No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA)'s judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented is:

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

PARTIES TO THE PROCEEDING

Petitioners are Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, and Robert C. Bonner.*

Respondents are Susan Hallock and Ferncliff Associates, Inc., d/b/a Multimedia Technology Center.

* The court of appeals directed that Robert C. Bonner "should be dismissed from this action" because he did not hold office at the time of the events at issue in the litigation. App., *infra*, 2a n.1. Because the district court has not yet entered an order of dismissal, he joins in the petition as a protective matter. Additional John and Jane Doe defendants were named in the complaint, but no defendants other than those identified in the text as petitioners were served.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal-officer petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 387 F.3d 147. The opinions of the district court (App., *infra*, 18a–26a, 27a-40a) are reported at 281 F. Supp. 2d 425 and 253 F. Supp. 2d 361.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2004. An order denying a petition for rehearing was entered on January 4, 2005 (App., *infra*, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in an appendix to this petition. App., *infra*, 43a-46a.

STATEMENT

1. The FTCA's judgment bar protects federal employees from suit where the claimant has brought an action against the United States under 28 U.S.C. 1346(b) based on the same subject matter, and that action has already gone to judgment. The judgment bar provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Section 1346(b) is the jurisdictional provision of the FTCA. It provides the district courts with "exclusive jurisdiction" over tort claims against the United States. Specifically, Section 1346(b) provides that, "[s]ubject to the provisions of chapter 171 of this title," the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * 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). Chapter 171 of Title 28 contains the various procedural and liability provisions of the FTCA, as well as the exceptions to the FTCA. See 28 U.S.C. 2670-2680.

2. In June 2000, federal officers seized several computers from respondents pursuant to a lawful warrant obtained in connection with a child-pornography investigation. App., *infra*, 28a. No criminal charges were filed against respondents, and the seized property was returned to them on December 21, 2000. *Id.* at 28a-29a & n.1.

3. In July 2002, respondents filed a complaint against the United States in the United States District Court for the Northern District of New York. In their complaint, respondents alleged that some of the computers seized in the Government's investigation were damaged while in the Government's custody, and that the resulting loss of personal and business records caused respondents to have to close their business. The sole basis for jurisdiction asserted in respondents' complaint against the United States was 28 U.S.C. 1346(b), the jurisdictional provision of the FTCA. App., *infra*, 27a. The complaint sought money damages against the United States for injury or loss to respondents' property caused by the negligent or wrongful acts of employees of the United States Customs Service and other governmental agencies while acting within the scope of their employment. *Id.* at 27a-28a, 29a-30a.

The United States moved to dismiss the claim based on the detention-of-goods exception to the FTCA. 28 U.S.C. 2680(c). That provision establishes an exception to the FTCA for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." *Ibid.*

The district court granted the United States' motion to dismiss the FTCA action. App., *infra*, 27a-40a. The court held that 28 U.S.C. 2680(c) precluded respon-

dents' claims regardless of whether the seizure and detention of their goods was related to the collection of customs duties or to other law-enforcement purposes, and that the protection afforded by the exception is not limited to actions of officials of the Customs Service or Internal Revenue Service but rather extends to all law enforcement officers. App., *infra*, 32a-35a. The court rejected respondents' argument that the gravamen of their claims related to the "seizure" of the computers, rather than their "detention." *Id.* at 35a-38a. The court found, to the contrary, that respondents' claims for "negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury" all "arise 'out of the detention' of their property, and are thus precluded by § 2680(c)." *Id.* at 38a-40a. The district court entered a final judgment dismissing respondents' claims on March 24, 2003. Respondents did not appeal. *Id.* at 6a.

4. Seven months after filing their FTCA suit, respondents filed a second suit—the case presently before the Court—against petitioners, who are individual federal employees, for their alleged role in the seizure and detention of respondents' computers. Respondents allege a claim against the individual employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on the theory that they intentionally deprived respondents of their intellectual property and business income in violation of respondents' rights under the Due Process Clause of the Fifth Amendment. C.A. App. A-16 to A-17.[1]

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[1] Respondents' original complaint alleged only that the individual defendants had been negligent, but respondents amended their complaint to assert that the individual defendants had acted

Petitioners moved to dismiss the *Bivens* suit based on the FTCA's judgment bar, 28 U.S.C. 2676. The district court denied the motion. App., *infra*, 18a-26a. The court acknowledged petitioners' argument that 28 U.S.C. 2676 places no qualification on the term "judgment." App., *infra*, 23a (noting "the absence of qualifying language in the statute"). Nevertheless, the court construed Section 2676 as not applying where the prior FTCA judgment was based on one of the FTCA exceptions to the waiver of sovereign immunity. *Ibid.* Characterizing such a judgment as merely a "procedural loss" for the FTCA plaintiffs, the district court held that such a judgment "does not prevent them from pursuing enforcement of their substantive rights against the proper defendants." *Id.* at 24a.

