5,000,000 to cover emotional distress and all other intangibles. The court stated, “A flourishing career was shot down over a tax deficiency of less than three and one-half thousand dollars which stemmed from no desire to cheat the Government, but only from the naive accounting procedures of a well-meaning wife.” The court also focused on testimony concerning a conversation Johnson had with an IRS agent where the IRS agent told Johnson that getting Johnson’s name in the paper would accomplish the IRS’s purpose even if it could not convict him. Id.


122. Johnson v. Sawyer, 4 F.3d 369 (5th Cir. 1993). The court, in supplementing and amending its original panel opinion, expressly stated that the initial opinion still applies except where expressly modified. Id. at 372 n.1. In its most recent opinion, however, the court focused its negligence and negligence per se analyses on a negligent invasion of privacy under Texas law. Id. at 376-82.
A. Johnson I

1. Negligence and Negligence Per Se

In an FTCA claim, a plaintiff must prove that the negligent or wrongful act or omission of an agent or employee of the federal government caused plaintiff's damages. The act or omission must occur under circumstances in which the United States, if a private person, would be liable under the law of the place where the act or omission occurred.

The Fifth Circuit summarized Johnson's claim based on state negligence principles. Johnson argued that I.R.C. § 6103, which prohibits the disclosure of return information, set the standard of care, the violation of which was negligence per se in Texas. The IRS responded that under the FTCA, one cannot rely on a federal statute to establish liability since the FTCA requires a state tort.

The court, however, recognized that the Texas Supreme Court has consistently held that "[t]he unexcused violation of a statute setting an applicable standard of care constitutes negligence as a matter of law if the statute is designed to prevent an injury to the class of persons to which the injured party belongs." Although the court used a federal statute as establishing a standard of care, the court found that its decision was not contrary to previous Fifth Circuit decisions because "Texas tort law recognizes per se negli-
gence when a statute or ordinance meant to protect a class of persons is violated—regardless of whether that statute or ordinance originates with federal, state, county, or city action. 130

In Johnson, the court found that I.R.C. § 6103 imposed a duty of confidentiality on the government that broadly prohibited disclosure of tax return information. 131 The government argued for the Fifth Circuit to adopt the rule that if return information is disclosed in a court proceeding, the taxpayer loses all privacy rights in that information, and the IRS may release the information. 132 Rejecting the government’s argument, the court found that much of the information came from confidential records. 133

The court next examined whether the release established a tort under Texas law. The court determined that the IRS agents’ violations of the duty and standard of care imposed by I.R.C. § 6103 constituted negligence, if not a reckless disregard or a deliberate violation, under Texas tort law. 134 Also, the court highlighted testimony from a meeting where one IRS agent told Johnson the only favorable publicity that the IRS receives is when it “bring[s] a big one down and . . . ‘your name is a household word to thousands of people.’ ” 135 Johnson asked if the agent believed that the IRS could convict him based on what they had from his record; the IRS agent responded saying “‘probably not, but I can get your name in the newspapers and that will have accomplished

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130. Id. at 1498 (responding to the United States reliance on United States v. Smith, 324 F.2d 622 (5th Cir. 1963), and Tindall v. United States, 901 F.2d 53 (5th Cir. 1990)).

131. Id. One commentator cites Johnson, stating the use of confidential tax information by the IRS to bully taxpayers is analogous to extortion. Little, supra note 116, at 1042, 1045.

132. Johnson, 980 F.2d at 1496. The circuits are split over whether return information loses confidentiality after it is disclosed in a court proceeding. The government favored the Ninth Circuit’s rule that once return information is part of the public domain, the taxpayer has no privacy right in that information. Consequently, the IRS may issue press releases containing return information. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989). The Tenth Circuit, to the contrary, ruled that return information never loses its confidentiality and protection. Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983).

133. Johnson, 980 F.2d at 1496-97 (stating that even under the Ninth Circuit’s rule, the IRS agents’ disclosures violated § 6103). Since the information never lost its confidentiality, the court was not required to select a rule from among the different circuits. Id.

134. Id. at 1497. The court focused partly on: (1) the conduct of IRS agent Stone, who knew of the restrictions in the plea agreement arrangement, yet reported the information to the Public Affairs officer Sassen, in neglecting to mention it was not to be published; and (2) the fact that Sassen wrote the release based on Stone’s information without checking whether the information was accurate or if the release was proper. Stone also approved the release for publication. Stone and other IRS officials knew (or should have known) better. Id.

135. Id. at 1497-98.
my purpose.

The majority refused to allow such "trophy hunting" mentality by the IRS.

