

APPENDIX

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ENTERED AUGUST 22, 2017

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15105

D.C. Docket No. 5:15-cv-01232-AKK

GARY THACKER,
VENIDA L. THACKER,

Plaintiffs-Appellants,

versus

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

(August 22, 2017)

Before ED CARNES, Chief Judge, and ROSENBAUM and DUBINA, Circuit Judges.

PER CURIAM:

Gary and Venida Thacker sued the Tennessee Valley Authority (“TVA”) for its alleged negligence involving a tragic accident on the Tennessee River. On July 30, 2013, while Gary Thacker and his friend Anthony Szozda were participating in a local fishing tournament, TVA was attempting to raise a downed power line that was partially submerged in the river. The power line, which crossed the river, had become lax earlier in the day when a pulling cable failed during a conductor- replacement project. At the same moment that TVA began lifting the conductor out of the water, the fishing partners’ boat passed through the area at a high rate of speed, and the conductor struck both Thacker and Szozda. As a result, according to the complaint, Thacker suffered serious physical injuries, his wife suffered loss- of-consortium damages, and Szozda was killed instantly.

The district court dismissed the Thackers’ complaint for lack of subject- matter jurisdiction. We now must affirm.

The Thackers assert that the district court erred in two ways: (1) in the Thackers’ view, the discretionary-function exception to the government’s sovereign-immunity waiver in the TVA Act cannot apply to TVA’s activities at issue here; and (2) even if the exception applies, the challenged

conduct does not fall within it. We address the Thackers' arguments in order.

I.

When we review a district court's decision to grant a motion to dismiss under Rule 12(b)(1), Fed. R. Civ. P., for lack of subject-matter jurisdiction, we review its legal conclusions, which are all that are at issue here, *de novo*. *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1250 (11th Cir. 2007).

II.

The United States enjoys sovereign immunity from suit unless it unequivocally waives it in statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted). When Congress waives sovereign immunity, we must strictly construe that waiver, in terms of its scope, in favor of the United States. *See id.* (citation omitted).

Yet we have recognized that the doctrine of sovereign immunity does not entirely bar suit against TVA, *Peoples Nat'l Bank of Huntsville, Ala. v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987) (citing 16 U.S.C. § 831c(b)), a corporate agency of the United States that is expressly authorized to engage in commercial, power-generating activities, among other functions, 16 U.S.C. §§ 831c(j), 831d(l), 831k; *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 127 (1939) ("The [TVA] Act erects a corporation, an instrumentality of the United States, to develop by a series of dams on the

Tennessee River and its tributaries a system of navigation and flood control and to sell the power created by the dams.” (footnote omitted)). Rather, the TVA Act expressly provides that TVA “[m]ay sue and be sued in its corporate name.” 16 U.S.C. § 831c(b). Though “sue-and-be-sued” waivers are liberally construed, *Loeffler v. Frank*, 486 U.S. 589, 554 (1988) (quoting *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940)), courts have interpreted this language to mean that TVA is “liable to suit in tort, subject to certain exceptions.” *United States v. Smith*, 499 U.S. 160, 168-69 (1991) (citing *Meredith*, 812 F.2d at 684-85; *Queen v. Tenn. Valley Auth.*, 689 F.2d 80, 85 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983)).

As relevant here, we have held that TVA cannot be subject to liability when engaged in governmental functions that are discretionary in nature. *Meredith*, 812 F.2d at 685. And we have specifically applied the discretionary-function exception in cases arising out of TVA’s commercial, power-generating activities. *See, e.g., Johns v. Pettibone Corp.*, 843 F.2d 464, 466–67 (11th Cir. 1988) (negligence suit arising out of electrocution death caused by a TVA power transmission line).

We must do so here as well because TVA’s challenged actions occurred in the context of its performance of a governmental function. Under the TVA Act, TVA has the “power to acquire real estate for the construction of . . . transmission lines, power houses, and other structures . . . , and in the event that the owner or owners of such property shall fail and refuse to sell to [TVA] at a price

deemed fair and reasonable . . . , then [TVA] *may* . . . *exercise the right of eminent domain* . . .” 16 U.S.C. § 831c(i) (emphasis added); *see also id.* at § 831c(h) (TVA “[s]hall have power *in the name of the United States of America* to exercise the right of eminent domain . . .”) (emphasis added).