5. Petitioners appealed, and the court of appeals affirmed the district court's conclusion that Section 2676 does not bar respondents' *Bivens* claim. App., *infra*, 1a-15a.[2] The court of appeals rejected the district

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intentionally in damaging respondents' computers. See App., *infra*, 25a n.5.

[2] The court of appeals held that an order denying a motion to dismiss on the basis of the FTCA's judgment bar is immediately appealable pursuant to the collateral order doctrine recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). App., *infra*, 9a-10a. Although the court recognized that the Third Circuit had held that such orders were not immediately appealable, *id.* at 11a (citing *Brown* v. *United States*, 851 F.2d 615, 619 (3d Cir. 1988)), the Second Circuit reasoned that the judgment bar was intended to confer an immunity from suit, rather than simply a defense to liability, and that immediate appeal is therefore proper by analogy to qualified immunity decisions in *Bivens* suits. See *id.* at 10a (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). See also *Farmer* v. *Perrill*, 275 F.3d 958, 961 (10th Cir. 2001) (holding denial of motion to dismiss on judgment bar grounds immediately appealable). The presence of this question of appellate jurisdiction

court's distinction between procedural and merits-based FTCA judgments. App., *infra*, 14a. The court nevertheless held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a 'judgment in an action under section 1346(b)'" that triggers the judgment bar. App., *infra*, 14a. The court reasoned that there was no judgment in respondents' prior case for purposes of Section 2676 because "the action was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." *Ibid.* According to the court, "for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Tort Claims Act. In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event." *Ibid.*

District Judge Marrero, sitting by designation, concurred separately. App., *infra*, 15a-17a. He favored the district court's merits/procedural dichotomy over the court of appeals majority's analysis focusing on whether the basis for the prior judgment was a lack of subject-matter jurisdiction. *Id.* at 15a. Judge Marrero recognized, however, that both the approach of the district court and that of the court of appeals majority "read an implied term" into the statute. *Ibid.*

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does not detract from the appropriateness of this case for certiorari. To the contrary, the acknowledged circuit conflict on the issue itself warrants resolution by this Court.

6. The court of appeals denied the federal employees' petition for rehearing. App., *infra*, 41a-42a.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the scope of protection from suit afforded federal employees by the judgment bar in the Federal Tort Claims Act, 28 U.S.C. 2676. That statutory provision establishes a "complete bar" to "any action" against government employees in connection with acts that have been the subject of "an action under section 1346(b)" of the FTCA that has gone to "judgment." *Ibid.* The court of appeals' decision renders the judgment bar inapplicable even though it is undisputed that these respondents brought a prior suit pursuant to Section 1346(b) concerning the same subject matter and that a final judgment has been rendered in that suit. The court of appeals' holding is contrary to the plain language of Section 2676, creates a direct conflict among the courts of appeals, and cannot be reconciled with decisions of this Court interpreting two similarly worded provisions of the FTCA. Review by this Court is warranted to resolve those conflicts on an important and recurring issue.

I. THE COURT OF APPEALS' REFUSAL TO APPLY THE FEDERAL TORT CLAIMS ACT'S JUDGMENT BAR TO A PRIOR JUDGMENT BASED ON AN EXCEPTION TO THE FTCA IS CONTRARY TO SECTION 2676'S PLAIN TEXT AND THE OVERALL STRUCTURE OF THE ACT

The text of the FTCA's judgment bar is simple and direct, and there is no question that the express elements for its application are satisfied in this case. The statute provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a

complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. The term "[t]he judgment" is unqualified.

Thus, as the Second Circuit recognized (App., *infra*, 14a-15a), and as the other courts of appeals that have considered the question have unanimously concluded, a judgment under the FTCA triggers the judgment bar in a subsequent suit against federal employees on the same subject matter even when the FTCA judgment is adverse to the claimant. See *Farmer*, 275 F.3d at 963; *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). Section 2676 is a "judgment bar," not a "favorable judgment bar." As the Tenth Circuit has explained, "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer*, 275 F.3d at 963.