To satisfy negligence requirements, the court next addressed the causation element. The acts and omissions of the IRS agents directly and proximately caused the release of protected information and the resulting publicity "immediately decimated Johnson's exemplary business career." The government argued that the releases did not proximately cause Johnson's damages. The court refuted the government's argument because Johnson had disclosed his troubles to several of American National's high level officials, including the president who assured him his position would remain unchanged and that the board did not need to be informed. After the press releases, however, the board requested that Johnson resign. This was sufficient to establish proximate cause.

2. United States Affirmative Defenses

The government asserted several affirmative defenses, including the discretionary and tax exception. The IRS argued that Johnson's claim sounded in contract, not tort, because it was based on a breach of the plea agreement. However, the court found that Johnson's claim was not based on a breach of the plea agreement and the IRS was not a party to the plea agreement between the Johnsons and the Department of Justice. Johnson's claim was based on the parties' plea agreement arrangement that the information would be kept confidential. The government next argued that I.R.C. § 7217, which provided a cause of action

136. Id. (citing Johnson, 760 F. Supp at 1233).
137. Id. (adding that the IRS agents knew or should have known about § 6103's strict requirements).
138. Id. at 1498.
139. Id. at 1500. The government argued that Johnson's conviction would have to be disclosed in company information, therefore, American National eventually would have fired Johnson. Id.
140. Id.
141. Id. at 1500. The Ninth Circuit has recently treated the discretionary exception as an affirmative defense and requires the government to show that the decision was based on sound governmental policy. See Prescott v. United States, 973 F.2d 696, 702 (9th Cir. 1992).
142. Johnson, 980 F.2d at 1500.
143. Id. at 1500-01. Johnson's claim was based on public disclosure of private facts and negligence principles. Id.
144. Id. at 1501 (stating that the IRS had no privity with Johnson, and without privity, there can be no breach of contract).
145. If the private information was in the plea agreement, the information would be a matter of public record, defeating the purpose of the arrangement to protect Johnson's identity. Thus, many of the facts, including Johnson's true identity, are not in the plea agreement.
against individuals who breach I.R.C. § 6103, preempted the FTCA claim. The court would not infer Congress’s intent to preempt the FTCA. 146

The government also argued that the discretionary exception barred Johnson’s claim. 147 The Fifth Circuit, holding to the contrary, strictly applied the discretionary exception and noted that it does not encompass all acts of government employees simply because the acts involve some element of discretion. 148 The majority exercised restraint in applying this exception to ensure that: (1) the government is not completely immune from tort liability, and (2) the FTCA’s purposes (of providing a remedy for claimants injured by the government) were not frustrated. 149 Basically, the Fifth Circuit applied the planning and operational distinction from previous decisions. 150 All governmental decisions carrying out a policy are not necessarily protected; otherwise, the government would be immune from all torts. The court concluded that at least some of the agents’ actions were not protected by the discretionary exception. As a result, if the government adopts a discretionary policy, the government “must thereafter exercise constant vigilance to ensure that actions taken in furtherance of that policy are not performed negligently.” 151

The Johnson majority reluctantly acknowledged that the IRS, in its discretion, decided to maintain a policy of issuing press releases about people convicted of tax evasion. Generally, the discretionary exception is intended to protect this kind of policy decision. However, the agents who implemented this policy either deliberately ignored, or negligently overlooked, I.R.C. § 6103. 152

146. Id. Section 7217 provided a cause of action against the individuals who released return information but was repealed and replaced by § 7431, which allows a cause of action against the United States for § 6103 violations. I.R.C. § 7431. Under current § 7431, the government’s preemption argument may be more persuasive. See R. Tracy Sprouls, IRC §§ 7431 and 7433: Civil Remedies for Abusive Practices by the IRS, 1 FLA. TAX. REV. 563, 588 (1993).

147. Johnson, 980 F.2d at 1502. For a discussion of the discretionary exception, see supra part IV.

148. Id. (relying on a Fifth Circuit decision, the court stated, “our ‘decisions . . . have been extraordinarily careful to avoid any interpretation of the discretionary function exception that would embrace any governmental act merely because some decision-making power was exercised by the official whose act was questioned’”) (quoting Trevino v. General Dynamics Corp., 865 F.2d 1474, 1484 (5th Cir. 1989), cert. denied, 493 U.S. 935 (1989)).

149. Id. (refusing to employ a “classic example of the exception swallowing the rule”).

150. Id. (citations omitted).

151. Id. (citing Payton v. United States, 679 F.2d 475, 479 (5th Cir. 1982) (discussing Indian Towing Co. v. United States, 350 U.S. 61 (1955))).