The power of eminent domain that TVA may exercise when it constructs power-transmission lines, of course, belongs solely to the United States, not to commercial entities. Since TVA can exercise that power when it constructs power-transmission lines, we conclude that it acts as an agency of the United States when constructing power-transmission lines. *Cf. Lynn v. United States*, 110 F.2d 586, 590 (5th Cir. 1940) (“In the erection of dams [TVA] is only an agency of the United States.”) (citing 16 U.S.C. § 831c(h), (i), (k)). Because the construction of power lines is a governmental activity, TVA cannot be sued for actions arising out of that activity if those actions fall within the discretionary-function exception. *See Meredith*, 812 F.2d at 685–86.

The Thackers’ allegation that TVA negligently “failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River” is encompassed within TVA’s construction of power-transmission lines. And their contention that TVA “failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards the TVA created” allegedly occurred incident to TVA’s construction of power-transmission lines. As a result, we must determine

whether TVA's challenged actions fall within the discretionary-function exception.

III.

To determine whether TVA is shielded from liability under the discretionary-function exception based on the challenged conduct, we use the same test that applies when the government invokes the discretionary-function exception to the Federal Tort Claims Act ("FTCA"). *See, e.g., Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1310 (11th Cir. 2017) (relying on cases analyzing the FTCA's discretionary-function exception to evaluate the exception's applicability in a lawsuit against TVA).

Before applying the test, however, we must first identify "exactly what conduct is at issue." *Swafford v. United States*, 839 F.3d 1365, 1370 (11th Cir. 2016) (citation and quotation marks omitted). As we have noted, the Thackers allege that TVA negligently "(1) failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River, and (2) failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards the TVA created."

Having identified the challenged actions, we apply a two-part test to that conduct to ascertain whether the conduct falls within the bounds of the discretionary-function exception. *Id.* At the first step, we evaluate whether the conduct at issue "is a matter of choice for the acting employee." *Id.* (quoting *Berkovitz ex rel. Berkovitz v. United States*,

486 U.S. 531, 536 (1988) (internal quotation marks omitted)). An action is not a matter of choice—and therefore not discretionary—“when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *Id.* (quoting *Berkovitz*, 486 U.S. at 536 (internal quotation marks omitted)). Under those circumstances, an employee is required to follow the directive, meaning that the employee’s actions are not discretionary and do not fall within the discretionary-function exception. *Id.*

Here, the Thackers point to no specific federal statute, regulation, or policy that sets forth a particular course of action for employees raising a power line from a river to follow, either in the construction of the line or in safety precautions to undertake to protect the public. Instead, for the first time in their reply brief, the Thackers cite generally 29 C.F.R. § 1926, a group of regulations that concerns safety and health regulations for construction. But arguments raised for the first time in a reply brief are not properly before this Court. *Herring v. Sec’y, Dep’t. of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (citations omitted).

And even if we were to address the Thackers’ argument, their general citation to § 1926 is inadequate. Section 1926 consists of multiple subparts governing items varying from fire protection and prevention (29 C.F.R. §§ 1926.150-1926.155) to fall protection (29 C.F.R. §§ 1926.500-1926.503) to stairways and ladders (29 C.F.R. §§ 1926.1050-1926.1060) to toxic and hazardous substances (29 C.F.R. §§ 1926.1100-1926.1153). So even if we ignored the lateness of

the Thackers' reliance on § 1926, they have not pointed to a specific regulation that TVA allegedly transgressed. This does not suffice. Under these circumstances, the first step of the discretionary-function test is satisfied.

At the second step, we consider whether the conduct at issue involves the kind of judgment designed to be shielded by the discretionary-function exception. *Swafford*, 839 F.3d at 1370. “[T]he purpose of the exception is to prevent judicial ‘second-guessing’ of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). For this reason, the discretionary-function exception applies to only that conduct “that involves the permissible exercise of policy judgment.” *Berkovitz*, 486 U.S. at 539. This type of conduct, in turn, concerns “governmental actions and decisions based on considerations of public policy.” *Id.* at 537 (citation omitted); *see also Gaubert*, 499 U.S. at 322-23.