Furthermore, by the statute's plain text, the judgment bar applies where judgment is entered in favor of the government because the claim is found to fall within one of the FTCA's exceptions in Section 2680. The exceptions in Section 2680 limit *both* the jurisdiction of courts over FTCA actions, 28 U.S.C. 1346(b)(1), and the substantive liability of the United States, 28 U.S.C. 2674. It does not matter whether the exception was found to apply on a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), on a motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6), on summary judgment under Rule 56, or after a trial. No matter what procedural device triggered the

judgment, the judgment bar applies. The court of appeals' decision engrafts onto the statutory language an additional requirement that is not found in its text—that the prior judgment rested on some ground other than lack of subject matter jurisdiction because of the applicability of one of the FTCA's exceptions. That was error, for "when 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). There is no argument here that applying Section 2676 by its terms would be absurd. To the contrary, it is the court of appeals' modification of the text that renders its application unworkable.

A. The Court Of Appeals Erred By Reading An Implicit Limitation Into The Unambiguous Text Of Section 2676

The terms of Section 2676 as written are unquestionably satisfied here. It is clear that, absent the addition of unstated limitations, respondents' prior FTCA suit was "an action under section 1346(b)." There is no dispute that the sole basis asserted for the court's jurisdiction in respondents' suit against the United States was Section 1346(b) of the FTCA. See App., *infra*, 5a (noting that respondents' alleged loss "was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346"); *id.* at 27a (stating that respondents "brought suit against defendant United States of America

('United States') pursuant to the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346").

It is also clear that the present action arises out of "the same subject matter" as the FTCA suit, and that "judgment" was entered in the earlier litigation. As reflected in the district court docket sheet in the FTCA action, a separate judgment was entered on March 24, 2003. The court of appeals likewise acknowledged that "[a] judgment of dismissal" was entered in respondents' FTCA action, and that "[n]o appeal was taken from that judgment." App., *infra*, 6a.

The court of appeals nonetheless resisted the conclusion that Section 2676 was satisfied and, instead, carved out an exception to Section 2676 where the prior FTCA "judgment declar[es] a lack of subject matter jurisdiction." App., *infra*, 14a. The court reasoned that because the prior district court judgment dismissed respondents' FTCA claims for lack of jurisdiction, on the ground that the claims fell within the detention-of-goods exception in 28 U.S.C. 2680(c), the prior suit "was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." App., *infra*, 14a.

There was no justification for the court of appeals to engraft that additional requirement onto the statute. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) ("analysis begins with the language of the statute. * * * And where the statutory language provides a clear answer, it ends there as well.") (citation and internal quotation marks omitted). The prior judgment in respondents' action under Section 1346(b) establishes "a complete bar to any action" by respondents against the government employees whose conduct gave rise to the earlier FTCA action.

B. The Court Of Appeals' Purported Distinction Between Subject Matter Jurisdiction And Other Grounds Of Judgment Is Without Merit Under The FTCA, In Which Questions Of Jurisdiction And The Merits Often Merge

In addition to finding no support in the text of Section 2676, the court of appeals' distinction between judgments based on lack of subject matter jurisdiction and judgments on other grounds is inconsistent with the overall structure of the FTCA. For purposes of the FTCA, many defenses, including those set forth in Section 2680, can be stated in both jurisdictional and non-jurisdictional terms. There is no indication in the text of Section 2676 that its application should turn on the fortuity of whether the district court in the FTCA action characterized its judgment on such a ground as being entered under Federal Rule of Civil Procedure 12(b)(1), for lack of jurisdiction, or under Rule 12(b)(6), for failure to state a claim upon which relief can be granted.

In particular, the FTCA exceptions enumerated in Section 2680 serve both as limitations on the United States' waiver of its sovereign immunity and as substantive restrictions on the United States' liability under Section 2674. Section 1346(b)(1) waives the sovereign immunity of the United States for tort claims and grants the district courts jurisdiction over such claims, "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.* The provisions of Sections 2671 *et seq.*, including the exceptions set forth in Section 2680, create and define the scope of the United States' substantive tort liability. Because those provisions are incorporated into Section 1346(b)(1), they are *also* conditions on the waiver of sovereign immunity and

limitations on the jurisdiction of the district court. Thus, Section 2680 provides that *neither* the "provisions of this chapter" (*i.e.*, the FTCA's procedural and substantive provisions) *nor* "section 1346(b) of this title" (the waiver of sovereign immunity and grant of jurisdiction) shall "apply" to claims falling within the exceptions.

