

SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS: THE UNITED STATES’ REFUSAL TO PROTECT ITS PROTECTORS

Michelle Visser*

INTRODUCTION.....	663
I. THE STORY OF ADNAN AWAD: FROM TERRORIST, TO HERO, TO VICTIM	665
II. THE ARGUMENTS FOR AND AGAINST SOVEREIGN IMMUNITY	673
A. <i>Justifications for Sovereign Immunity’s Continuing Role in American Law</i>	675
B. <i>Arguments Against Sovereign Immunity’s Continuing Role in American Law</i>	677
III. CONGRESSIONAL AND JUDICIAL “WAIVERS” OF SOVEREIGN IMMUNITY: HOW ADNAN AWAD ALMOST RECEIVED JUSTICE.....	679
A. <i>Congressional Waivers of Sovereign Immunity: Awad’s Claims Against the United States</i>	679
B. <i>A Judicial “Waiver” of Sovereign Immunity: Awad’s Claims Against Federal Officials in Their Individual Capacities</i>	687
IV. SUGGESTED CONGRESSIONAL AND JUDICIAL MEASURES TO PRECLUDE FURTHER INJUSTICE AND TO BOLSTER THE GOVERNMENT’S ABILITY TO FIGHT TERROR.....	692
A. <i>Justifications for Changing the Current System: Unnecessary Injustice and National Security Concerns</i>	692
B. <i>Potential Congressional Measures To Remedy the Situation</i>	694
C. <i>Potential Judicial Measures To Remedy the Situation</i>	696
CONCLUSION	698

INTRODUCTION

Once labeled the “highest-ranking Iraqi terrorist ever to defect to the

* Law Clerk to the Honorable Bruce M. Selya of the U.S. Court of Appeals for the First Circuit; J.D., Stanford Law School, 2005; B.A., Calvin College, 2002. The author thanks Gerald Alexander, Katherine Wright, Jason Freedman, and the *Stanford Law Review* editing staff for their helpful comments on earlier drafts.

West,”¹ and still considered “one of the true heroes in the international battle against terrorism,”² Adnan Awad risked his life and sacrificed his past to help the United States in its fight against terrorism. Backing out of a terrorist mission, Awad turned himself in at an American embassy, joined the Witness Protection Program (WPP), and assisted U.S. government officials in thwarting terrorist plots, identifying Iraqi terrorists, and securing a verdict against a prominent terrorist.³ Despite all of this assistance, the government did not give Awad a hero’s welcome. Instead, it repaid him with mistreatment and broken promises for which, Awad discovered, there would be no legal remedy.

Already a victim of injustice at the hands of government officials charged with his well-being, Awad also became a victim of sovereign immunity—the age-old doctrine stating that the United States, as “the sovereign,” cannot be sued without its consent.⁴ When Congress passed the Tucker Act⁵ and the Federal Tort Claims Act (FTCA),⁶ it arguably gave Awad the green light he needed to bring his case against the government. Nevertheless, decades of judicial interpretation have eroded these congressional acts in ways that precluded Awad from enforcing his rights against the United States. Moreover, even though the Supreme Court has held that, in some instances, potential plaintiffs can bypass the restraints of sovereign immunity by bringing actions against individual government officials through a “*Bivens* claim,”⁷ Awad could not meet the stringent standards for stating a cognizable *Bivens* claim.

While Awad’s story naturally evokes sympathy for the individual and frustration with the government officials he encountered and the legal system that refused to vindicate his rights, the ramifications of that story extend far beyond Awad’s personal plight for justice. As long as the war on terror remains a prominent national concern, the willing cooperation of individuals such as Awad will be an invaluable asset for government officials seeking to protect this country. Unless the government improves its track record for dealing with these informants, it will likely suffer a “diminish[ed] ability to bring these individuals to our side and to protect the world from terrorist acts,”⁸ putting us all at risk.

1. STEVEN A. EMERSON & CRISTINA DEL SESTO, *TERRORIST: THE INSIDE STORY OF THE HIGHEST-RANKING IRAQI TERRORIST EVER TO DEFECT TO THE WEST* (1991).

2. *Terrorist Defectors: Are We Ready?: Hearing Before the S. Comm. on Governmental Affairs*, 102d Cong. 2 (1992) [hereinafter *Terrorist Defectors*] (statement of Senator Joseph Lieberman).

3. See discussion *infra* Part I.

4. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); see also Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 524 (2001).

5. Ch. 359, 24 Stat. 505 (1887) (codified at 28 U.S.C. §§ 1491-1503 (2005)).

6. Pub. L. No. 79-601, §§ 401-422, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

7. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

8. *Terrorist Defectors*, *supra* note 2, at 5 (statement of Senator William Cohen).

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 665

Part I of this Note provides a detailed account of Awad's story, which ends with the doctrine of sovereign immunity precluding his claims for relief against the government. Part II gives a brief description of the doctrine of sovereign immunity and presents the common arguments for and against its continued vitality in today's legal system. Part III explores the areas in which Congress and the Supreme Court have weakened the doctrine of sovereign immunity in ways that have almost, but not quite, opened the courthouse doors to Awad. Part IV concludes that something must be done to ensure that Awad's story is not repeated and offers suggestions for both congressional and judicial actions that could achieve the desired result.

I. THE STORY OF ADNAN AWAD: FROM TERRORIST, TO HERO, TO VICTIM

Born in Palestine in 1942, Awad and his family relocated to Syria following the 1948 Arab-Israeli War.⁹ Awad's frustrations with oppressive, mendacious governments began during his obligatory stint with the Palestine Liberation Organization.¹⁰ Becoming openly critical of the Syrian government after completing his five-year commitment, he was pressured to leave the country and eventually immigrated to Iraq in 1980.¹¹ Starting out as a lowly trucker, Awad worked his way up and eventually purchased a lucrative construction company.¹² Recalling this highpoint, Awad commented, "I had more than two million dollars in the bank, five cars, a house, and a beautiful young girlfriend. Everything would have been fine, but I met up with stupid people."¹³

The first "stupid person" Awad met was Mohamed Rashid,¹⁴ the infamous terrorist responsible for the bombing of Pan Am Flight 830. Introduced through a mutual friend, Awad and Rashid began socializing, and Rashid eventually introduced Awad to his boss, Abu Ibrahim.¹⁵ Ibrahim was the leader of the May 15 Organization¹⁶ and "had the reputation among Western antiterrorist

9. EMERSON & DEL SESTO, *supra* note 1, at 4, 10; Steven Emerson, *Capture of a Terrorist*, N.Y. TIMES MAG., Apr. 21, 1991, at 30, 56.

10. Deposition of Adnan Mohammed Awad at 8, *Awad v. United States*, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989 (N.D. Miss. Apr. 27, 2001) [hereinafter *Awad Dep.*]; EMERSON & DEL SESTO, *supra* note 1, at 16-19.

11. EMERSON & DEL SESTO, *supra* note 1, at 19-20; Emerson, *supra* note 9, at 56.

12. EMERSON & DEL SESTO, *supra* note 1, at 26-27; Emerson, *supra* note 9, at 56.

13. EMERSON & DEL SESTO, *supra* note 1, at 28.

14. Mohamed Rashid is also known as Mohamed Rashed. *See United States v. Rashed*, 234 F.3d 1280 (D.C. Cir. 2000) (noting in the case name that the defendant is known as Rashed and Rashid). For the purposes of this Note, "Rashid" will be used unless a source is quoted that references "Rashed."

15. *Awad Dep.*, *supra* note 10, at 20-21; EMERSON & DEL SESTO, *supra* note 1, at 28-29, 33.

16. The May 15 Organization is "a radical Iraqi-based Palestinian terrorist group notorious for bombings across Europe and the Middle East." *Awad v. United States*, No.

agencies as one of the most ruthless and obsessed terrorists in the world.”¹⁷ While he knew of Rashid and Ibrahim’s terrorist ties, Awad explained that he did not avoid these men because terrorism was so commonplace in Iraq that it was essentially recognized as a normal occupation.¹⁸ Thinking it was purely conversational, Awad spoke with Ibrahim about the Palestinian cause and their mutual frustration with the Israelis.¹⁹ Eventually, Ibrahim asked Awad to make a personal contribution to their “shared cause.” Misunderstanding the request, Awad pulled out his checkbook. Ibrahim, however, explained that he had a different sort of contribution in mind: he wanted Awad to become a terrorist.²⁰

Awad politely declined, but Ibrahim persisted, calling Awad multiple times and eventually becoming angry with his repeated refusals.²¹ One day, Awad received a call that his workers had been banned from entering the construction site associated with one of Awad’s government contracts. When he arrived at the scene, the security officer told him that he would need to speak directly with Abu Ibrahim if he wanted to resolve the issue.²² Seeing firsthand the extent of Ibrahim’s influence and recognizing for the first time the close connections between the Iraqi government and the terrorist network, Awad realized that he had no choice but to acquiesce to Ibrahim’s request.²³

Using his government connections, Ibrahim obtained a fake passport for Awad and sent him to Geneva with instructions to bomb the Noga Hilton Hotel.²⁴ As he set out on his mission, Awad hoped to be caught so that he would not have to make the decision whether to go through with the bombing, potentially taking innocent lives, or to face Ibrahim’s wrath if he squealed or refused to complete the task.²⁵ Unfortunately for Awad, he carried one of

1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *2 (N.D. Miss. Apr. 27, 2001).

17. EMERSON & DEL SESTO, *supra* note 1, at 40.

18. *Id.* at 31.

19. Awad Dep., *supra* note 10, at 21; EMERSON & DEL SESTO, *supra* note 1, at 21.

20. EMERSON & DEL SESTO, *supra* note 1, at 36.

21. *Id.* at 36-37.

22. Trial Transcript, Day One at 16, 66-67, Awad v. United States, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989 (N.D. Miss. Apr. 27, 2001) [hereinafter Day One] (plaintiff’s opening statement and testimony of Awad); Awad Dep., *supra* note 10, at 25; EMERSON & DEL SESTO, *supra* note 1, at 37-38.

23. Day One, *supra* note 22, at 67-68 (testimony of Awad) (“I felt he can destroy me any way he can. Because if he have power enough to shut my government job and they need the job so quickly because the war, I mean if he have power to stop that, he have power to do anything he want to.”); EMERSON & DEL SESTO, *supra* note 1, at 41 (“This was a business deal that Adnan had been forced to accept and there were no negotiable terms.”).

24. The ease with which Ibrahim obtained the passport confirmed Awad’s suspicions that the May 15 Organization was working closely with the Iraqi government. EMERSON & DEL SESTO, *supra* note 1, at 46-47. Ibrahim picked this hotel because the owner was Jewish and because it often housed a number of Americans. Day One, *supra* note 22, at 16 (opening instructions); EMERSON & DEL SESTO, *supra* note 1, at 42.

25. Day One, *supra* note 22, at 72 (testimony of Awad); EMERSON & DEL SESTO, *supra* note 1, at 68-69.

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 667

Ibrahim's "invisible bombs" that contained roughly 100 pounds of TNT, yet was concealed in the inside lining of a suitcase. The bomb easily cleared airport security, forcing Awad to confront his dreaded decision.²⁶

On August 31, 1982, "compelled by an overwhelming sense of grief which arose from his concern for human safety, [Awad] purposely disregarded the imminent threat to his life occasioned by terrorist reprisal and surrendered himself. . . ." ²⁷ After being turned away by the Saudi consulate, Awad sought out the American Embassy and confessed to an American diplomat that he had a bomb in his possession and had been sent to blow up the hotel.²⁸ He disclosed the location of the bomb, which was then removed and turned over to FBI bomb specialists.²⁹ The specialists were able to determine that the same person was responsible for making both Awad's bomb and the bomb that caused the explosion on Pan Am Flight 830.³⁰ Through Awad's surrender, agents were finally able to connect the May 15 Organization to the Pan Am disaster. The American diplomat thanked Awad for his assistance but informed Awad that he was being turned over to the Swiss because the matter was under their jurisdiction.³¹

In the days after he turned himself in, Awad told his story to the Swiss police and to various foreign intelligence services, including representatives from the United States. Awad provided these agents with information concerning future bombings, identified photographed terrorists (including Mohammed Rashid), gave one of the first descriptions of Abu Ibrahim, and supplied important information regarding the intricacies of Ibrahim's invisible bombs, which had baffled intelligence agencies throughout the world.³² Awad's initial "cooperation thwarted many bombings and saved many lives."³³

Awad spent roughly the next two years in the Swiss system. After Swiss officials discovered that the Iraqi government had seized all of Awad's assets, they undertook the job of supporting and protecting Awad in exchange for his assistance with various terrorism issues. Along with his new identity, they gave

26. Day One, *supra* note 22, at 72 (testimony of Awad); EMERSON & DEL SESTO, *supra* note 1, at 69; *see also* Emerson, *supra* note 9, at 56.