In this case, the challenged actions plainly involved public-policy considerations. The challenged actions and decisions in this case could require TVA to consider, among other things, its allocation of resources (such as personnel and time), public safety, cost concerns, benefits, and environmental impact. *See OSI, Inc. v. United States*, 285 F.3d 947, 950–51 (11th Cir. 2002) (“The exception does not require there to have been actual weighing of policy considerations.”) (quotation marks

omitted). As a result, the second step of the discretionary- function exception is also satisfied, and the exception applies.

IV.

For these reasons, we affirm the district court's dismissal for lack of subject- matter jurisdiction.

AFFIRMED.

ENTERED August 22, 2017

**UNITED STATES COURT OF APPEALS
For the Eleventh Circuit**

No. 16-15105

District Court Docket No.
5:15-cv-01232-AKK

GARY THACKER, VENIDA L. THACKER,

Plaintiffs - Appellants,

versus

TENNESSEE VALLEY AUTHORITY,

Defendant - Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 22, 2017
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

ENTERED May 23, 2016

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA NORTHEASTERN DIVISION

GARY THACKER)	
and VENIDA L. THACKER,)	
)	
Plaintiffs,)	
)	Civil Action
)	Number
vs.)	5:15-cv-1232-AKK
)	
TENNESSEE VALLEY)	
AUTHORITY,)	
)	
Defendant.)	

ORDER

Gary Thacker and Venida L. Thacker bring this action against the Tennessee Valley Authority (“TVA”) alleging negligence and wantonness arising from an accident that occurred on the Tennessee River in July 2013. *See generally* doc. 1. Specifically, the Thackers allege that they sustained injuries due to the TVA’s negligence in supervising and training its employees, as well as its failure to implement policies instructing employees on the proper response to emergencies. Doc. 1. The TVA has moved to dismiss this complaint, doc. 11, contending that because the complaint concerns personal injuries arising out of the TVA’s response to an emergency

created during maintenance of its electrical power lines, this court lacks subject matter jurisdiction under the discretionary function doctrine.¹

A motion to dismiss filed under Fed. R. Civ. P. 12(b)(1) may be based upon either a facial or factual challenge to the complaint. *McElmurray v. Consolidated Gov't of Augusta-Richmond Cty*, 501 F.3d 1244 (11th Cir. 2007). Where the challenge is facial, the court must merely “see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.” *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). By contrast, where the challenge is factual, as it is here, the existence of subject matter jurisdiction is considered irrespective of the pleadings, “and matters outside the pleadings, such as testimony and affidavits are considered.” *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

The TVA is a “constitutionally authorized corporate agency and instrumentality of the United States.” *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130,1137 (N.D. Ala. Oct. 29, 2013); *see also* 16 U.S.C. § 831 *et seq.* (1933). While the Thackers are correct that the TVA does not enjoy sovereign immunity, *see* 16 U.S.C. § 831c(b), they overlook that, “[w]hen TVA is engaged in a governmental function that is discretionary in nature, where the

¹ The court also has for consideration the Defendant’s Motion for Leave to File Excess Pages, doc. 18, which is **GRANTED**.

United States itself would not be liable, TVA cannot be subject to liability.” *Hill v. Tenn. Valley Auth.*, 842 F. Supp. 1413, 1420 (N.D. Ala. 1993). *See also U.S. v. Smith*, 699 U.S. 160, 168 (1991) (noting that the TVA is “liable to suit in tort subject to certain exceptions.”). Whether the TVA is entitled to the discretionary function exception depends on two things: (1) whether the challenged act or omission violated a mandatory statute, regulation, or policy that allowed no judgment or choice; and (2) if the challenged conduct is discretionary, i.e., that there is no mandatory policy regarding a particular course of action, whether the conduct is the kind the discretionary function exception was designed to shield. *See U.S. v. Gaubert*, 499 U.S. 315, 322–3 (1991). Basically, “[f]or a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.” *Id.* at 324–25. If a mandatory statute, regulation, or policy exists, then the discretionary function exception would not apply because “conduct cannot be discretionary unless it involves an element of judgment or choice.” *Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988).