The Court has recognized the substantive nature of limitations of this sort, even though phrased in jurisdictional terms. See *Republic of Austria* v. *Altmann*, 124 S. Ct. 2240 (2004). As the Court explained in *Altmann*, "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply," "the limitation is essentially substantive." *Id.* at 2251 n.15 (citing *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). That description is particularly appropriate with respect to the limitations on the United States' liability expressed in Section 2680. Although they may be characterized in jurisdictional terms, they also "prescribe[] a limitation that any court entertaining the cause of action [is] bound to apply." *Ibid.*

The court of appeals' discussion of the statute of limitations underscores this point. As this Court has recognized, a dismissal on statute-of-limitations grounds is a "judgment on the merits" that is treated like a "dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995). Perhaps for that reason, the court of appeals recognized that a judgment dismissing an FTCA action on statute-of-limitations grounds *would* trigger the judgment bar. App., *infra*, 14a-15a. In the special context of the FTCA, however, restrictions on a plaintiff's

ability to sue the United States are also limitations on the United States' waiver of its sovereign immunity. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Thus, as the Second Circuit has elsewhere recognized, a dismissal on the basis of the FTCA's statute of limitations, 28 U.S.C. 2401(b), is also a dismissal for lack of jurisdiction. See *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189-190 (2d Cir. 1999); *Millares Guiraldes de Tineo* v. *United States*, 137 F.3d 715, 719-720 (2d Cir. 1998). The court of appeals' failure to explain why a dismissal for lack of jurisdiction based on statute-of-limitations grounds should trigger the judgment bar, while a judgment under Section 2680(c) does not, suggests that the court misunderstood the close interrelationship between jurisdictional and non-jurisdictional bases for judgment under the FTCA.[3]

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[3] Indeed, under the FTCA, even a finding that the plaintiff's claim fails to satisfy the substantive elements of a state law cause of action could be treated as a dismissal for lack of jurisdiction. Section 1346(b) grants jurisdiction only to the extent that "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." That jurisdictional limitation is nearly identical to the provision defining the scope of the United States' liability under the FTCA, which provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Accordingly, a defense that a private person could not be held liable under state law might form a basis for judgment in the government's favor either on the merits (Section 2674) or for lack of jurisdiction (Section 1346(b)). See *Makarova* v. *United States*, 201 F.3d 110, 116 (2d Cir. 2000) (affirming "dismissal for lack of subject matter jurisdiction" because plaintiff "could not have brought suit against a private employer in Washington, D.C.," which made workers' compensation an exclusive remedy); *Gould Elecs., Inc.* v. *United States*, 220 F.3d 169, 192 (3d Cir. 2000) (holding that the district court "lacked subject matter jurisdiction over the indemnity claim"

As the foregoing demonstrates, the Second Circuit's purported distinction between jurisdictional and non-jurisdictional dismissals is without support not only in the text of Section 2676, but also is at odds with the entire structure of the FTCA.

II. THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY THIS COURT

A. The Court of Appeals' Decision Squarely Conflicts with Decisions of The Seventh and Ninth Circuits

The court of appeals' decision is in direct conflict with the decisions of the two other circuits that have considered the precise question presented here. The Seventh and Ninth Circuits have each held that the judgment bar applies where the prior FTCA judgment was based on a determination that the action was precluded by one of the FTCA exceptions in 28 U.S.C. 2680. See *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). In *Gasho*, the Ninth Circuit held that a *Bivens* action was properly dismissed under the judgment bar on the basis of a prior FTCA judgment granting summary judgment to the United States on the ground that the plaintiffs' claims were barred by the detention-of-goods exception in Section 2680(c). 39 F.3d at 1433-1434, 1436, 1437-1438. That is the same FTCA exception that formed the ground for the FTCA judgment on which petitioners rely here. Similarly, in *Hoosier Bancorp*, the Seventh Circuit held that a *Bivens* action was properly

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because "the United States would not be liable" under the law of the relevant jurisdictions).

dismissed under the judgment bar on the basis of a prior FTCA judgment dismissing the plaintiffs' claims for lack of subject matter jurisdiction in light of the discretionary function exception in Section 2680(a). See 90 F.3d at 184-185, aff'g *Hoosier Bancorp* v. *United States*, No. IP94-1265-C-D/F (S.D. Ind. Feb. 17, 1995).[4] Both the Seventh and Ninth Circuits relied on the broad, unconditional language of Section 2676 to conclude that "*any* FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in the prior judgment." *Id.* at 185 (quoting *Gasho*, 39 F.3d at 1437).