152. Id. The Fifth Circuit found the IRS agents’ conduct negligent in the abstract and negligent per se because the agents violated § 6103 statutory requirements. Id. at 1503.
Relying on these principles, the court held that the discretionary exception does not shield the government from liability for all actions in carrying out policies (here, to deter tax evasion) when the IRS agents violate a federal statute, regulation, or express policy.\textsuperscript{153}

The government also argued that the tax exception should nullify Johnson's recovery because publishing press releases deters potential tax evaders, which furthers the more general purpose of collecting taxes.\textsuperscript{154} The Fifth Circuit found the government's argument "untenable."\textsuperscript{155}

Criticizing a broad interpretation of the tax assessment and collection exception, the court stated that a broad reading would extend the exception so far that the "FTCA's waiver of sovereign immunity vis-a-vis the IRS would be wholly subsumed in that exception."\textsuperscript{156} The court found no authority supporting such pervasive immunity and decided that the exception only applies broadly to activities that have a realistic nexus to the functions of assessing or collecting taxes.\textsuperscript{157} Additionally, the court believed that accepting the government's argument would stretch the exception to cover all IRS deterrent activity, even though, as here, the taxpayer may have paid the tax deficiency, penalties, and interest.\textsuperscript{158}

The Fifth Circuit also discussed a concept apparent in many IRS cases but, nevertheless, not recognized in prior decisions. Regarding the breadth of the exception, the court stated that not all IRS employees are engaged in assessing and collecting taxes, although that is the IRS's primary purpose.\textsuperscript{159} Furthermore, the court recognized that not all official acts of agents engaged in collecting or assessing taxes sufficiently relate to those functions to have the nexus that justifies the tax exception's protection.\textsuperscript{160}

Thus, the court emphatically refused to expand the exception be-

\textsuperscript{153} Id. at 1503 (stating, "[t]he sheltering wings of the exception are broad, but not infinite").

\textsuperscript{154} Id.

\textsuperscript{155} Id. The district court found the agents' actions beyond the scope of tax assessment and collection. The Fifth Circuit agreed, stating a contrary finding "strains credulity beyond the breaking point." \textit{Id.}

\textsuperscript{156} Id. (adding that extending the tax assessment and collection exception that far would exempt every act of every IRS agent).

\textsuperscript{157} Id. (acknowledging the broad reading in Wright v. United States, 719 F.2d 1032, 1035-36 (9th Cir. 1983), and Capozzoli v. Tracey, 663 F.2d 654, 657-58 (5th Cir. 1981)).

\textsuperscript{158} Id. at 1503-04.

\textsuperscript{159} Id. at 1504. The court noted that one agent was a public relations officer; the others were special agents involved in criminal tax violations. The court stated, "Off hand, we can think of no two IRS jobs with less nexus to the functions of assessing or collecting taxes." \textit{Id.}

\textsuperscript{160} Id. This sufficient nexus test is novel to IRS decisions.
yond its already broad range. The court held that the tax exception's plain language illustrates that Congress did not intend to include deterrent publicity within the scope of the exception.

In conclusion, the court held that the agents had a duty of care under I.R.C. § 6103, they breached that duty, and the breach was negligence or negligence per se under Texas law, which is actionable under the FTCA. As a result, the majority affirmed in part, modified as to pension losses, and remanded in part to clarify the emotional damages.

B. Johnson II

In 1993, the Fifth Circuit issued a second opinion modifying and clarifying its original opinion. Two aspects of the second opinion differ from the original opinion and require discussion. First, the court found liability under another Texas state tort theory. Overruling the district court, the majority held that Johnson established a state tort for public disclosure of private facts based on privacy rights. Johnson had a reasonable expectation of privacy in the disclosed return information, and the government ignored the congressional determination that return information remain confidential. The government, as a result, was liable under Texas law, just as any other private person would be for publishing private and confidential information. The court noted that absent I.R.C. § 6103, Johnson could assert a cause of action for invasion

161. Id. The Fifth Circuit reasoned that the Johnson case fit the situation described in Capozzoli and quoted the following language that:

an IRS agent could engage in tortious conduct sufficiently removed from the agents official duties of assessing or collecting taxes as to be beyond the scope of Section 2680(c), and at the same time sufficiently within the scope of his employment [as] to give rise to an action against the United States.

Id. at 1504 (quoting Capozzoli, 663 F.2d at 658).

162. Id.

163. Id. at 1505. The court also found that the breach caused Johnson's damages. Circuit Judge Garwood filed a dissenting opinion based on several problems he felt the majority overlooked or ignored. Judge Garwood sided with the government's arguments in the discussion of the majority opinion because he believed that: (1) Johnson's claim was not based on Texas law; (2) the released information was not confidential or, if it was, the breach of privacy was so minimal it did not cause damage; and (3) Johnson's FTCA claim was preempted by a more specific remedial statute. Id. at 1506-13. The majority carefully refuted each of the dissent's concerns.