27. Amended Complaint ¶ 6, Awad v. United States, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989 (N.D. Miss. Apr. 27, 2001) [hereinafter Amended Complaint].

28. Day One, *supra* note 22, at 74-76 (testimony of Awad); EMERSON & DEL SESTO, *supra* note 1, at 75-76, 78-79.

29. EMERSON & DEL SESTO, *supra* note 1, at 80, 94. Ibrahim's bomb was so hard to detect that the officials' first attempt to locate the bomb failed and they accused Awad of fabricating the story to avoid paying his hotel bill. The bomb was discovered only after Awad provided exact instructions regarding which seams of the luggage needed to be separated in order to reveal it. *Id.* at 80.

30. *Id.* at 94.

31. *Id.* at 82.

32. Day One, *supra* note 22, at 18 (plaintiff's opening statement); *see* EMERSON & DEL SESTO, *supra* note 1, at 82, 84-85, 102; Emerson, *supra* note 9, at 56.

33. Amended Complaint, *supra* note 27, ¶ 9.

him a BMW, a salary of \$700 per week, an apartment, clothing, and both a Swiss and a Lebanese passport, which allowed him to travel wherever he chose to go.³⁴

In November of 1984, U.S. officials came to Switzerland and asked Awad to come to the United States in order to be a witness against Mohammed Rashid and the May 15 Organization. The officials explained that Awad would join the WPP and represented that the process would take approximately one year. They further indicated that Awad would receive U.S. citizenship and a U.S. passport in exchange for his testimony and that he would be free to leave the United States and return to his current circumstances if he did not like the program.³⁵ As a precondition to joining the WPP, Awad was required to turn over all current identification documents, including his Swiss and Lebanese passports. However, the Witness Certification Statement (WCS) he signed as part of his WPP Memorandum of Understanding stated that the United States would return those documents if he ever chose to leave the program.³⁶ When questioned, the U.S. marshal who signed the WCS indicated that it was his belief that the United States would, in fact, return those passports to Awad if he ever chose to leave the program.³⁷ What Awad did not know and was not warned about before he entered the United States was that, soon after he gave the U.S. officials his passports, the U.S. government returned those passports to Swiss officials.³⁸ Awad asserts that he never would have come to the United States if the U.S. officials had not assured him that this “easy out” was available.³⁹

When asked what he wanted in return for his testimony, Awad simply replied that he wanted to be treated at least as well as he had been by the Swiss, and the agents agreed to meet those terms.⁴⁰ Although he enjoyed his life in Switzerland, Awad was eager to help and truly believed that, if anything, life in America would be an improvement over his current situation. Reflecting on his

34. Day One, *supra* note 22, at 18 (plaintiff’s opening statement); Awad Dep., *supra* note 10, at 32; EMERSON & DEL SESTO, *supra* note 1, at 84, 92-95.

35. Awad v. United States, 301 F.3d 1367, 1369 (Fed. Cir. 2002); Awad v. United States, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *3 (N.D. Miss. Apr. 27, 2001), *aff’d*, 301 F.3d 1367 (Fed. Cir. 2002); Day One, *supra* note 22, at 19 (plaintiff’s opening statement); Awad Dep., *supra* note 10, at 50; EMERSON & DEL SESTO, *supra* note 1, at 103.

36. Awad, 301 F.3d at 1369. As Awad understood it, the process would be a “[s]imple . . . switch,” whereby he would turn in his new identity documents in return for his old documents, including the two passports, if he ever desired to leave. Day One, *supra* note 22, at 109, 114 (testimony of Awad).

37. Trial Transcript, Day Four at 177-79, Awad, 2001 U.S. Dist. LEXIS 8989 [hereinafter Day Four] (testimony of William Gerke).

38. Awad, 2001 U.S. Dist. LEXIS 8989, at *4 n.3.

39. Trial Transcript, Day Seven at 56, Awad, 2001 U.S. Dist. LEXIS 8989 [hereinafter Day Seven] (testimony of Alan Maxwell); Trial Exhb.P-61, Awad, 2001 U.S. Dist. LEXIS 8989; *see also* Day One, *supra* note 22, at 114 (testimony of Awad).

40. Awad v. United States, 61 Fed. Cl. 281, 282 (2004); Day One, *supra* note 22, at 100-01.

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 669

decision to go, Awad recalled thinking, “I am going to live in the best country in the world. . . . America is democracy. America is a superpower. America is freedom.”⁴¹

When he arrived in the United States, Awad’s dreams of America were shattered by the harsh reality of the WPP. Rather than receiving a hero’s welcome, Awad recalls being treated more like a criminal.⁴² Forced to endure an intrusive medical examination and an initial period of confinement in a small room in Washington, D.C., Awad eventually moved to Miami, where he received the paltry sum of \$900 per month, a job as a mechanic, and a small apartment—a definite step down from his life in Switzerland.⁴³

While in Miami, he met a Costa Rican woman. As their relationship progressed, she asked Awad to travel to Costa Rica with her. He explained that he did not have a passport, even though government officials had originally indicated that he would receive one, and she replied that she would use her political connections to procure one for him. He informed the U.S. Marshals Service of his plans to travel and obtain a passport. However, before those plans could be realized, the marshals told Awad that he was in danger and forced him to move to Boston, ending his relationship with the Costa Rican woman and shattering his hopes of obtaining the sought-after passport.⁴⁴

When Awad was moved to Boston, he was given a new identity and a driver’s license, but still no passport.⁴⁵ Roughly a year and a half after coming to the United States, word got out that Iraqi military intelligence had put out a contract on Awad’s life, and Awad received a mysterious phone call from a man falsely claiming to be in the CIA.⁴⁶ The marshals informed Awad that he would need to pick up and start over again, but, to their surprise, he refused and voluntarily terminated his participation in the WPP in May of 1986.⁴⁷ While he understood that the government agents legitimately believed that his life was in danger, he was tired, lonely, exhausted, and ready to end his WPP lifestyle. The government had originally promised that the entire process would only take one year, but after a year and a half, no one had ever contacted Awad about testifying, the government was not making good on its promise to provide Awad with the documentation he needed to pursue his travel goals, and he was

41. EMERSON & DEL SESTO, *supra* note 1, at 105.

42. See Jill Smolowe, *A Hero’s Unwelcome: Washington’s Shabby Handling of a Palestinian Informant Undercuts U.S. Antiterrorism Efforts*, TIME MAG., May 9, 1994, at 50.

43. Day One, *supra* note 22, at 21-22 (plaintiff’s opening statement); Amended Complaint, *supra* note 26, ¶¶ 14, 16; EMERSON & DEL SESTO, *supra* note 1, at 140-44.

44. Awad Dep., *supra* note 10, at 60-61; EMERSON & DEL SESTO, *supra* note 1, at 145-46.

45. Trial Transcript, Day Two at 9, *Awad*, 2001 U.S. Dist. LEXIS 8989 [hereinafter Day Two] (testimony of Awad).

46. Awad Dep., *supra* note 10, at 80; EMERSON & DEL SESTO, *supra* note 1, at 162.

47. *Awad v. United States*, 301 F.3d 1367, 1369 (Fed. Cir. 2002); Day One, *supra* note 22, at 7 (opening instructions); EMERSON & DEL SESTO, *supra* note 1, at 164.

sick of living in a state of relative poverty, compared to his positions in Iraq and Switzerland.⁴⁸

Relying on the terms of the WCS, Awad tried to trade his WPP-issued driver's license for his Swiss and Lebanese passports. An agent took his license and told him that he just needed to wait a little while to receive his papers, but the papers never arrived, and Awad never saw the agent again.⁴⁹ Without a passport, Awad was confined to the United States against his will.⁵⁰

Meanwhile, the statute of limitations for the Pan Am bombing was dangerously close to expiring, and U.S. officials had not yet managed to secure an indictment.⁵¹ As a result, officials finally visited Awad to request the assistance that motivated Awad's initial trip to the United States. At that meeting, Awad again asked for his previously surrendered passports. On that occasion, a government agent told him not to worry about it. The agent explained that Awad would not need them because the government wanted to make him an American citizen and give him an American passport.⁵² On July 31 and August 1, 1986, although no longer in the WPP, Awad flew to Washington, D.C., and testified before a grand jury that subsequently returned indictments in the United States' case against Mohammed Rashid and Abu Ibrahim.⁵³ Following his testimony, the same government agent assured Awad that he would finally receive U.S. citizenship and a passport, but nothing happened. Once again, Awad was the victim of an empty promise.⁵⁴

The United States eventually captured Rashid in Athens, Greece, on May 30, 1988, where he was initially held for carrying a fake passport.⁵⁵ The United States requested extradition for a U.S. trial, and the controversial request was initially granted. However, after numerous challenges and delays, the two countries entered a compromise whereby Rashid would be tried in Greece for his terrorist acts.⁵⁶ As indicated in a government report, officials considered Awad's testimony a critical component in the case against Rashid.⁵⁷

48. EMERSON & DEL SESTO, *supra* note 1, at 163-64.

49. Day One, *supra* note 22, at 23 (plaintiff's opening statement); Day Two, *supra* note 45, at 14 (testimony of Awad).

50. Awad v. United States, 61 Fed. Cl. 281, 283 (2004).

51. Awad, 301 F.3d at 1369; EMERSON & DEL SESTO, *supra* note 1, at 173.

52. Day Two, *supra* note 45, at 21 (testimony of Awad). The agent suggested that the process of securing a passport for Awad would take approximately one year. *Id.* at 22.

53. *Id.* at 22-23 (testimony of Awad); EMERSON & DEL SESTO, *supra* note 1, at 174-75. Although indicted, Ibrahim never left Baghdad and, therefore, escaped the reach of the U.S. judicial system. Emerson, *supra* note 9, at 69.

54. Day One, *supra* note 22, at 24 (plaintiff's opening statement).

55. EMERSON & DEL SESTO, *supra* note 1, at 179-80.

56. *Id.* at 180-81, 184-86, 190-93; Emerson, *supra* note 9, at 69.

57. Day Seven, *supra* note 38, at 44 (testimony of Alan Maxwell) (reading a report stating that "[i]t is the opinion of the Department of Justice that without Awad's availability to testify, serious consideration would have to be given to withdrawing the extradition request and dismissing the indictment").

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 671

In order to make certain that his testimony would be available, the U.S. marshals convinced Awad to rejoin the WPP on October 12, 1989, inducing him with renewed promises of citizenship and a passport. They indicated that the trial should only take about six months and that Awad would receive a reward of at least \$2 million if Rashid were convicted.⁵⁸ During his second stint in the WPP, government officials continued to represent to Awad that, if he left the program again, they would make good on their original promise to return his Swiss passport, even though it had long since been surrendered to the Swiss government.⁵⁹

Rashid's trial was repeatedly delayed, and, during that time, Awad continually, but unsuccessfully, attempted to attain U.S. citizenship and a passport. He frequently voiced his concerns to various government officials, but they simply gave him the repeated song and dance: "We're working on it, don't worry, you'll get it soon."⁶⁰ Eventually, in the fall of 1990, things seemed to be progressing when Awad was summoned to Washington, D.C., to provide testimony to the Greek prosecutors. The Greeks demanded that Awad share his real name and, after being pressured by U.S. marshals to acquiesce and assured by those marshals that the information would be kept in confidence, Awad agreed.⁶¹ Shortly thereafter, Awad received word that, once again, he had been lied to: his name and the fact that he would testify against Rashid had been leaked to the Greek press.⁶² Awad feared for his family's safety and begged the U.S. government to grant him a passport so he could go to his family and protect them. The government still refused.⁶³

Frustrated with the recurrent roundabout treatment and no longer confident that he was truly being protected, Awad left the WPP for good in March of 1991. Again he demanded that the government return his Swiss and Lebanese passports, and again he was refused.⁶⁴ Having been failed once again by the

58. Awad eventually received \$750,000 of the promised \$2 million reward. However, based on the \$2 million promise, he overspent in anticipation of the reward, suffering considerable debt as a result. See Douglas Pasternak, *Squeezing Them, Leaving Them*, U.S. NEWS & WORLD REP., July 8, 2002, at 12.