The court of appeals in this case distinguished *Gasho* "as a case decided on the merits." App., *infra*, 13a. But that purported distinction only underscores the extent to which the Second Circuit's mistaken version of the judgment bar would turn on procedural fortuities. As noted above, the FTCA action at issue in *Gasho* was barred by the detention-of-goods exception in 28 U.S.C. 2680(c), precisely the same basis of the prior FTCA judgment in this case. Thus, it appears that the court of appeals sought to distinguish *Gasho* on the ground that, in that case, the decision holding that Section 2680(c) foreclosed the plaintiffs' claims was reached at the summary judgment stage, 39 F.3d at 1432, whereas the FTCA decisions in *Hoosier Bancorp* and this case were reached on motions to dismiss for lack of jurisdiction, C.A. App. A-51; App., *infra*, 29a. As previously discussed, see pp. 11-14, *supra*, there is no basis for making such distinctions among judgments for purposes of the judgment bar.

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[4] The district court's decision in *Hoosier Bancorp* can be found at C.A. App. A-50 to A-68.

B. The Court Of Appeals' Decision Is Also Contrary To Decisions Of This Court Construing Similarly Worded Provisions Of The FTCA

The Second Circuit's interpretation of the phrase "under section 1346(b)" in Section 2676 to include only those cases that are not subject to one of the defenses provided elsewhere in the FTCA also cannot be reconciled with decisions of this Court and other courts of appeals construing the similarly worded exclusivity provisions of Section 2679 of the FTCA.

1. Section 2679(b) states that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of this title" is exclusive and bars a claim against the employee whose conduct is at issue, except for claims based on the Constitution or a federal statute that provides a cause of action against the employee as an individual. In *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected a construction of the phrase "provided by sections 1346(b) and 2672" in Section 2679 that was nearly identical to the reading of the phrase "under section 1346(b)" in Section 2676 that the court of appeals adopted here. The Ninth Circuit had held that Section 2679(b)'s exclusive remedy provision applied only if the FTCA would provide the plaintiff a remedy once the United States was substituted as the defendant. *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (9th Cir. 1989). This Court reversed, holding that Section 2679(b) bars suit against an individual officer even if, as a result of one of Section 2680's exceptions, "the FTCA itself does not provide a means of recovery." 499 U.S. at 166.

The court of appeals' decision in this case cannot be reconciled with this Court's interpretation of Section 2679(b). Just as the phrase "[t]he remedy * * * provided by sections 1346(b) and 2672" in Section 2679(b)

includes cases in which the claim, though otherwise proper under Section 1346(b), is barred by Section 2680, so too the phrase "an action under section 1346(b)" in the FTCA's judgment bar, 28 U.S.C. 2676, must include a case brought under Section 1346(b) that is later held to be barred by a Section 2680 exception.[5]

2. The FTCA's other exclusivity provision—Section 2679(a)—makes the FTCA the exclusive avenue for tort claims against the government, even against agencies that may otherwise "sue and be sued" in their own names. See *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). Section 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)* of

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[5] *Smith* also refutes any contention that Section 2679(b)(2)(A)'s exception for constitutional claims suggests that *Bivens* claims should be excepted from the judgment bar. When Congress excepted *Bivens* claims from Section 2679(b) in 1988, see Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4564, it demonstrated that it was aware that the Act otherwise would have affected the availability of *Bivens* claims. But Congress did not provide a similar exception to the FTCA's judgment bar. Rather, Congress left Section 2676 intact, even though courts had been applying it to *Bivens* claims. See, *e.g.*, *Serra* v. *Pichardo*, 786 F.2d 237 (6th Cir.), cert. denied, 479 U.S. 826 (1986). As *Smith* notes, the exception for *Bivens* claims in Section 2679(b) shows that Congress knows how to preserve the liability of federal employees when it wants to do so, and thus that inferring additional exceptions in Section 2676 is unwarranted. See 499 U.S. at 166-167 (citing *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")).

> this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a) (emphasis added).