164. Id. at 1506.

165. Johnson v. Sawyer, 4 F.3d 369 (5th Cir. 1993). The court also agreed to hear the case en banc. Id. at 401.

166. Id. at 374-76.

167. Id. at 375 (stating that Congress enacted I.R.C. § 6103 to protect taxpayers' reasonable privacy rights).
of privacy.\textsuperscript{168}

Second, the court clarified a previous mistake both it and the district court made when using I.R.C. § 6103 to establish a duty. The court stated that under Texas law, courts can adopt a standard of care from a statute to measure the care owed to others under a state common-law duty.\textsuperscript{169} Using a federal statute as a standard of care is consistent with previous Fifth Circuit decisions.\textsuperscript{170}

The court concluded that the district court erred in not upholding FTCA liability on Johnson's invasion of privacy claim and found that the government owed a common-law duty, as any private person in like circumstances, to act as a reasonable person.\textsuperscript{171} Consequently, the court reaffirmed its prior holding based on negligence and negligence per se and modified its holding based on privacy tort notions.\textsuperscript{172}

\textbf{C. Johnson's Impact}

The majority decision in Johnson illustrates that courts are beginning to step back from sovereign immunity's broad application. Johnson also demonstrates that courts will not always allow the FTCA's exceptions to swallow the general rule. Consequently, Johnson has established precedent that other courts may follow.\textsuperscript{173}

\begin{itemize}
  \item \textsuperscript{168} Id. at 377-78.
  \item \textsuperscript{169} Id. at 376-77. The court found that § 6103 did not establish a duty. The duty not to disclose private and embarrassing facts is owed by any reasonable person under state common law. Section 6103 was used to measure the appropriate standard of care under the common-law duty. \textit{Id.}
  \item \textsuperscript{170} Id. at 378 (relying on Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 282 (5th Cir. 1987); Gibson v. Worley Mills, Inc., 614 F.2d 464, 466 (5th Cir. 1980)).
  \item \textsuperscript{171} Id. at 392 (stating that a reasonable person does not publicize damaging or embarrassing facts about others).
  \item \textsuperscript{172} Id. Invasion of privacy claims are allowed in FTCA cases because they do not fall within the exceptions. \textit{See} Black v. Sheraton Corp., 564 F.2d 531, 539-41 (D.C. Cir. 1977) (the plaintiff was a lobbyist whose hotel room was bugged by the FBI; the obtained information was used to damage his reputation; he was subsequently convicted of tax evasion and lost his career).
  \item \textsuperscript{173} Courts have relied on Johnson for various purposes. \textit{See}, e.g., Wilkerson v. United States, 839 F. Supp. 440 (E.D. Tex. 1993). In Wilkerson, the IRS levied on half of Ms. Wilkerson's income to collect taxes from her alleged, then or former, delinquent husband, contending the wages were community property. The IRS communicated information about the levies to her bank, at least 35 of her customers, and other individuals. She sued, claiming she lost her business (worth over $1,000,000) from the alleged wrongful disclosures. \textit{Id.} at 441. The court stated that based on the pleadings, it was impossible to tell whether the disclosures to third parties were related to tax assessment or collection or done to harass Wilkerson and ruin her business. The court cited Johnson to support its reasoning that the tax exception may not cover the latter activity if Wilkerson's allegations were true. Accordingly, the court refused to grant the government's motion to dismiss on this issue. \textit{Id.} at 446; \textit{see also} Hrubec v. National R.R. Passenger Corp., 829 F. Supp. 1502, 1506 (N.D. Ill. 1993)
\end{itemize}
For example, the Eighth Circuit relied on Johnson in finding that the violation of I.R.C. § 6103 is a tort.\textsuperscript{174} If upheld by the en banc panel, Johnson is a significant victory against sovereign immunity. If overturned, Johnson strongly evidences why sovereign immunity should be eroded or eliminated. Regardless of the final outcome, the dissent did not dispute the majority's interpretation of the discretionary and tax exceptions.

1. Discretionary Exception Post-Johnson

The discretionary exception remains confusing, and predicting how future courts will interpret it is difficult. In cases where the discretionary exception may apply, the decisions appear fact-specific. A claimant should be aware of the United States Supreme Court's recent interpretation of the exception.\textsuperscript{175} Although courts often interpret the discretionary exception in favor of the United States, this need not create an impenetrable barrier.