Turning to the allegations here, because the conduct is the TVA’s response to an emergency that created a hazard to boaters on the Tennessee River, rather than a purported failure to carry out the mandate of its existing policy, doc. 1 at 3–7, the first part of the *Gaubert* discretionary test is satisfied. Moreover, as to the second part, it is axiomatic “that safety decisions represent an exercise of

discretion giving rise to governmental immunity.” *Johns v. Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988). *See also Slappey v. U.S. Army Corps of Engineers*, 571 F. App’x 855, 860 (11th Cir. 2014) (“an agency’s decision whether to warn, and how to warn, implicates policy concerns for purposes of the discretionary function analysis.”); *Monzon v. United States*, 253 F.3d 567, 572 (11th Cir. 2001) (decision whether to warn about rip currents is a discretionary function). Therefore, absent a policy mandating the manner in which the TVA should respond to water hazard emergencies,² doc. 12-1 at 3, the court finds that the TVA’s actions in responding to the river incident here are clearly discretionary as they involve some judgment and choice. Accordingly, the court finds that the conduct here is the type that the discretionary function exception was designed to protect, and that the complaint is due to be dismissed for lack of subject matter jurisdiction. *Hughes v. United States*, 110 F.3d 765, 767 n.1 (11th Cir. 1997) (The court does not look to see “whether the allegations of negligence are true,” but “whether the nature of the conduct involves judgment or choice and whether that judgment is of the kind that the exception was designed to protect.”).

² The Thackers’ complaint does not identify a statute, regulation, or mandate that TVA was required to follow and instead relies on the TVA’s decision not to place warning flags or buoys in the area. Doc. 1 at 5–6

For these reasons, the TVA's motion to dismiss, doc. 11, is **GRANTED**, and this matter is **DISMISSED** without prejudice for lack of subject matter jurisdiction.

DONE the 23rd day of May, 2016.

/s/
ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE

ENTERED November 28, 2017

IN THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 16-15105-CC

GARY THACKER,
VENIDA L. THACKER,

Plaintiffs - Appellants,

versus

TENNESSEE VALLEY AUTHORITY,

Defendant - Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

BEFORE: ED CARNES, Chief Judge, and
ROSENBAUM and DUBINA, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Gary Thacker
and Venida L. Thacker is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

16 U.S.C. § 831c. Corporate powers generally; eminent domain; construction of dams, transmission lines, etc.

Except as otherwise specifically provided in this Act, the Corporation—

- (a) Shall have succession in its corporate name.
- (b) May sue and be sued in its corporate name.
- (c) May adopt and use a corporate seal, which shall be judicially noticed.
- (d) May make contracts, as herein authorized.
- (e) May adopt, amend, and repeal bylaws.
- (f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The Board shall select a treasurer and as many assistant treasurers as it deems proper: Provided, that any member of said Board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

- (f) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

- (h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

- (i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the Board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all

condemnation proceedings: Provided, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a-258e, inclusive, of Title 40 of the United States Code.

- (j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

- (k) Shall have power in the name of the United States —

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: Provided, That no transfer authorized herein in (b) shall be made without the approval of Congress: And provided further, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Gunterville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United

States: Provided, however, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: And provided further, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds \$ 500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant

Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President.

(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of this Act; and may cooperate with Federal, State, and local agencies to that end.

28 U.S.C. § 1346. United States as a defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

- (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
- (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which

are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

- (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

- (2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

- (c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

- (d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

- (e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

- (f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or

interest in real property in which an interest is claimed by the United States.

- (g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

- (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

- (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney

General shall conclusively establish scope of office or employment for purposes of removal.

- (3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his

office or employment, the action or proceeding shall be remanded to the State court.

- (4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.
- (5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—
 - (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
 - (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

- (e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

- (a) Any claim based upon an act or omission of an employee of the Government, 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.
- (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
- (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

- (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
 - (2) the interest of the claimant was not forfeited;
 - (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
 - (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.
- (d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.
- (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
- (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
- (g) [Repealed]

- (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
- (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
- (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
- (k) Any claim arising in a foreign country.
- (l) Any claim arising from the activities of the Tennessee Valley Authority.
- (m) Any claim arising from the activities of the Panama Canal Company.

- (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.