59. Day Seven, *supra* note 39, at 54 (testimony of Alan Maxwell) ("I've always been consistent in saying yes, [you can get your passport back,] if you get out of the program, you get whatever you gave the government.").

60. Day Two, *supra* note 45, at 63 (testimony of Awad); Trial Transcript, Day Three at 155-56, Awad v. United States, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989 (N.D. Miss. Apr. 27, 2001) [hereinafter Day Three] (testimony of Lynn Awad).

61. Day One, *supra* note 22, at 29-30 (plaintiff's opening statement); Awad Dep., *supra* note 10, at 136; EMERSON & DEL SESTO, *supra* note 1, at 197-98.

62. EMERSON & DEL SESTO, *supra* note 1, at 198.

63. Day One, *supra* note 22, at 31 (plaintiff's opening statement); EMERSON & DEL SESTO, *supra* note 1, at 198-99. As a result of the leak, his brother was subject to persecution before he escaped to the United States, and his sister was forced to flee from Iraq to Syria. Day One, *supra* note 22, at 33-35 (plaintiff's opening statement).

64. Day One, *supra* note 22, at 8, 32 (opening instructions and plaintiff's opening statement); Day Two, *supra* note 45, at 113-15 (testimony of Awad).

U.S. government, he tried to attain U.S. citizenship and obtain a passport on his own so that he could leave the country that had effectively imprisoned him in exchange for his willingness to help. However, he was told that the necessary procedures could not be completed because his file was being held in Washington.⁶⁵

After everything he had endured, Awad still agreed to testify in Rashid's trial. He first traveled to Greece in June of 1991, but the trial was postponed until December of the same year.⁶⁶ Before returning in December, Awad conditioned his testimony on the U.S. government's promise to give him citizenship and a passport.⁶⁷ Largely due to Awad's testimony, the Greek court convicted Rashid of the Pan Am bombing, but Awad never received his promised passport.⁶⁸

During this time, Awad became depressed and eventually sought help from clinical psychologist Louis Masur, who later testified that Awad's frustrations from being "cheated by the United States Government" had led to an adjustment disorder, with mixed emotional features including depression, anxiety, and anger.⁶⁹ In February of 1992, Senator Joseph Lieberman invited Awad to Washington, D.C., to testify about the treatment of foreign nationals in the WPP. Shortly before he went to Washington, and arguably in an effort to soften his testimony, government agents renewed their promises to secure him a passport. Once again, these promises went unfulfilled.⁷⁰ During that same year, Awad received word that his father was ill and dying. He requested travel documents so that he could see his father one last time, but he again was refused.⁷¹

In April of 1993, Awad made one more trip to Greece to testify at Rashid's retrial, where an appellate court upheld the conviction.⁷² Initially, Awad attempted to condition his testimony on receipt of a U.S. passport, but the U.S.

65. Day Two, *supra* note 45, at 182-83 (testimony of Awad).

66. *Id.* at 128-30 (testimony of Awad).

67. Amended Complaint, *supra* note 27, ¶ 9.

68. *Awad v. United States*, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *5 (N.D. Miss. Apr. 27, 2001), *aff'd*, 301 F.3d 1367 (Fed. Cir. 2002); *see also* *Awad v. United States*, 61 Fed. Cl. 281, 283 (2004).

69. Day Three, *supra* note 60, at 10-11 (testimony of Dr. Masur). Dr. Masur also examined Awad in 1998, at which point his diagnosis was upgraded to dysthymia—a characterological type of depression. Dr. Masur again attributed Awad's condition to mistreatment from the U.S. government. *Id.* at 17-18.

70. Day One, *supra* note 22, at 35 (plaintiff's opening statement); Day Two, *supra* note 45, at 136-38 (testimony of Awad).

71. Day Two, *supra* note 45, at 126, 132 (testimony of Awad).

72. Day One, *supra* note 22, at 10 (opening instructions). The Greek court convicted Rashid of intentional homicide and placement of explosive devices in an aircraft and sentenced him to fifteen years in prison. *United States v. Rashed*, 234 F.3d 1280, 1281 (D.C. Cir. 2000). However, he was released in December of 1996. *Id.* He was subsequently taken into custody, arrested by the FBI, and retried for his crimes in the United States. *Id.* (rejecting Rashid's double jeopardy claims).

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 673

officials responded with conditions of their own. They replied that the retrial would occur with or without Awad, but that “he didn’t know what the government could do to him” if the conviction were overturned.⁷³ The meeting reminded him of his initial encounters with Abu Ibrahim. Feeling threatened and betrayed, he agreed to go.⁷⁴

Finally fed up with the government’s failed promises, Awad filed suit against the United States and various individual agents on December 17, 1993.⁷⁵ Among other things, he alleged that he had been fraudulently induced to come to the United States and confined against his will after he arrived, that the agents had negligently failed to keep his identity secret and to secure for him U.S. citizenship and a passport, and that the government had breached its good faith duty to perform its contractual obligation to return his original documents.⁷⁶ Reflecting on his experience in the United States, Awad lamented,

I’ve lost myself. Who am I? I don’t have a country, I don’t have a name. If I had known it was going to take this long to help the Americans with their case and that, in the meanwhile, I would not be in control of my own life, I would never have come.⁷⁷

No longer relying on promises from U.S. officials, Awad finally received U.S. citizenship and a passport as a result of his own efforts in 2000,⁷⁸ a date ironically coinciding with the start of the trial. Awad’s case against the United States and individual agents went to trial in 2000, but his claims were ultimately dismissed in 2004 because they could not surmount the formidable wall of sovereign immunity. In the end, after roughly twenty years of sacrifice that were rewarded by deception and mistreatment at the hands of a government he had trusted, Awad was left without a remedy because that same government decided that this was an area where its conduct could not be challenged.

II. THE ARGUMENTS FOR AND AGAINST SOVEREIGN IMMUNITY

Under the doctrine of sovereign immunity, the United States, as the sovereign, cannot be sued without its consent.⁷⁹ In its strongest and traditional

73. Day One, *supra* note 22, at 37-38 (plaintiff’s opening statement); Day Two, *supra* note 45, at 152 (testimony of Awad).

74. Day Two, *supra* note 45, at 152 (testimony of Awad).

75. Complaint, *Awad v. United States*, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989 (N.D. Miss. Apr. 27, 2001) [hereinafter Complaint]. Awad subsequently filed an amended complaint on May 12, 1994. Amended Complaint, *supra* note 27. The charges in the amended complaint were essentially similar to those in the original.

76. Complaint, *supra* note 75, ¶¶ 9, 11, 17; Amended Complaint, *supra* note 27, ¶ 32.

77. *EMERSON & DEL SESTO*, *supra* note 1, at 231.

78. *Awad v. United States*, 301 F.3d 1367, 1370 (Fed. Cir. 2002).

79. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Hill*, *supra* note 4, at

form—absolute immunity—the doctrine implies that “even the most egregious, knowing, and malicious acts of [the government], producing perhaps incalculable harm to constitutional rights, nonetheless can create no [] liability as a matter of law.”⁸⁰

Vested with sole authority to speak for the sovereign, Congress alone has the power to waive the government’s immunity from suit.⁸¹ However, while Congress alone can *explicitly* waive immunity, sovereign immunity is typically regarded as an original common law doctrine.⁸² As a result, the doctrine has been legislatively altered and judicially redefined in such a way that the government no longer enjoys complete and absolute immunity.⁸³ However, while it has been weakened, sovereign immunity has not been destroyed, and individuals such as Adnan Awad are still feeling its effects.

524.

80. Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying out for Understanding*, 61 CHI.-KENT L. REV. 61, 89 (1985) (quoting Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189, 222 (1981)).

81. Hill, *supra* note 4, at 524 (“In the American constitutional systems it is the legislative rather than the judicial branch that speaks for the sovereign, and it has never seriously been suggested otherwise. Certainly, it has never been thought that the judiciary can consent for the sovereign in the particular case [of sovereign immunity].”); *see also* *Sherwood*, 312 U.S. at 586.

82. *See* Rebecca Heintz, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263, 267 (1994) (arguing that there is no evidence that the framers intended the government to enjoy sovereign immunity protection and that the doctrine is purely a product of judicial action because “nothing in the Constitution declar[es] the federal government immune from suit by its citizens”); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2245 (1996) (noting that “sovereign immunity is a common law doctrine” and that “[t]he Constitution nowhere indicates it should be treated as different from any other common law doctrine”); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 79 (1988) (“The doctrinal bases of the common law doctrine of sovereign immunity have no application whatsoever to the constitutional relationship of the states to federal courts.”). *But see* Hill, *supra* note 4, at 489-90, 523-24 (arguing that sovereign immunity is “an inherent attribute of sovereignty,” which was embodied in the original understanding underlying the Constitution and “has none of the significant incidents of common law doctrine”).

A case could also be made that the doctrine was indirectly implied through the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, which provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Assuming damages are to be paid from the Treasury, this Clause would disallow monetary rewards except when Congress consents to honor them.

Some contend that the doctrine was originally based on the English law notion of royal supremacy: the idea that the king can do no wrong. *See* Heintz, *supra*, at 263; *see also* Stanley H. Friedelbaum, *Traditional State Interests and Constitutional Norms: Impressive Cases in Conventional Settings*, 64 ALB. L. REV. 1245, 1253 (2001) (suggesting that sovereign immunity was “derived from feudal practices”).

83. *See* discussion *infra* Part III.

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 675

Academics, judges, and lawmakers have been debating the merits of sovereign immunity since the early days of this country's formation.⁸⁴ As judges and legislators continue to tweak (or, potentially, decide to overhaul) the doctrine of sovereign immunity, they will undoubtedly be influenced by the wide array of justifications for and criticisms against the proposition that the United States should be immune from suit.

A. Justifications for Sovereign Immunity's Continuing Role in American Law

There was arguably a time when the concept of sovereign immunity was viewed as such an obvious component of any well-functioning government that it was not necessary to even consider its underlying justifications.⁸⁵ However, as critics have increased their attacks on the age-old doctrine, the policy justifications for the rule may play an important role in maintaining its existence. As the Supreme Court recognized in *United States v. Shaw*,⁸⁶ there are a variety of justifications for the often-challenged, yet ever-enduring, doctrine: "The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants."⁸⁷

Although the notion of the "impregnable legal citadel" is probably the most criticized explanation for the government's immunity,⁸⁸ some still contend that sovereign immunity is "inherent in the nature of sovereignty."⁸⁹ As Justice Holmes described it, "there can be no legal right as against the authority that

84. Much of the debate has centered on the issue of state sovereign immunity and the federal government's power to override it. However, for the purposes of this Note, I will be focusing solely on the sovereign immunity of the federal government.

85. See *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) ("It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign from prosecution in a court of justice at the suit of individuals. . . . It is enough for us to declare its existence.").

86. 309 U.S. 495 (1940).

87. *Id.* at 501.