If a government agent's conduct is specifically prescribed by a statute or regulation, and the agent ignores or overlooks prescribed steps, the Berkovitz rule, rendering the discretionary exception inapplicable, should apply.\textsuperscript{176} Also, remnants of the planning and operational distinction may still exist despite the Court's refusal to apply that distinction in Gaubert. The Johnson court noted these concepts from prior cases, refusing to extend protections to agents carrying out government policies.\textsuperscript{177} Even under Gaubert, the discretionary exception requires that the decision or policy be based on considerations of public policy.\textsuperscript{178} As in Johnson, a claimant should argue that the government's acts were not based on public

\textsuperscript{174} McLarty v. United States, 6 F.3d 545, 549 (8th Cir. 1993). In McLarty, the taxpayer settled a previous improper use of tax returns case with the IRS. McLarty then sued to recover his attorney's fees and expenses. \textit{Id.} at 547. The IRS argued that McLarty could not recover attorney's fees because his original claim based on § 6103 sounded in tort. The court agreed and cited Johnson for the proposition that a § 6103 violation constitutes a tort. \textit{Id.} at 549. Apparently, the IRS conceded that violating § 6103 is a tort.

\textsuperscript{175} United States v. Gaubert, 499 U.S. 315, 324 (1991). The Court reasoned that "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." \textit{Id.} This reasoning appears circular. Nonetheless, it obviously provides broad latitude favoring the government.

\textsuperscript{176} Berkovitz v. United States, 486 U.S. 531 (1988); see supra text accompanying notes 53-56.

\textsuperscript{177} Johnson, 980 F.2d at 1502-03.

\textsuperscript{178} Gaubert, 499 U.S. at 323.
policy so the exception should not apply. Finally, to avoid the exception, a claimant should argue in favor of the FTCA’s original intent of providing relief for parties injured by government agents. Hopefully, courts in future cases will decide that the discretionary exception is not so encompassing that it continues to swallow the FTCA, rendering the Act meaningless.

2. **Tax Assessment and Collection Exception Post-Johnson**

One of the more significant aspects of the *Johnson* decision is how the court handled the tax assessment and collection exception. Arguing in favor of the tax exception, the IRS relied on previous Fifth Circuit cases that broadly interpreted the tax exception. Thus, Johnson had significant hurdles to overcome in convincing the court not to apply the exception. In light of *Johnson*, the Fifth Circuit may no longer support a broad reading of the tax assessment and collection exception.

The IRS called the exception the “federal tax exception” and implied that any tort involving the IRS is covered by the exception. A literal reading of I.R.C. § 2680(c), however, illustrates that the exception only encompasses tax assessment and collection. The Fifth Circuit has interpreted this statute as intended to protect the collection process from interference by constant litigation. However, Johnson’s attorney contended that the exceptions to the FTCA should be narrowly construed, arguing that Congress enacted the FTCA to eliminate traditional all-encompassing governmental tort immunity and to allow unprecedented liability on the government. The court agreed, noting that the

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179. *Johnson*, 980 F.2d at 1502-03. The court was skeptical about the policy of deterring tax evasion by publishing confidential information.

180. See *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984). In *Kosak*, Justice Marshall responded to the government’s argument that the FTCA’s exceptions should be broadly construed by stating that “unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute.” *Id.* (citing United States v. Yellow Cab Co., 340 U.S. 543, 548 n.5 (1951)). This language should apply to all of the FTCA’s exceptions.


183. *Brief for Appellee at 21, Johnson v. Sawyer*, 980 F.2d 1490 (5th Cir. 1992) (No. 91-2763) [hereinafter Appellee’s Brief].

184. 28 U.S.C. § 2680(c).

185. *See Interfirst*, 769 F.2d at 308.


exception is broadly interpreted, but only in cases where it relates to agents' activities with a realistic nexus to the functions of assessing or collecting taxes.\textsuperscript{188}

Assuming, for argument's sake, that the press releases had a deterrent purpose, the \textit{Johnson} majority still held that the actions were not "sufficiently related" to assessing or collecting taxes to uphold sovereign immunity.\textsuperscript{188} The court added, "It is equally true that not every official act of those agents who are thus engaged [in assessing or collecting taxes] is sufficiently related to assessing or collecting taxes to have the nexus required to enjoy protection of [I.R.C.] § 2680(c)."\textsuperscript{190} Though the primary purpose of the IRS is to assess and collect taxes, the court refused to conclude that every act of an IRS agent or employee falls within that description.\textsuperscript{191} \textit{Johnson} favors claimants, because the court accepted distinctions previously not recognized.

Claimants should capitalize on the distinction that exists among agents within the IRS. Not every agent, officer, or employee of the IRS is involved in assessing or collecting taxes.\textsuperscript{192} The court in \textit{Johnson} found merit in this argument, because not every IRS agent or employee assesses or collects taxes.\textsuperscript{193} This new approach in reviewing the tax assessment and collection exception gives claimants additional leverage.

Finally, to avoid the tax exception, claimants might look to dicta in prior cases. The Fifth Circuit has raised doubts about sovereign immunity, indicating its uneasiness in affording such broad liability protection to the United States.\textsuperscript{194} For example, in \textit{Interfirst Bank of Dallas, N.A. v. United States}, the court criticized the doctrine of sovereign immunity because it bars suits by both the innocent and guilty. Likewise, the doctrine is often harsh and makes little sense in the United States.\textsuperscript{195} In \textit{Capozzoli}, the Fifth

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  \item \textsuperscript{188} \textit{Johnson}, 980 F.2d at 1504. This "realistic or substantial nexus" is a novel approach to interpreting the tax exception and an argument that claimants should encourage courts to address.
  \item \textsuperscript{189} \textit{Id}.
  \item \textsuperscript{190} \textit{Id}.
  \item \textsuperscript{191} \textit{Id}.
  \item \textsuperscript{192} Appellee's Brief, supra note 183, at 22.
  \item \textsuperscript{193} \textit{Johnson}, 980 F.2d at 1503-04.
  \item \textsuperscript{194} See \textit{Interfirst}, 769 F.2d at 310; \textit{Capozzoli v. Tracey}, 663 F.2d 654 (5th Cir. 1981).
  \item \textsuperscript{195} \textit{Interfirst}, 769 F.2d at 310 (adding that it nonetheless remains the law so the court was obligated to uphold it). For a discussion of sovereign immunity's application in the United States, see supra notes 11-20 and accompanying text.
\end{itemize}
Circuit recognized a limitation on sovereign immunity.\footnote{Capozzoli, 663 F.2d at 658. Interpreting the tax exception in favor of the United States, the court indicated that it was not suggesting that the government is insulated from all tort liability from IRS transgressions. A tort wholly unrelated to an agent’s official duties would not be sheltered by sovereign immunity. \textit{Id.}} Also, the Ninth Circuit refused to apply the tax assessment and collection exception in a malicious prosecution claim specifically authorized by the FTCA.\footnote{Wright v. United States, 719 F.2d 1032, 1035 (9th Cir. 1983) (acknowledging that although the tax exception had been broadly construed, the court was “disinclined to interpret the exception so generously”).} Based on dicta and direct language from previous decisions, claimants should mold favorable language into their FTCA claims.

3. \textit{Negligence and Negligence Per Se}

The court in \textit{Johnson} found that when federal officials violate federal statutory requirements, it is negligence per se or at least negligence. The court’s holding on this issue provides additional arguments for future FTCA claims. Since statutory violations are negligence per se under state law and actionable against the tortfeasor, such violations should be viable under the FTCA’s plain language.\footnote{The agent’s position with the government should be irrelevant.} In the alternative, a claimant could argue that it is ordinary negligence for IRS agents to ignore statutes and regulations in the Internal Revenue Code.\footnote{The IRS should be responsible for understanding and abiding by the Internal Revenue Code. Since IRS agents work with the Internal Revenue Code, IRS agents should be required to comply with the Code’s provisions. Private individuals, on the other hand, often know very little about the Code, yet suffer from penalties, interest, fines, liens, levies, or felony tax evasion charges when they violate tax code provisions. Within its discretion, the IRS can seize a taxpayer’s property for Code violations without first appearing in front of an impartial tribunal to determine whether the IRS’s assessment is proper. See \textit{Burnham}, supra note 2, at 18, 43, 62. Burnham notes the strange anomaly in tax cases because one adversary (the IRS) acts as the judge with legal authority to decide the case and can apply penalties against the taxpayer or tax practitioner. \textit{Burnham}, supra note 2, at 43.} Thus, in cases where the IRS ignores its own statutes and regulations, negligence or negligence per se principles should apply.

VII. \textit{Other Potential Remedies}

As this Comment illustrates, successfully suing the federal government is difficult and rarely successful.\footnote{To make the burden even more difficult, the IRS may pursue attorneys who zealously represent clients in litigation against the IRS. See \textit{United States v. Heller}, 830 F.2d 150 (11th Cir. 1987). In that case, Heller, an attorney, represented a newspaper that was reporting about IRS undercover operations. The IRS disapproved of the newspaper stories, so two IRS agents met with Heller to discuss legal proceedings against Heller’s client. The same two IRS agents pursued Heller personally after they exchanged heated words in Hel-}
United States are time-consuming and extremely expensive.\textsuperscript{201} The United States has unlimited resources and staff. To enhance chances of recovery, a claimant may alternatively plead other potential claims, depending on the facts.