88. There are other, arguably weaker, justifications for sovereign immunity, but they are not applicable to sovereign immunity as it exists in the United States today and are generally not recognized as legitimate defenses for the current rule. One is the simple belief that "the king can do no wrong." See Heintz, *supra* note 82, at 272 (quoting Jeremy Travis, Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 617 (1982)). Given the amount of government criticism that exists today, combined with the fact that Congress has explicitly provided for certain types of suit against the government, it can no longer be argued that this justification carries any weight. Second is the idea that the government needs sovereign immunity to protect it from the indignity of being hailed into court. *Id.* As Heintz explains, this rationale may apply to new, more fragile governments, but is irrelevant within our current system. *Id.*

89. THE FEDERALIST NO. 81 (Alexander Hamilton).

makes the law on which the right depends.”⁹⁰ In a recent paper, Professor Dean Spader explained that there is still a surviving notion that sovereign immunity “is necessary to maintain the supremacy of the lawmaker.”⁹¹

An offshoot of the “inherent right” justification is the argument that sovereign immunity is necessary to give the government the discretion it needs to govern effectively. The early judiciary accepted the doctrine because it worried that the government would be unable to perform its proscribed functions if it were constantly at risk of being called into court to defend its actions.⁹² Because the government is routinely compelled to make risky choices and exercise bold decisionmaking, sovereign immunity continues to play a valuable role in precluding the chilling effect that could result if private citizens were able to use the court system to hold the government accountable every time they were adversely affected by a particular decision.⁹³

Falling under the general umbrella of “government effectiveness” is the contention that sovereign immunity is “necessary to prevent vexatious lawsuits and maintain the judicial floodgates against an inundation of lawsuits.”⁹⁴ Without the protection afforded by sovereign immunity, government officials would be forced to shift some of their energies from fulfilling their duties of the moment to justifying their actions of the past.

Along with protecting the government from the general public, some contend that sovereign immunity is necessary to protect the government from itself; that is, to preserve the separation of powers.⁹⁵ As Professor Spader explains, the result of a continued decline in the doctrine of sovereign immunity would be that the courts could exercise a power to “review the discretionary, policymaking decisions which are the functions of the other branches of government and thereby combine all functions in the judiciary.”⁹⁶

Finally, defenders of sovereign immunity argue that the doctrine is

90. *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907).

91. Spader, *supra* note 80, at 70.

92. *See Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868) (“[B]ut for the protection which [sovereign immunity] affords, the government would be unable to perform the various duties for which it was created.”); *see also The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869) (“It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.”).

93. *See Spader, supra* note 80, at 78 (“Immunity is necessary to encourage risk, vigorous exercise of official authority, decisiveness, principled decisionmaking, flexibility in government decisions and actions and to avoid paralysis.”).

94. *See id.* at 83.

95. *See id.* at 73-74 (“The primary justification for the retention of the sovereign immunity doctrine is that it prevents the courts from interfering unduly with operations of the executive branch.”) (quoting W. GELHORN & B. BOYER, *ADMINISTRATIVE LAW AND PROCESSES* 290-91 (2d ed. 1981)).

96. Spader, *supra* note 80, at 74.

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 677

necessary to protect the public treasury.⁹⁷ Although the United States may be the named defendant in a case, it is the common taxpayer who is ultimately responsible for footing the bill if a court finds the government liable and awards monetary damages.

B. Arguments Against Sovereign Immunity's Continuing Role in American Law

Countering the argument that sovereign immunity is an inherent feature of any government, critics of the doctrine assert that the doctrine was imported from England and was based on the powers of a monarchy. Therefore, the doctrine has no place in our democratic nation that adopted a Constitution with the specific purpose of limiting government power.⁹⁸

The most common objection to the doctrine of sovereign immunity is that it undercuts one of this country's foundational values: the availability of justice for all. Although proponents argue that sovereign immunity is necessary to preserve government functionality, critics assert that, by definition, the doctrine precludes one of the most essential of all government functions: "the dispensation of justice according to law."⁹⁹ Although "the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed,"¹⁰⁰ sovereign immunity has shattered that dream for many individuals, including Adnan Awad, when the initial injustice was suffered at the hands of the United States itself.

A recognized critic of the doctrine, Justice John Paul Stevens asserts that the current application of sovereign immunity suggests that "justice is nothing more than 'the interest of the stronger.'"¹⁰¹ Justice Stevens defends the scholarly criticism of the doctrine, arguing that sovereign immunity "has clashed with the just principle that there should be a remedy for every wrong. [It] inevitably places a lesser value on administering justice to the individual

97. See John Cibinic, Jr., *Retroactive Legislation and Regulations and Federal Government Contracts*, 51 ALA. L. REV. 963, 967 (2000) ("The wisdom of [sovereign immunity] arises, not from any ancient privileges of the sovereign, but from the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government."); see also Spader, *supra* note 80, at 79-80.

98. See *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting) ("[Sovereign immunity] is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State."); see also Hill, *supra* note 4, at 488 (summarizing criticisms of sovereign immunity).

99. CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 153 (1972).

100. *Warth v. Seldin*, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).

101. John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1123 (1993) (quoting PLATO, *THE REPUBLIC* 77 (Desmond Lee trans., Penguin Books 2d ed. 1974)).

than on giving government a license to act arbitrarily.”¹⁰²

The United States’ well-developed legal system evidences the importance this country places on protecting victims. Although the current system serves to alleviate some of the pain victims suffer at the hands of other private citizens, similarly situated victims are left without a remedy when their antagonist is the federal government. However, as Abraham Lincoln asserted many years ago, “it is as much the duty of the government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.”¹⁰³ If that is, indeed, a duty of the government, the doctrine of sovereign immunity has effectively precluded satisfactory performance.

While many critics focus on the availability of justice in general in light of sovereign immunity, others focus on the narrower category of justice in response to constitutionally based claims, arguing that “there is error in allowing the doctrine to defeat claims founded on the Constitution, especially when it is considered that the Constitution makes no provision for sovereign immunity in the first place.”¹⁰⁴

Even though proponents assert that sovereign immunity is necessary to protect the government’s decisionmaking process, opponents counter that the doctrine’s removal could actually improve that process by encouraging officials to exercise greater care.¹⁰⁵ They argue that “[i]mmunity breeds negligence; [whereas] liability breeds caution.”¹⁰⁶

While advocates argue that sovereign immunity is necessary to maintain the separation of powers, those challenging the doctrine point out that courts were established “not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and their government.”¹⁰⁷

Finally, critics of sovereign immunity assert that the doctrine does not need to be preserved in order to protect the public fisc. They argue that this rationale may have made sense when the nation was younger and more vulnerable, based on its limited resources, but is no longer applicable today.¹⁰⁸

102. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 54 (1994) (Stevens, J., concurring) (citation omitted).

103. *Kenecott Copper Corp.*, 327 U.S. at 580 (Frankfurter, J., dissenting) (quoting Abraham Lincoln).

104. Hill, *supra* note 4, at 488.

105. See Spader, *supra* note 80, at 78 (“Liability is necessary to encourage due care and caution, attentiveness, vigilance, responsibility, accountability, diligence, and to require minimal knowledge of the law and individual rights.”).

106. *Id.*

107. *Id.* at 74 (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882)).

108. See Heintz, *supra* note 82, at 274; see also John E.H. Sherry, *The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 ADMIN. L. REV. 597, 613 (1969) (explaining that sovereign immunity was once justified when it served “early pragmatic considerations, necessitating the protection of the public purse of a young, relatively

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 679

III. CONGRESSIONAL AND JUDICIAL “WAIVERS” OF SOVEREIGN IMMUNITY:
HOW ADNAN AWAD *ALMOST* RECEIVED JUSTICE

Over the years and in response to some of the arguments against the doctrine, Congress has undertaken various actions to reduce the original harshness of absolute sovereign immunity.¹⁰⁹ In addition, the Supreme Court has “redefined” the boundaries of sovereign immunity, allowing suits against government officials in certain situations.¹¹⁰

However, as far as current sovereign immunity law is concerned, Awad and his claims still fall on the losing side of the debate. Although each distinct congressional and judicial doctrinal modification did provide protection against some specific government abuse that had previously gone unchecked, the combined result of these historical refinements to sovereign immunity law is a hodgepodge of exceptions where some potential plaintiffs, such as Awad, just miss being able to state a claim under a number of available theories.

A. *Congressional Waivers of Sovereign Immunity: Awad’s Claims Against the United States*

For more than the first half-century of the United States’ existence, “sovereign immunity prohibited virtually all suits against the federal government.”¹¹¹ In those days, “[a] citizen’s only avenue of redress for an injury by the federal government was to petition Congress to pass a private bill granting relief.”¹¹² However, in order to eliminate its burden of dealing with petitions for private bills¹¹³ and to provide just compensation to the victims of government misconduct,¹¹⁴ Congress exercised its authority to waive the government’s sovereign immunity in certain circumstances. Two of the broadest and most important congressional waivers are found in the Tucker

impoverished federal and state body politic”). *But see* Stevens, *supra* note 101, at 1129-30 (criticizing the doctrine of sovereign immunity, but conceding that some form of it may be necessary when the federal deficit is a national issue).

109. *See, e.g., infra* Part III.A (discussing the Tucker Act and the FTCA).

110. *See* discussion *infra* Part III.B (discussing *Bivens* claims).

111. Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301, 302 (1997); *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (“The universally received opinion is, that no suit can be commenced or prosecuted against the United States. . .”).

112. Kirgis, *supra* note 111, at 302.

113. *See* *United States v. Muniz*, 374 U.S. 150, 154 (1963) (noting that the FTCA was designed “to eliminate [the] burden on Congress of investigating and passing upon private bills seeking individual relief”); *see also* John Astley, *United States v. Johnson: Feres Doctrine Gets New Life and Continues To Grow*, 38 AM. U. L. REV. 185, 193 (1988) (“The purpose of the FTCA was . . . to relieve Congress’ burden of considering thousands of private bills each year.”).

114. *See* *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *see also* Astley, *supra* note 113, at 193.

Act¹¹⁵ and the FTCA.¹¹⁶

1. *The Tucker Act*

The Tucker Act of 1887 gave the United States Court of Federal Claims (CFC)¹¹⁷ the

jurisdiction to render judgment upon any claim against the United States 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.¹¹⁸

Because it gives the CFC “jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.”¹¹⁹ The phrase providing for CFC jurisdiction over contract claims is the most utilized, and is generally regarded as the most important, clause of the Act.¹²⁰ Through the Tucker Act, Congress sought to ensure that the government’s voluntary agreements with citizens would “conform to the same standard of honorable conduct as it exacts of them.”¹²¹

The origins of the Tucker Act trace back to 1855, when Congress created what is now known as the CFC.¹²² In order to deal with the increasing flood of petitions for private relief bills, Congress created the CFC and gave it jurisdiction to review a subset of those petitions and to return its recommendations to Congress, which still made the ultimate decisions.¹²³ In

115. Ch. 359, 24 Stat. 505 (1887) (codified at 28 U.S.C. §§ 1491-1503 (2005)).

116. Pub. L. No. 79-601, §§ 401-422, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

117. When the Tucker Act was enacted, the CFC was still referred to as the Court of Claims. *See infra* note 122.

118. 28 U.S.C. § 1491(a)(1) (2005).

119. *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (footnote omitted).

120. *See Kirgis, supra* note 111, at 308.

121. Cibinic, *supra* note 97, at 965. According to Cibinic:

Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealing when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequence.

Id.

122. Act of February 24, 1855, ch. 122, 10 Stat. 612 (repealed 1863). The CFC was originally named the Court of Claims. It was renamed in 1992 to reflect the nature of its jurisdiction: claims against the federal government. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, tit. IX, 106 Stat. 4506 (1992); *see also* 8 JANE BERGNER, WEST’S FEDERAL FORMS § 13112 (2d ed. 2004). The CFC has no authority to hear cases between private parties; it only operates to hear cases against the United States. 8 JANE BERGNER, WEST’S FEDERAL FORMS § 13122. For the purposes of this Note, all references to this court will be to the CFC, regardless of the court’s actual name at the relevant time.