Other potential remedies include: \textit{Bivens} constitutional tort actions,\textsuperscript{202} other statutory waivers of sovereign immunity, and private claim bills. First, for constitutional violations, a claimant may plead a constitutional tort action against the individual agents.\textsuperscript{203} Since the individual agent is the defendant in a \textit{Bivens} suit, a plaintiff may have little chance of recovering adequate damages. \textit{Bivens} claims have been upheld for other than Fourth Amendment violations.\textsuperscript{204} Nonetheless, \textit{Bivens} tort actions have achieved limited success against the IRS\textsuperscript{205} making it difficult for a claimant to

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  \item The Johnson case has been in court over ten years.
  \item See \textit{Bivens v. Six Unknown Federal Narcotics Agents}, 403 U.S. 388, 397 (1971) (holding that a district court may award damages against federal agents for injuries plaintiff suffered from the agents’ violation of Plaintiff’s Fourth Amendment rights).
  \item \textit{Id.}
  \item See, e.g., \textit{Carlson v. Green} 446 U.S. 14, 16-25 (1980) (upholding a \textit{Bivens} constitutional tort by decedent’s widow who sued based on the Eighth Amendment when her husband died in prison because he did not receive proper health care); \textit{Gibson v. United States}, 781 F. Supp. 552, 556 (D. Mont. 1985). On her tax return, Mrs. Todd typed that she was paying her taxes involuntarily under penalty of statutory punishment. The IRS responded by imposing a $500 fine for filing a frivolous return, and Mrs. Todd refused to pay the fine. The IRS seized her bank account and filed a tax lien on her property. The district court held that assessing a penalty for the comment typed on her tax return violated her First Amendment rights and attaching her bank account and imposing a tax lien on her property without prior hearing violated the Fifth Amendment. \textit{Id.} at 554-55. \textit{Todd}, however, was overturned by the Ninth Circuit. \textit{Todd v. United States}, 802 F.2d 1152 (9th Cir. 1986), \textit{superseded by} 849 F.2d 365 (9th Cir. 1988).
  \item See, e.g., \textit{Lojeski v. Boandl}, 788 F.2d 196 (3d Cir. 1986) (reversing the district court, the Third Circuit held that despite the IRS’s continuous and unjustified harassment of the plaintiff, and imposing liens and levies on her property, no constitutional or statutory rights were violated). The ineffectiveness of \textit{Bivens} suits is illustrated by a statement that then IRS Commissioner Gibbs made in congressional hearings against the proposed Taxpayer Bill of Rights. Commissioner Gibbs argued that taxpayers have sufficient safeguards under the \textit{Bivens} doctrine. To illustrate that IRS agents do not abuse their positions, Commissioner Gibbs stated that between 1980 and 1986, over 1,000 \textit{Bivens} suits were filed, but
\end{itemize}
recover for constitutional violations. The inadequacy of these remedies illustrates that the IRS may violate constitutional rights and yet escape unchecked by the judiciary.

Second, Congress has waived sovereign immunity under several different statutes found in the tax code. Perhaps most interesting, and of recent debate, is the Taxpayer Bill of Rights. The Taxpayer Bill of Rights was enacted, in part, as a response to horror stories by taxpayers who testified in congressional hearings. Although the bill appears to provide broad remedies, several features limit its effectiveness for potential claimants. Section 7433 of the Code only applies to collection activities; abuses connected with wrongful assessments, no matter how egregious, are not actionable. Also, the statute limits claims to reckless or intentional acts by IRS agents. Damages under the Taxpayer Bill of Rights

none were successful. The commissioner testified to show that Congress should not grant statutory waivers of sovereign immunity in IRS cases. See Sprouls, supra note 146, at 591.

Perhaps more difficult, but nonetheless plausible in a given case, is a § 1983 claim for civil rights violations. A § 1983 claim requires state action, so the IRS would have to act under the color of state law or act with a state agency or officials to subject the agents to liability. However, a § 1983 claim is likely to meet limited success and is rarely upheld against federal agents.

Burnham argues that the only effective way to control the IRS is by enhancing the nearly non-existent congressional oversight. Burnham, supra note 2, at 353. However, Congress may be hesitant to effectively oversee the IRS, since the IRS has been involved in auditing and removing congressmen who have challenged the IRS by suggesting more stringent oversight. Burnham, supra note 2, at 291-308.

See, e.g., I.R.C. § 7426 (1988) (allowing a third-party wrongful levy action against the IRS); I.R.C. § 7421 (1988) (allowing, in limited situations, an injunction or judicial review of specific IRS activities); I.R.C. § 7430 (1988) (providing claims for reasonable litigation costs in cases where the taxpayer prevails and the government’s position in the litigation was unreasonable); I.R.C. § 7431 (1988) (waiving sovereign immunity for wrongful disclosure of confidential tax return information); I.R.C. § 7432 (1988) (involving damage claims when the government refuses to release a lien). The coverage and applicability of these provisions is beyond the scope of this Comment, and these are not the only purportedly remedial provisions of the tax code.

Like the FTCA, this section requires that taxpayers first exhaust remedies with the IRS. I.R.C. § 7433(d)(1) (1988).

For an excellent discussion of the Taxpayer Bill of Rights, its legislative history, courts' interpretations, and shortcomings, see Sprouls, supra note 146, at 589-605. Among those who testified was Thomas Treadway, telling Congress how he and Lojeski lost their businesses as a result of IRS abuse. Sprouls, supra note 146, at 591 n.91. See supra note 3 for a brief discussion of the case involving Treadway and Lojeski.

The Act requires that an IRS agent intentionally or recklessly disregard an Internal Revenue Code provision or its regulations in connection with the collection of tax. The disregard must proximately cause direct economic damages. See Sprouls, supra note 146, at 590.

Sprouls, supra note 146, at 590.

The government is not liable for negligent collections and only needs to prove that the particular agent was unaware of the provision violated. See Sprouls, supra note 146, at 602. Sprouls concludes that the IRS can maximize revenue by maintaining poorly informed but zealous agents to press tax collection by proper or im-
are limited to $100,000 (punitive damages are not allowed), which may not cover actual economic damages, let alone a claimant’s devastated credit rating\(^\text{214}\) and personal reputation.\(^\text{215}\) Likewise, since I.R.C. § 7433 is the exclusive remedy in cases where it applies, the $100,000 limit restricts recovery where the taxpayer may be able to recover more under the FTCA or a \textit{Bivens} suit. The Taxpayer Bill of Rights does provide some remedies for taxpayers, but its shortcomings limit it as a complete remedy for damaged claimants.\(^\text{216}\)

Finally, if the other remedies are ineffective or inapplicable, a taxpayer damaged by the IRS can resort to a private claim bill. A private claim bill works like any other legislation and, if passed, would be a congressional award for the IRS’s wrongful activity.\(^\text{217}\) Private claim bills are still available, despite the fact that the FTCA was enacted to limit their use.\(^\text{218}\) Of course, private claim bills are time-consuming, and Congress is not likely to respond to all IRS abuses by enacting legislation. Thus, private claim bills may provide little hope. Like the FTCA, other avenues of relief have limitations for a party damaged by the IRS.

\section*{VIII. Conclusion}

The doctrine of sovereign immunity often bars claims from taxpayers damaged or injured by tortious IRS conduct. To provide redress for such conduct, Congress enacted the FTCA, allowing a cause of action against the United States for the negligent or wrongful acts or omissions of its agents and employees. On its face, the FTCA appears to allow citizens to use the judicial system to protect their rights. However, the discretionary and tax assessment and collection exceptions limit the FTCA’s effectiveness in cases involving the IRS. Likewise, other potential causes of action may

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\(^{214}\) An IRS tax lien may affect a taxpayer’s credit rating for up to seven years, even if the taxpayer pays the alleged deficiency to clear the lien. See Marvin J. Garbis & James J. Keightly, \textit{Internal Revenue Service Collection Procedures, Jeopardy Assessments, and Litigation}, C889 A.L.I.-A.B.A. 319, 352 (1993).

\(^{215}\) See Sprouls, \textit{ supra} note 146, at 592. Sprouls also suggests several congressional changes to enhance § 7433 as an effective civil remedy for IRS abusive practices. Sprouls, \textit{ supra} note 146, at 604-05.

\(^{216}\) One may believe that Rule 11 sanctions prevent frivolous IRS actions, however, see \textit{Rule 11: Should Sanctions be Imposed Against the Government and Its Attorneys in Federal Tax Cases? A Review and Critique of Mattingly v. United States}, 5 Geo. J. Legal Ethics 613, 613-14 (1992) (stating that although Rule 11 is a federal court rule, the United States and its tax lawyers generally escape Rule 11 sanctions against parties who litigate with the IRS).

\(^{217}\) See Goldman, \textit{ supra} note 23, at 837-38 & n.2.

\(^{218}\) See Goldman, \textit{ supra} note 23, at 837-38 & n.2.
not provide a sufficient remedy for IRS tortious or unconstitutional conduct.

A court granting a claimant relief, as in Johnson, rarely occurs. Courts frustrated with sovereign immunity should strictly scrutinize the FTCA's waivers, breathing life into the original remedial purposes of the FTCA. Moreover, Congress should seriously reconsider the doctrine of sovereign immunity and re-examine the limited waivers currently provided.219 Perhaps, in light of recent cases and commentary on this issue, Congress will respond and either more effectively oversee the IRS or eliminate or limit sovereign immunity.

Until then, claimants should continue to urge courts to protect their rights in FTCA claims and other cases. After all, litigation is the time-tested mechanism by which private citizens remedy unlawful conduct. The mechanism should apply whether the defendant is an agent of the government or a private citizen. Permitting citizens access to the courts reaffirms the judiciary's ability to serve as a check on executive agencies. The elimination or limitation of sovereign immunity could transform the IRS and other government agencies into more efficient and responsible bureaucracies.

219. History illustrates that abusive tax practices were a significant factor behind the American Revolution and the adoption of the United States Constitution.