123. The Act only gave the court jurisdiction over claims founded upon laws of

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 681

1863, Congress gave the court the authority to enter final judgments.¹²⁴ However, Congress was still unduly preoccupied with petitions involving what it considered to be “valid claims” from victims with no forum.¹²⁵ As a result, Congress passed the Tucker Act in 1887, extending the CFC’s jurisdiction to include claims founded on the Constitution and for liquidated or unliquidated damages in cases not sounding in tort.¹²⁶ In a further effort to make sure there was an available forum for those valid claims, Congress also enacted the Little Tucker Act, giving district courts concurrent jurisdiction with the CFC over Tucker Act claims not exceeding \$10,000.¹²⁷

The Tucker Act is only a jurisdictional statute: it “does not create any substantive right enforceable against the United States for money damages.”¹²⁸ Rather, it simply gives individuals the right to bring suit against the United States for the listed causes of action when those suits would otherwise have been barred by sovereign immunity. Consistent with the doctrine of sovereign immunity, the CFC *only* has jurisdiction to hear claims against the United States for situations in which Congress has given it the explicit authority to do so, as it did in the Tucker Act.¹²⁹

While the explicit language of the Tucker Act suggests that the CFC would have jurisdiction over “*any* claim against the United States” falling under one of the enumerated categories,¹³⁰ courts have construed the Act to convey jurisdiction only in suits for money damages, disallowing claims for declaratory or other forms of equitable relief.¹³¹ Moreover, beyond simply

Congress, regulations of the executive branch, express or implied contracts with the United States, and all claims referred to the court “by either house of Congress.” Act of February 24, 1855, ch. 122, § 1.

124. Act of March 3, 1863, ch. 92, § 5, 12 Stat. 765, 766 (1863) (codified at 28 U.S.C. § 2519 (2005)).

125. See CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3657, at 480-81 (3d ed. 1998).

126. Tucker Act of 1887, 28 U.S.C. §§ 1491-1503 (2005).

127. 28 U.S.C. § 1346(a)(2) (2005); see also *Shaw v. Gwatney*, 795 F.2d 1351, 1355-56 (8th Cir. 1986) (explaining that the purpose of the Little Tucker Act was to give victims with only small claims the ability to sue, without subjecting them to the inconvenience or expense of traveling to Washington, D.C.). If the prime objective of a claimant’s suit is monetary relief in excess of the \$10,000 limit, the claimant cannot avoid a trip to the District of Columbia by framing her suit as a request for declaratory or injunctive relief. See WRIGHT ET AL., *supra* note 125, § 3657, at 511-17.

128. *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (citations omitted).

129. See *United States v. Testan*, 424 U.S. 392, 399 (1976) (“Except as Congress has consented to a cause of action against the United States, there is no jurisdiction in the [CFC] more than in any other court to entertain suit against the United States.”) (citations omitted); *Thurston v. United States*, 232 U.S. 469, 476 (1914) (finding that the CFC can only recognize those claims which “by the terms of some act of Congress are committed to it”).

130. 28 U.S.C. § 1491(a)(1) (emphasis added).

131. *United States v. Jones*, 131 U.S. 1, 18 (1889); see also *Miami Tribe of Okla. v. United States*, 316 F. Supp. 2d 1035, 1040 (D. Kan. 2004) (noting that because the sovereign has the power to decide *how* it will allow itself to be sued and because “[t]he only remedy to

basing jurisdiction on a *request* for monetary relief, “the claimant must establish that the law violated *obligates* the government to pay him money.”¹³² While the CFC has no jurisdiction to grant specific equitable relief, it can “exercis[e] equitable powers as ‘an incident of [its] general jurisdiction.’”¹³³

2. *The Federal Tort Claims Act*

Enacted in 1946, the Federal Tort Claims Act (FTCA) operates as a broad waiver of sovereign immunity, allowing victims of government employees’ tortious acts to recover damages directly from the United States.¹³⁴ Like the Tucker Act, the FTCA did not create any new or independent cause of action but is better understood as a jurisdictional statute that waives the government’s sovereign immunity so that it is liable in tort as if it were a private citizen.¹³⁵ The Act only applies to tortious conduct committed in the exercise of the employee’s official duties¹³⁶ and does not allow for suits against the individual employee.¹³⁷

which the United States has consented in cases of breach of contract is to the payment of money damages under the Tucker Act, . . . federal courts do not have the power to order specific performance by the United States of its alleged contractual obligations”) (citations omitted).

David Cohen, director of the Commercial Litigation Branch of the Department of Justice—the branch responsible for defending the United States in cases brought in the CFC—notes that the language of the Tucker Act is “remarkably similar” to the statute granting district courts federal question jurisdiction, 28 U.S.C. § 1331, suggesting that it would have been reasonable for the courts to construe the Tucker Act as providing CFC jurisdiction for a broader class of claims than just those where the violation obligates the government to pay money. David M. Cohen, *Claims for Money in the Claims Court*, 40 CATH. U. L. REV. 533, 533 (1991).

132. *Mients v. United States*, 50 Fed. Cl. 665, 671 (2001) (emphasis added) (“[I]t is not enough that the Government has violated some law and in so doing inflicted injury for which a monetary award might make the claimant whole.”); *see also Murray v. United States*, 10 Cl. Ct. 696, 698 (1986) (finding that the CFC’s jurisdiction “depends on whether the particular statute can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained”) (citations omitted).

133. *Pauley Petroleum, Inc. v. United States*, 219 Ct. Cl. 24, 38 (1979) (quoting *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 488 (1966)).

134. The Act provides that the district courts 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. 28 U.S.C. § 1346(b)(1) (2005).

135. *See id.*; *see also Reynolds v. United States*, 643 F.2d 707, 709 (10th Cir. 1981).

136. 28 U.S.C. § 1346 (b)(1) (providing that the Act only applies to injuries caused by an employee “while acting within the scope of his office or employment”).

137. *Id.* § 1379(b)(1) (providing that the victim’s remedy against the United States is her exclusive remedy, specifically precluding an action against the employee).

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 683

Although the FTCA does expose the government to liability in a wide array of cases previously barred by sovereign immunity, it was enacted with a number of express exceptions.¹³⁸ For example, the United States is not liable for employee actions involving discretionary functions,¹³⁹ for claims involving lost or negligently handled mail,¹⁴⁰ for claims involving tax collections,¹⁴¹ or for claims in admiralty.¹⁴² These and the other explicit exceptions were incorporated for two reasons. First, although Congress recognized the importance of providing remedies to victims of government torts, it “wanted to insulate from suit certain governmental activities it believed must not be hampered but would be if subject to suit.”¹⁴³ Exceptions motivated by this justification operate to maintain the government’s sovereign immunity. Second, Congress felt that adequate remedies already existed for certain tort claims.¹⁴⁴ For exceptions motivated by this justification, the result is simply that the district court lacks subject matter jurisdiction for that claim under the FTCA, but some other form of relief does exist. The existence and specificity of these enumerated exceptions suggests that “[t]here is no justification for [courts] to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.”¹⁴⁵

3. *Judicially created exceptions to the congressional waivers and Awad’s failure to find a forum*

Awad first attempted to bring suit against the United States under the FTCA, alleging false imprisonment, conspiracy, intentional infliction of emotional distress, bad faith breach of contract, invasion of privacy, negligence, trespass to chattels, and conversion.¹⁴⁶ However, his FTCA claims were ultimately barred by an “exception” not specifically provided by the Act: the district court determined, and the Federal Circuit agreed, that all of his claims *sounded* in contract, rather than tort, and thus could only be adjudicated under the Tucker Act and in the CFC.¹⁴⁷

138. *Id.* § 1380 (enumerating thirteen specific exceptions).

139. *Id.* § 1380(a). However, the discretionary function does not apply to *any* activity that involves an affirmative choice on the part of the employee, but only applies in those instances where the choice is grounded in social, economic, or political policy. Berkowitz v. United States, 586 U.S. 531, 536-37 (1988).

140. 28 U.S.C § 1380(b).

141. *Id.* § 1380(c).

142. *Id.* § 1380(d).

143. Astley, *supra* note 113, at 196 & n.74 (listing exempted activities such as postal-service activities, combatant activities of the military, and treasury activities).

144. *See id.* at 196.

145. Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957) (footnote omitted).

146. *See* Awad v. United States, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *1 (N.D. Miss. Apr. 27, 2001), *aff’d*, 301 F.3d 1367 (Fed. Cir. 2002).

147. *Id.* at *24.

Although common law does recognize bad faith breach of contract as an independent tort,¹⁴⁸ suggesting that some conduct could fall under *both* the FTCA and the Tucker Act, courts have held that “[t]he FTCA and the Tucker Act’s respective waivers of sovereign immunity are non-overlapping.”¹⁴⁹ Therefore, the FTCA does not waive the government’s sovereign immunity or provide for district court jurisdiction when the claims, although tortious in nature, arise out of the government’s alleged breach of a contractual duty.¹⁵⁰ To determine whether a particular claim sounds in tort or in contract for jurisdictional purposes, courts are called to look beyond labels and examine the essence of the claim to see whether liability would ultimately depend on the government’s alleged promise.¹⁵¹ Thus, if the adjudication of an otherwise-valid FTCA claim requires an initial determination as to whether there was, in fact, a breach of contract, the claim must be dismissed or transferred to the CFC.¹⁵²

148. See, e.g., *Hurst v. S.W. Miss. Legal Servs. Corp.*, 610 So.2d 374, 383 (Miss. 1992) (applying a different statute of limitations to a claim for the tort of bad faith breach of contract than would have been applied to a claim for breach of contract).

149. *Awad*, 2001 U.S. Dist. LEXIS 8989, at *8; see also *New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1079 (Fed. Cir. 1989) (holding that the CFC does not have jurisdiction over claims alleging tortious acts); *Am. Sci. & Eng’g, Inc. v. Califano*, 571 F.2d 58, 62 (1st Cir. 1978) (holding that the CFC has exclusive jurisdiction over suits grounded in contract); *WRIGHT ET AL.*, *supra* note 125, § 3657, at 485 (“The Tucker Act provides the exclusive basis for the assertion of contract claims against the United States.”).

150. See *City Nat’l Bank v. United States*, 907 F.2d 536, 546 (5th Cir. 1990) (dismissing a gross negligence claim brought under the FTCA because it arose out of the government’s failure to act in accordance with a loan-participation agreement); *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351, 357 (5th Cir. 1965) (“That claims based upon breach of contract are wholly alien to the [FTCA] is beyond question.”); *Woodbury v. United States*, 313 F.2d 291, 296 (9th Cir. 1963) (dismissing a breach of fiduciary duty claim brought under the FTCA because it was premised on a contractual promise to provide financing for a housing project); *Dakota Tribal Indus. v. United States*, 34 Fed. Cl. 295, 297-98 (1995) (finding that although the plaintiff’s misrepresentation claims were incontrovertibly tortious in nature, the claim would lie in contract, not tort, for the purpose of Tucker Act jurisdiction, where the party could show a connection between the alleged misrepresentation and the United States’ contractual obligation); *L’Enfant Plaza Props., Inc. v. United States*, 645 F.2d 886, 892 (Ct. Cl. 1981) (finding that the CFC had jurisdiction over tortious breaches of contract, but not where the alleged tort was independent of the contract); see also *Petersburg Borough v. United States*, 839 F.2d 161, 162 (3d Cir. 1988); *Putnam Mills Corp. v. United States*, 432 F.2d 553, 554 (2d Cir. 1970).

Note, however, that at least one court has recognized a cause of action under the FTCA for a breach of the duty of good faith and fair dealing because, although the duty arose from a contractual relationship, the duty was in no way defined by the terms of the contract and was, therefore, a separate tort, properly brought under the FTCA. *Love v. United States*, 871 F.2d 1488 (9th Cir. 1989). This situation should be distinguished from *Awad*’s case, where the duty allegedly breached was defined by the terms of the agreements.

151. See *City Nat’l Bank*, 907 F.2d at 546; *Woodbury*, 313 F.2d at 296 (finding that when “liability, if any, depends wholly upon the government’s alleged promise, the action must be under the Tucker Act, and cannot be under the Federal Tort Claims Act”).

152. See *City Nat’l Bank*, 907 F.2d at 546. If a district court finds that it lacks

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 685

Although Awad argued that his FTCA claims were independent of the two purported agreements, in which the government allegedly promised to provide Awad with U.S. citizenship and a passport and to return his Swiss and Lebanese passports if Awad chose to leave the WPP,¹⁵³ the court found that the success of each claim depended on the existence and subsequent breach of one or both of those agreements.¹⁵⁴ For example, Awad could not succeed in his bad faith breach of contract claim without first showing that a contract was, in fact, breached.¹⁵⁵ Similarly, Awad could not succeed in his negligence claim without first showing that the government owed him, and subsequently breached, a duty, but “[a]ny duty the government had to provide Awad with United States citizenship or a passport sprang initially from the agreement.”¹⁵⁶ Because each claim was dependant on at least one of the alleged agreements and because Awad’s damage claims exceeded \$10,000, the district court did not have the jurisdictional power necessary to hear his claims.

In response to the transfer to the CFC, Awad filed an amended complaint under the Tucker Act, restating his grievances as contract claims.¹⁵⁷ Although the Tucker Act’s plain language gives the CFC jurisdiction over “*any* express or implied contract with the United States,”¹⁵⁸ Awad again fell victim to a judicially created exception to a congressional waiver of sovereign immunity: CFC jurisdiction under the Tucker Act does not extend to *every* situation in which the government is said to have entered an agreement.¹⁵⁹

jurisdiction because an adjudication requires a determination as to whether a breach of contract occurs, it can transfer the case pursuant to 28 U.S.C. § 1631 (2005).

153. The court found that all of the claims were premised on two agreements: (1) the agreement whereby Awad consented to come to the United States and assist the government in its fight against terrorism in return for U.S. citizenship and a passport; and (2) the agreement whereby Awad gave federal agents his identification documents in exchange for a promise that they would be returned if he left the program. *Awad*, 2001 U.S. Dist. LEXIS 8989, at *10-11.

154. *Id.* at *11-12; *see also* *Awad v. United States*, 301 F.3d 1367, 1373-74 (Fed. Cir. 2002).

155. *Awad*, 2001 U.S. Dist LEXIS 8989, at *12.

156. *Id.* at *18-19.

157. *Awad v. United States*, 61 Fed. Cl. 281, 282-83 (2004). Awad alleged that he entered into an oral agreement in which government representatives promised they would provide him U.S. citizenship and a passport, a quality of life equal to or better than what he enjoyed in Switzerland, and the option to return if he so chose, in exchange for his agreement to relocate to the United States and assist in counterterrorism endeavors, including the prosecution of Rashid. Awad claimed that he cooperated fully, fulfilling his contractual obligations, but that the United States failed to provide the promised benefits of the exchange. Motion to Dismiss of Defendant at 2-4, *Awad*, 61 Fed. Cl. 281 (No. 03-1538C).

158. 28 U.S.C. § 1491(a)(1) (2005) (emphasis added).

159. *Kania v. United States*, 650 F.2d 264, 268 (Ct. Cl. 1981) (“The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds.”).

The types of contracts the government makes can be divided into two categories: proprietary and sovereign. Proprietary contracts are those contracts in which the government engages in a commercial transaction as if it were a private entity. Sovereign contracts, by contrast, refer to contracts for which there could be no private analogue—where only the government, as the sovereign, has the authority necessary to make the promises made. For example, a plea agreement is one type of a contract the government enters in its sovereign capacity, as no private party could make this sort of agreement with a criminal defendant.¹⁶⁰ Without providing any support for its conclusions regarding the congressional intent behind the Tucker Act, the CFC in *Kania v. United States* created the “sovereign capacity” exception when it reasoned that “Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services” as if it were a private party.¹⁶¹ Since *Kania*, the general rule in the CFC has been that the court “has jurisdiction over most proprietary contracts, but generally does not have jurisdiction over contracts the government makes in its sovereign capacity.”¹⁶²

However, the *Kania* court did carve out a small exception to the “sovereign capacity” exception, finding that “it would be *possible* to make a binding [sovereign] contract subject to Tucker Act jurisdiction.”¹⁶³ In order to qualify for this “exception,” a potential claimant must satisfy a two-pronged test: (1) the claimant must show that the contracting government official had specific authority to make an agreement obligating the United States to pay money;¹⁶⁴ and (2) the agreement must be one that “clearly and unmistakably subjects the government to monetary liability for any breach.”¹⁶⁵

160. *Sadeghi v. United States*, 46 Fed. Cl. 660, 662 (2000) (finding that plea agreements are entered in the government’s sovereign capacity because “administering the criminal justice system is an activity that lies at the heart of sovereign action”).

161. *Kania*, 650 F.2d at 268; *see also Sadeghi*, 46 Fed. Cl. at 662 (finding that the CFC did not have jurisdiction pursuant to the Tucker Act when the claimant alleged that the government breached an immunity agreement).

162. *Awad*, 61 Fed. Cl. at 284 (citing *Kania*, 650 F.2d at 268); *see also Sadeghi*, 46 Fed. Cl. at 660 (finding that the CFC lacked Tucker Act jurisdiction to hear a claim regarding an allegedly breached promise to protect a witness because it was made in the government’s sovereign capacity); *Drakes v. United States*, 28 Fed. Cl. 190, 193 (1993) (finding that the CFC lacked Tucker Act jurisdiction to hear a claim regarding an allegedly breached plea agreement because it was made in the government’s sovereign capacity).

163. *Kania*, 650 F.2d at 268 (emphasis added).

164. *Id.*

165. *Sanders v. United States*, 252 F.3d 1329, 1335 (Fed. Cir. 2001). The *Kania* opinion originally described the second prong as only requiring the agreement to “spell[] out how in such a case [of breach] the liability of the United States is to be determined.” *Kania*, 650 F.2d at 268. *Sanders* clarified that the liability must be in monetary form and could not be implied, but would “exist only if there was an unmistakable promise to subject the United States to monetary liability.” *Sanders*, 252 F.3d at 1336.

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 687

Because only the sovereign has the ability to grant citizenship or provide passports and because counterterrorism prosecutions are solely a government function, the court found that the government had contracted with Awad in its sovereign capacity.¹⁶⁶ And, like most other claimants facing the two-pronged exception test,¹⁶⁷ Awad was unable to meet the requirements necessary for the CFC to exercise its Tucker Act jurisdiction over his claims. First, the contracting officials included a U.S. attorney and an attorney from the Department of Justice. However, only Department of State officials have the authority to issue passports,¹⁶⁸ and the Commissioner of the Immigration and Naturalization Service has sole authority regarding the citizenship of aliens.¹⁶⁹ Therefore, the makers of the contracts did not have the specific authority necessary to pass the first prong.¹⁷⁰ Moreover, the court went on to find that Awad also failed to satisfy the second prong because the agreement did not clearly subject the government to monetary liability upon any breach but simply provided that Awad could return to Switzerland if he was unhappy with the government's performance.¹⁷¹ The CFC "sympathize[d] with [Awad's] position . . . that he should have his day in court,"¹⁷² but ruled that precedent required it to refuse jurisdiction. Unable to find a court with jurisdiction under either the FTCA or the Tucker Act, Awad was left without a forum and without justice for his claims against the United States.

B. A Judicial "Waiver" of Sovereign Immunity: Awad's Claims Against Federal Officials in Their Individual Capacities

Even though Congress alone is supposedly vested with the authority to waive the government's sovereign immunity, some suggest that the doctrine is in danger of a judicially imposed extinction, as in recent years a "substantial number of the justices, usually not less than four, has stood poised to eliminate the doctrine root and branch."¹⁷³

166. *Awad*, 61 Fed. Cl. at 285.

167. *See Sanders*, 252 F.3d. at 1336; *Sadeghi*, 46 Fed. Cl. at 663; *Drakes*, 28 Fed. Cl. at 193; *Kania*, 650 F.2d at 268.

168. 22 U.S.C. § 211(a) (2005).

169. Under 8 U.S.C. § 1421(a), the Attorney General has sole authority, but this authority was delegated to the Commissioner, pursuant to 28 C.F.R. § 0.105(b) (2005).

170. *Awad*, 61 Fed. Cl. at 285.

171. *Id.* at 286.

172. *Id.*

173. Hill, *supra* note 4, at 487. *But see* Stevens, *supra* note 101, at 1129-30 (suggesting that it would be up to Congress to "abolish the judge-made doctrine [of sovereign immunity] entirely," and that there may be some justifications for maintaining a limited form of sovereign immunity, even though Hill lists Stevens as one of the Justices who would be ready to judicially eliminate the doctrine).

1. *The Bivens claim*

Although not technically an exception to sovereign immunity's ban on suits against the federal government, the Supreme Court took a step in that direction when its decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹⁷⁴ carved out another potential method of relief for individuals injured as a result of their dealings with the federal government. Even though Congress had not expressly authorized such a remedy, the Court held that a federal agent, acting under the color of his authority, could be personally liable for damages stemming from a Fourth Amendment violation.¹⁷⁵

In so ruling, the Court refused to address the possibility that sovereign immunity should shield the individual agents.¹⁷⁶ However, "[i]n so far as *Bivens* created a damage remedy against federal officials without congressional authorization, it did precisely what the doctrine of sovereign immunity purports to bar courts from doing—with one major difference."¹⁷⁷ A *Bivens* claim can only be made against a federal employee in his or her individual capacity and not against the federal government itself.

While the majority opinion avoided all mention of sovereign immunity, the concurring and dissenting opinions demonstrate that the Court's holding may represent a couched attempt to bypass the strict boundaries of the controversial doctrine. In his concurrence, Justice Harlan suggested that a direct suit against the federal government may be the most desirable form of relief, but that an action against the individual agents would need to suffice because the former would be barred by sovereign immunity.¹⁷⁸ In his dissent, Chief Justice Burger recognized the need for some sort of relief against unconstitutional conduct by

174. 403 U.S. 388 (1971).

175. *Id.* at 389. The Court's willingness to recognize an action against federal officials, based on a constitutional violation, without congressional authorization, is especially noteworthy in light of the fact that Congress had expressly authorized damage actions against *state* officials for similar conduct, demonstrating its ability to provide such a remedy, where it deemed appropriate:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2005). In his dissent, Justice Black used this statute to demonstrate that, if it had desired, Congress could have created the remedy that Black felt the majority imposed improperly. *Bivens*, 403 U.S. at 427-28 (Black, J., dissenting).

176. *Bivens*, 403 U.S. at 397-98.

177. Travis, *supra* note 88, at 599.

178. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring) ("However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.").

November 2005] SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS 689

federal officials,¹⁷⁹ but emphasized that it was Congress's responsibility to provide such a remedy and that the Court's holding violated the separation of powers required by the Constitution.¹⁸⁰ Burger suggested that Congress could achieve this mandate through the passage of a simple statute that waived sovereign immunity and created a cause of action for damages stemming from those illegal acts of federal officials that are committed in the performance of their assigned duties.¹⁸¹

In subsequent cases, the Court extended its *Bivens* holding to encompass Fifth Amendment claims,¹⁸² Eighth Amendment claims,¹⁸³ and, eventually, all constitutional claims.¹⁸⁴ However, even as the Court built up the *Bivens* doctrine, it also began the process of tearing it down by providing exceptions whereby federal employees could escape this form of judicially created liability.¹⁸⁵ Although the Court in its *Carlson* holding first suggested that a plaintiff could base a *Bivens* claim on any form of constitutional violation, it further provided that a *Bivens* action could be defeated if one of two conditions were satisfied: (1) the "defendants [could] demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress;'"¹⁸⁶ or (2) the "defendants [could] show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."¹⁸⁷

Along with avoiding *Bivens* liability on one of those grounds, a federal employee can also escape liability under the doctrine of qualified immunity. Although most federal officials facing a *Bivens* suit do not share the absolute

179. *Id.* at 415 (Burger, C.J., dissenting) ("I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials.").

180. *Id.* at 422 (Burger, C.J., dissenting).

181. *Id.* at 422-24 (Burger, C.J., dissenting). Burger also suggested that Congress could establish a tribunal, patterned after the CFC, to hear such claims. *Id.*

182. *See* *David v. Passman*, 442 U.S. 228 (1979) (recognizing a cause of action against federal agents based on a due process allegation).

183. *See* *Carlson v. Green*, 446 U.S. 14 (1980) (recognizing a cause of action against federal agents based on a cruel and unusual punishment allegation).

184. *See id.* at 18 ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.").

185. *See id.*

186. *Id.* (quoting *Bivens*, 403 U.S. at 396). For example, in determining that the plaintiffs did not have a valid *Bivens* claim, based on their First Amendment allegations, the Court in *Bush v. Lucas*, 462 U.S. 367 (1983), specifically acknowledged "the existence of a public interest in having public officials perform their functions efficiently," without fear of liability, and refused to allow a *Bivens* remedy where there was no express congressional authorization. William P. Kratzke, *Some Recommendations Concerning the Tort Liability of the Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1135 (1996).

187. Kratzke, *supra* note 186, at 1131.

immunity generally enjoyed by the federal government, they do enjoy a qualified immunity, the extent of which is dependent on their varying responsibilities.¹⁸⁸ To be eligible for this immunity, an officer must demonstrate that she had an objective, good-faith belief that she did not violate a clearly established statutory or constitutional right,¹⁸⁹ and current case law suggests that the Court intends this to be a lenient standard.¹⁹⁰ To determine whether a defendant's conduct is objectively reasonable, the Court looks to the specific context in which the incident occurred.¹⁹¹

The result of this almost simultaneous expansion and contraction of the *Bivens* route to recovery may be a doctrine that scares federal officials into a state of inaction and inefficiency, for fear of potential suits, yet, at the same time, fails to provide a remedy to injured individuals, because most suits will ultimately be dismissed on the basis of some exception.¹⁹² This is, arguably, exactly what happened in the case of Adnan Awad.

188. See *Butz v. Economou*, 438 U.S. 478, 497-98 (1978). Although the Court recognized that the duties of some government actors, such as judges or prosecutors, necessitate an absolute exemption from personal liability, it found that most officials should only enjoy a qualified immunity. *Id.* at 497-98, 508-10.

189. In the first case attempting to define the scope of the qualified immunity defense, the Court in *Butz* found:

In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 497-98 (internal quotation and alteration omitted). In a later decision, the Court refined its original definition, concluding that an objective good-faith belief would suffice, as opposed to requiring challenged officials to meet the burden of proving their subjective beliefs. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982) (finding that an official's subjective belief is irrelevant and that an official is immune so long as his or her conduct does not violate *clearly established* rights, which would be known to the reasonable person).

190. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (suggesting that the qualified immunity defense should shield "all but the plainly incompetent or those who knowingly violate the law").

191. See, e.g., *Robertson v. Plano City*, 70 F.3d 21, 24 (5th Cir. 1995) ("It goes without saying that, in determining whether the constitutional line has been crossed, the claimed wrong must be viewed in the context in which it occurred.") (citation omitted).

192. See Kratzke, *supra* note 186, at 1149-52. Professor Kratzke notes that roughly 5000 *Bivens* claims are brought per year, but that few plaintiffs ever prevail. *Id.* at 1149, 1151. However, he explains that "[t]he fact that it is difficult for a plaintiff to prevail in a *Bivens* action does not ameliorate the effect such claims have on federal employee defendants, ranging from annoyance to harassment." *Id.* at 1143. Like Chief Justice Burger, Kratzke suggests that a direct suit against the federal government may be a more desirable alternative. *Id.* at 1152.

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 691

2. *Awad's failures under Bivens*

Desperate for some sort of relief, Adnan originally brought suit not only against the United States, but also against twenty federal agents in their individual capacities,¹⁹³ alleging that the officials negligently failed to procure promised travel documents,¹⁹⁴ made false promises to induce his participation in the WPP and to secure his testimony,¹⁹⁵ wrongfully confined and intrusively monitored him without his consent,¹⁹⁶ and interfered with his personal decisions, associations, and speech rights.¹⁹⁷

Applying a three-pronged test encompassing the essential components of a *Bivens* claim and its available defenses,¹⁹⁸ the court immediately dismissed the claims against all but three of the original twenty, because Awad simply named the other seventeen as contributing to his mistreatment, without identifying any specific unconstitutional actions those officials committed, thereby failing the first prong of the test.¹⁹⁹ Determining that the reasonableness of the remaining officials' actions was a question of fact, the court allowed the trial to proceed against those three.

However, at the close of Awad's proof, the court dismissed the claims against these individuals as well, granting their motion for judgment as a matter of law.²⁰⁰ Focusing on the context in which the alleged constitutional violations occurred, the court did not simply ask whether Awad had successfully stated a claim for a *general* constitutional violation. Instead, it asked whether a participant in the WPP has a clearly established freedom from the alleged intrusions against federal agents who are charged with that participant's ultimate protection.²⁰¹ Framed in those terms, the court found that Awad's claims failed both the second and third prongs of the three-pronged *Bivens* test.²⁰²

193. See Complaint, *supra* note 75.

194. Amended Complaint, *supra* note 27, ¶ 20.

195. *Id.* ¶¶ 21-23, 25, 29.

196. *Id.* ¶¶ 25-28.

197. *Id.* ¶ 30.

198. The court asked: (1) whether the official's conduct violated a constitutional right; (2) whether that right was clearly established at the time of the alleged violation; and (3) whether a reasonably competent official would have known that the conduct violated a constitutional right. *Sealed Plaintiffs v. Sealed Defendants*, No. 1:93CV376-D-D, at 17 (mem. opinion) (citing *Creamer v. Porter*, 754 F.2d 1311, 1317 (5th Cir. 1985)).

199. *Sealed Plaintiffs*, No. 1:93CV376-D-D, at 19-20.

200. Day Four, *supra* note 37, at 18.

201. See *id.*

202. The court noted that the Attorney General and U.S. Marshals Service agents have "broad discretion in the operation of the witness protection program." *Id.* (citing *Garcia v. United States*, 666 F.2d 960, 963 (5th Cir. Unit B 1982)). Therefore, in the context of the WPP, the allegedly violated constitutional rights were not clear enough to put a reasonable officer on notice and the officials' conduct was objectively reasonable, considering the surrounding circumstances. *Id.* at 19-21.

Ultimately concluding that the remaining three individual defendants were “merely doing their job,” the court dismissed the claims against them, but not before those officials were subject to the annoyance, fear, and harassment described by Professor Kratzke as the unfortunate side-effects of *Bivens* claims.²⁰³ Although the court eventually recognized that the three officials were just doing their job, these agents and others similarly situated may, in the future, be less willing to do that job in the most effective manner, based on a reasonable fear that they could be haled into court and potentially subjected to personal civil liability as a result. Moreover, this potential loss in government productivity and efficiency was suffered without a corresponding gain, as Awad once again just missed out on another source of potential relief.

IV. SUGGESTED CONGRESSIONAL AND JUDICIAL MEASURES TO PRECLUDE FURTHER INJUSTICE AND TO BOLSTER THE GOVERNMENT’S ABILITY TO FIGHT TERROR

And so, at the end of it all, Adnan Awad was left without a remedy. Ironically, the product of the two legislatively created “potential positives” for his case against the United States ended up being a big negative, as one potential gateway to the courts—the FTCA—was barred by the availability of the other—the Tucker Act, under which Awad’s claims fell victim to a narrow, judicially created exception. Adding insult to injury, his claims against the individual officers were dismissed because those officers were “just doing the job” that the immune United States had instructed them to do. The sheer number of near misses that Awad endured in his struggle for justice suggests that this is the *type* of government conduct that should not be protected by sovereign immunity.

A. *Justifications for Changing the Current System: Unnecessary Injustice and National Security Concerns*

Unfortunately, Awad’s situation is not entirely unique. Other foreign defectors have agreed to assist the United States in its fights against terror and drugs in exchange for promises regarding citizenship, support, and security but have been left feeling helpless and cheated when those promises went unfulfilled.²⁰⁴ In the fall of 2004, a federal terrorism informant provided an

203. See *supra* note 192 and accompanying text.

204. For example, John Harold Mena agreed to testify against Columbian drug mafia bosses on the condition that, among other things, his family would be protected from retaliation. He provided testimony, but five of his family members were violently killed as a result. Tarik Abdel-Monem, *Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?*, 40 AM. CRIM. L. REV. 1235, 1235 (2003). Boris Korczak of Poland made an agreement with the CIA to serve as a double agent in exchange for U.S. citizenship and a small stipend. He kept his end of the bargain, but the government

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 693

extreme example of what can happen when these defectors have no recourse against broken government promises: the Yemen native set himself on fire in front of the White House in a desperate showing of frustration against a government that “had not kept promises they made to secure his cooperation.”²⁰⁵

While these personal stories are disturbing enough to warrant a reexamination of the way the current system treats its foreign defectors, the additional ramifications of the government’s poor performance in this area and the legal system’s failure to provide adequate remedies demand it: “[T]he lives of hundreds if not thousands of innocent civilians . . . hang in the balance depending upon how we deal, whether effectively or ineffectively, with [informants] who in fact defect to our country and offer their services and insight and intelligence and knowledge.”²⁰⁶

One obvious answer would be to fix the system from within, so that these individuals no longer need to resort to the courts for a remedy. Previously suggested ideas for such improvements include creating a program (distinct from the WPP) to deal with the unique needs of informant defectors,²⁰⁷ passing laws to speed up the process for defectors seeking U.S. citizenship,²⁰⁸ and increasing resources to deal with the cultural adjustments defectors face when they first arrive in our country.²⁰⁹ However, assuming that internal improvements will not completely alleviate the problems, some change in the current law is necessary to both vindicate the rights of these individuals and to enhance the United States’ ability to convince potential defectors to come to our country and assist us in protecting our world from future terrorist acts.

Given the still-existing arguments for retaining some version of the ancient

did not. Douglas Pasternak, *Squeezing Them, Leaving Them* (July 8, 2002), <http://www.eyespy.com/squeezingthemmpdf.htm>. Omer al-Ghadi, a crew member of a flight hijacked by the Lebanese Amal Militia, was promised \$1,000,000 in exchange for his testimony. He came to the United States, served as the government’s star witness, but received no reward. *Id.*

In a congressional hearing, Neil Gallagher, chief of the counterterrorism section of the FBI, indicated that the FBI has transported a number of terrorist defectors, like Awad, to the United States in order to receive their support in ongoing terrorist investigations. *Terrorist Defectors*, *supra* note 2, at 71.

205. Caryle Murphy & Del Quentin Wilber, *Terror Informant Ignites Himself Near White House*, WASH. POST, Nov. 16, 2004, at A1. The informant claimed that the state had not honored “promises including a large, but unspecified amount of money, eventual U.S. citizenship and protection of his identity.” *Id.*

206. *Terrorist Defectors*, *supra* note 2, at 8 (statement of Senator William Cohen).

207. *Id.* at 90 (statement of Howard Safir, former Associate Director for Operations, U.S. Marshals Service).

208. *Id.* at 73 (statement of Neil J. Gallagher, Chief, Counter-Terrorism Section, Federal Bureau of Investigation).

209. *Id.* at 84, 88-89 (statements of Victoria Toensing, former Assistant Attorney General, and Howard Safir, former Associate Director for Operations, U.S. Marshals Service).

doctrine, a complete abolishment of sovereign immunity would be both unnecessary and unwise.²¹⁰ However, a small change in the current doctrine, allowing individuals such as Awad to pursue a remedy, would not implicate many of those arguments. First, the government does not have an “inherent right” to make false promises in order to induce individuals to abandon their lives and risk their safety to help us. Moreover, there is nothing mutually exclusive about an efficient government and an honest government. Finally, given the limited number of individuals in Awad’s situation, providing a remedy when these informants are wronged does not create a substantial risk in terms of the public fisc.²¹¹

While the arguments in favor of using sovereign immunity to block *Awad*-type suits are weak, this is a model case for the arguments against the doctrine’s continued vitality. This is clearly an area where justice has been denied and real victims left without a remedy. In addition, while internal measures have thus far been unsuccessful,²¹² legal ramifications may encourage officials to exercise greater care when they interact with, and make promises to, potential defectors. The balance of the considerations for and against preserving sovereign immunity in this area makes clear that change is needed, and that change could be achieved through either legislative or judicial means.

B. Potential Congressional Measures To Remedy the Situation

Ultimately, because it alone is vested with the power to speak for the sovereign, Congress has final authority to decide when and how the government can be sued. Along with that authority comes responsibility, which compels Congress to take some form of affirmative action to avoid a repeat of the injustice that Awad endured and to ensure that the United States will have access to all available resources in its fight against terror. To that end, Congress could take either broad or very specific action in order to ensure that individuals such as Awad have a remedy if the government chooses to repay their cooperation and sacrifices with lies.

210. As Congress indicated when it enacted the FTCA, there are still government activities that need the protection sovereign immunity provides because they are so important that they “must not be hampered but would be if subject to suit.” Astley, *supra* note 113, at 196.

211. The “separation of powers” argument would still apply. However, its effect could be decreased if Congress actively supported such a change, evidencing its consent to expose the United States to this form of judicial scrutiny. Once again, given the small number of people in Awad’s position, this potentially undesirable result would have only a minimal effect. In addition, and as critics of sovereign immunity point out, the separation of powers doctrine could be interpreted to specifically provide that courts decide this sort of controversy between individuals and the government.

212. See *Terrorist Defectors*, *supra* note 2 (highlighting problems with treatment of foreign informant defectors); see also Abdel-Monem, *supra* note 204 (discussing the same).

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 695

On the broader end of the spectrum, one option would be to pass legislation to the effect that the FTCA and the Tucker Act should not be construed as mutually exclusive doctrines, which may have been Congress's intent in the first place. When it enacted the FTCA, Congress included thirteen enumerated exceptions,²¹³ suggesting that, had it wished to preclude otherwise valid FTCA claims also falling under the general umbrella of the Tucker Act, it would have done so explicitly.²¹⁴ Moreover, while Congress limited the applicability of the FTCA in certain situations in which *adequate remedies* already existed, Awad's failure to secure a forum under the Tucker Act makes clear that an FTCA exception is not warranted on those grounds. Finally, the language of the Act makes clear that Congress, in most instances, wished the government to be liable for its tortious acts as if it were a private citizen. Thus, it is counterintuitive that the government should be relieved of that duty and regain immunity because it also assumed an *additional* duty—one stemming from contract.

A second option would be for Congress to alter—or clarify its original intent regarding—the Tucker Act so that “*any claim*,”²¹⁵ including those for “*any express or implied contract*,”²¹⁶ is given its plain language interpretation. Although the CFC, as an Article I court, may not be able to grant specific relief under the Tucker Act,²¹⁷ an otherwise actionable claim should not be excused merely because the law violated does not obligate the government to pay money. If some form of monetary relief could *start* to compensate a victim of government mistreatment, that relief should be available. Moreover, this new legislation should eliminate the unjustified “sovereign capacity” exception created in *Kania*. Congress created the Tucker Act so that the sovereign could be held liable for breaking its contractual promises, just as if it were a private citizen. The comparison to the private citizen is only applicable insofar as it describes the means available to hold the government to its word: redress in the court system under a common law breach of contract theory. There is nothing in the Act to suggest that Congress was only concerned with the act of breaking a contract that a private citizen could also enter, as opposed to the act of breaking a contract in general.

Both of these options would serve the goals of providing justice for individuals in Awad's situation and strengthening the government's credibility as it negotiates with potential defectors. However, these measures would also waive the government's sovereign immunity in cases not involving foreign informants that currently are precluded under legal theories similar to those

213. 28 U.S.C. § 1380 (2005).

214. *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) (finding that the existence of the enumerated exceptions suggests that “[t]here is no justification for [courts] to read exemptions into the Act beyond those provided by Congress”).

215. 28 U.S.C. § 1491(a)(1) (2005) (emphasis added).

216. *Id.* (emphasis added).

217. *See Hoch v. United States*, 31 Fed. Cl. 111, 114 (1994).

blocking Awad's claims.²¹⁸ While this waiver could be considered an added bonus for those espousing strong "justice-for-all" views, it may have some negative implications when the common sovereign immunity justifications are considered.²¹⁹ Depending on how the balance of those considerations plays out, Congress could achieve the narrow goals listed above, without subjecting the government to lawsuits from other types of plaintiffs, if it simply passed legislation waiving the government's sovereign immunity for tortious acts and for all breaches of contract against informant defectors.

C. Potential Judicial Measures To Remedy the Situation

Unlike Congress, the courts do not have the power to explicitly waive the sovereign's immunity and should refrain from exercising such powers in contravention of the separation of powers. However, this limitation does not mean that the courts are powerless to provide relief for individuals such as Awad and, thereby, to bolster the government's position in its fight against terror. Congress, in enacting the FTCA and the Tucker Act, has already taken action that would have allowed the courts to provide Awad with the relief he deserved. It was only as a result of questionable, judicially created exceptions that Awad was left without a remedy.

As explained above, the plain language of the FTCA and its underlying congressional intent leave room for the possibility that FTCA and Tucker Act claims should not be deemed mutually exclusive, at least insofar as tortious acts sounding in contract are concerned. The courts should reexamine their past interpretations and allow for such a possibility.

Even if the courts maintain that the Tucker Act and the FTCA provide for nonoverlapping jurisdiction,²²⁰ FTCA claims should not be dismissed or transferred to the CFC unless a district court satisfies itself that jurisdiction *actually lies* in that court. This did not occur in Awad's case. In fact, Awad argued (and the Federal Circuit recognized) that there was a good chance his case would be dismissed in the CFC, based on the sovereign capacity

218. For example, an elimination of the "mutually exclusive" rule could allow entities entering commercial contracts with the government to avoid the \$10,000 Little Tucker Act jurisdictional limit and keep cases in the district courts by pursuing their actions as tort suits under the FTCA, as opposed to contract cases under the Tucker Act. In addition, a complete abolishment of the sovereign capacity exception would provide for CFC jurisdiction in cases involving alleged breaches of plea or immunity agreements, which could implicate the criminal justice system in a way that arguably intrudes on power granted to the general courts. Of course, if Congress were concerned with these or other specific situations, it could draft rules that explicitly provide exceptions sufficient to avoid those results.

219. Of special concern would be the effect on the public fisc from increased lawsuits and the potential for decreased efficiency and risk-taking in the decisionmaking process.

220. It could be argued that this result is necessary to fulfill Congress's intent that the FTCA not provide an additional form of relief where adequate remedies already exist.

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 697

exception.²²¹ Nevertheless, the court affirmed the transfer on the basis of that court's illusive jurisdiction.²²² If nothing else, courts faced with a similar situation should address and fix this inconsistency to make certain that victims of government torts have *some forum* for relief, provided the alleged tort does not qualify for one of the Act's clearly enumerated exceptions.

Along with fixing their FTCA interpretation, the courts should reexamine their Tucker Act jurisprudence. As mentioned above, the courts arguably misconstrued the congressional intent underlying this Act when they disregarded the Act's plain language, which subjects the government to suit for *any* of the listed causes of action.²²³ The courts could fix this erroneous interpretation by: (1) allowing claims to proceed under the Tucker Act even when the law violated does not obligate the government to pay money; and (2) getting rid of *Kania's* sovereign capacity exception.

Even if the courts insist on retaining some version of the *Kania* exception, it could be applied in a way that would not preclude relief for individuals like Awad. As at least one court has suggested—the U.S. District Court for the District of Massachusetts—a fair reading of *Kania* and subsequent Federal Circuit decisions could limit the current sovereign capacity exception to those cases in which the plaintiff is the subject of an outside criminal action and a CFC ruling under the Tucker Act would implicate the criminal justice system. Examples of such cases include actions for the government's alleged breach of a plea or an immunity agreement.²²⁴ This criminal/civil distinction, as opposed to the oft-cited sovereign/proprietor distinction, would serve the goal of respecting the fact that “the high function of enforcing and policing the criminal law is assigned to the courts of general jurisdiction and not to [the CFC].”²²⁵ At the same time, it would preserve the “presumption in the civil context that a damages remedy will be available upon the breach of an

221. *Awad v. United States*, 301 F.3d 1367, 1374-75 (Fed. Cir. 2002); Brief for Plaintiff-Appellant at 30-35, *Awad*, 301 F.3d 1367 (No. 01-1440).

222. *Awad*, 301 F.3d at 1372, 1374.

223. 28 U.S.C. § 1491(a)(1) (2005).

224. *See United States v. Zajanckauskas*, No. 02-40107, 2003 U.S. Dist. LEXIS 26063, at *12, 17 (D. Mass. May 9, 2003) (holding that “the Tucker Act waives the sovereign immunity of the United States over any contract to which it is a party unless the alleged contract arises out of and implicates the criminal justice system”).

In justifying the exception it created, the *Kania* court noted that “[i]t is particularly unreasonable to suppose that Congress in enacting the Tucker Act intended for this court to intervene in the delicate and sensitive business of conducting *criminal trials*.” *Kania v. United States*, 227 Ct. Cl. 458, 466 (1981) (emphasis added). In the most recent Federal Circuit case interpreting the *Kania* decision, the court upheld the exception in the context of an allegedly breached bail agreement, but specifically provided that “there is a presumption in the civil context that a damages remedy will be available upon the breach of an agreement” but that “a different rule obtains where the agreement is entirely concerned with the conduct of the parties in a criminal case.” *Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001).

225. *Kania*, 227 Ct. Cl. at 465; *see also Sanders*, 252 F.3d at 1335-36.

agreement,”²²⁶ thereby ensuring that individuals such as Awad will be duly compensated, as Congress originally intended.

CONCLUSION

Through the Tucker Act, Congress sought to ensure that the government’s voluntary agreements with citizens “conform to the same standard of honorable conduct as it exacts of them.”²²⁷ Similarly, Congress enacted the FTCA to make certain that, unless one of the enumerated exceptions applies,²²⁸ the government assumes accountability for its agents’ tortious acts, as if it were a private citizen.²²⁹ Through these broad sovereign immunity waivers, Congress hoped to provide just compensation to victims of government misconduct.²³⁰

Nevertheless, foreign defector and terrorist informant Adnan Awad, the victim of what can be described as *both* a government breach of contract and a series of government torts, was left without a remedy. While that injustice alone raises questions about the state of current sovereign immunity jurisprudence and suggests that congressional or judicial action is necessary to resolve the apparent problem, the potentially disastrous, far-reaching consequences of the situation demand it. Information from informants such as Awad has the potential to save “the lives of hundreds, if not thousands of innocent civilians.”²³¹ Unless the United States improves the way it treats foreign defectors and guarantees them access to our courts if they are wronged in the course of their efforts to help us, our government will likely encounter greater difficulty in convincing these individuals to give up their past lives and risk their safety to help us in the fight against terrorism.

To address and remedy this problem, Congress could enact legislation that clearly: (1) eliminates the current mutually exclusive relationship between the Tucker Act and the FTCA; (2) clarifies that “any claim” for “any contract” under the Tucker Act really means “any;” and/or (3) provides an express sovereign immunity waiver especially designed for terrorist informants.

Alternatively, and because most of the current problem stems from

226. *Sanders*, 252 F.3d at 1334.

227. Cibinic, *supra* note 97, at 965. According to Cibinic:

Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealing when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequence.

Id.

228. 28 U.S.C. § 1380 (2005).

229. *Id.* § 1346(b)(1).

230. *See Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *see also Astley*, *supra* note 113, at 193.

231. *Terrorist Defectors*, *supra* note 2, at 8 (opening statement of Senator William Cohen).

November 2005] *SOVEREIGN IMMUNITY AND INFORMANT DEFECTORS* 699

questionable judicial interpretation in the first place, the courts could remedy their own past mistakes and alleviate the current dilemma if Congress does not address the problem first. To that end, the courts could: (1) interpret the Tucker Act and the FTCA as allowing for concurrent jurisdiction or, at a minimum, refuse to dismiss cases brought under the FTCA as “Tucker Act cases,” unless the CFC would *actually* have jurisdiction; and/or (2) respect the plain language of the Tucker Act, which provides for CFC jurisdiction over “any claim” for “any contract” or, at a minimum, limit the sovereign capacity exception to those cases implicating the criminal justice system.

Although the optimal source or form of remedial action may not be clear, the current state of undue injustice and potentially compromised national security indicates that this is the type of situation where some type of action clearly is necessary.