In *Meyer*, the Court stated that a claim is "cognizable under section 1346(b)" if it is within the category of claims defined by Section 1346(b), which include "claims that are '[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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.'" 510 U.S. at 477 (quoting 28 U.S.C. 1346(b)). The Court explained that a claim "comes within this jurisdictional grant—and thus is 'cognizable' under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above." *Ibid.* Indeed, the Court emphasized that "[t]he question is not whether a claim is cognizable *under the FTCA* generally * * * but rather whether it is 'cognizable *under section 1346(b)*.'" *Id.* at 477 n.5 (quoting 28 U.S.C. 2679(a)). The court of appeals' holding makes the very mistake the Court warned against in *Meyer*. The court of appeals rewrote the phrase "under section 1346(b)," 28 U.S.C. 2676, as "*properly* brought *under* the Federal Tort Claims Act" generally. App., *infra*, 14a.

Applying *Meyer*, several courts of appeals have recognized that a claim is "cognizable under section 1346(b)," and thus precludes suit against the agency directly, so long as the claim arises under state law, even if the FTCA as a whole provides no remedy due to

one or more of the exceptions in Section 2680. See *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Maine Corp.* v. *United States Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999). Those decisions make clear that under Section 2679(a), a suit is an action "cognizable under section 1346(b)" so long as it asserts a tort claim against the United States premised upon state law, even if that claim is ultimately barred by one of the exceptions to suit provided in Section 2680.

The court of appeals made no effort to harmonize its construction of the phrase "under section 1346(b)" for purposes of 28 U.S.C. 2676, and the established meaning of the phrase "cognizable under section 1346(b)" in 28 U.S.C. 2679(a). And there is no apparent basis in the text for treating the two phrases so differently.

C. The Petition Presents A Recurring Question Of Considerable Importance Regarding The Personal Liability Of Federal Employees For Acts Taken In The Course Of Their Employment

This Court's review is warranted to resolve the conflicts with decisions of this Court and other courts of appeals identified above, and because the court of appeals' decision will otherwise undermine the purposes the judgment bar was intended to serve. The judgment bar reflects Congress's recognition that successive litigation of related claims imposes considerable burdens on the government, as well as federal employees subject to suit for acts taken within the scope of their employment. See *Gasho*, 39 F.3d at 1437 ("Congress * * * was concerned about the [G]overnment's ability to marshal the manpower and finances to

defend subsequent suits against its employees."). The decision of the court of appeals significantly reduces the effectiveness of the judgment bar, by carving out an exception for jurisdictional dismissals. Because of the "jurisdictional" nature of so many of the Government's defenses under the FTCA, that would deprive a very large number of FTCA judgments of their preclusive effect.

Indeed, even cases that have consumed considerable governmental resources, such as cases that have gone to summary judgment or trial on defenses such as the discretionary function exception, see, *e.g.*, *Bell* v. *United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (quoting *Redmon* v. *United States*, 934 F.2d 1151, 1155 (10th Cir. 1991) (holding that, because FTCA's discretionary function exception "involves both jurisdictional and merits issues," it should be decided on summary judgment, rather than motion to dismiss (citation omitted)), might, under a rule based upon a jurisdictional/non-jurisdictional distinction, be considered a "nullity" for purposes of the judgment bar. App., *infra*, 14a. The only alternative would be to have the application of the judgment bar turn solely on the stage of the proceedings or the caption of the dispositive motion. None of those rules can be reconciled with either the text or the purposes of Section 2676. This Court should grant review to correct the court of appeals' erroneous limitation of this important federal statute.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APRIL 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-6221

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC., DOING BUSINESS AS MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS-APPELLEES

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN NAMED AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN NAMED AGENTS OF UNITED STATES DEPARTMENT OF JUSTICE, UNKNOWN NAMED AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN NAMED AGENTS OF UNITED STATES MARSHALS SERVICE, JOHN & JANE DOES 1-25, DEFENDANTS-APPELLANTS

Argued: June 7, 2004
Decided: Oct. 22, 2004

Before: MINER and RAGGI, Circuit Judges, and MARRERO, District Judge.*

Judge MARRERO concurs in the majority opinion and in a separate concurring opinion.

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* The Honorable Victor Marrero, of the United States District Court for the Southern District of New York, sitting by designation.

MINER, Circuit Judge.

In this action, defendants-appellants, Robert C. Bonner,[1] Richard Will, Dennis P. Harrison, Margaret M. Jordan, and Thomas Virgilio, all employees of the United States Customs Service, sued along with other, "unknown named" agents of the United States Customs Service, the United States Department of the Treasury, the United States Justice Department, and the United States Marshals Service (collectively, the "defendants"), appeal from an order entered in the United States District Court for the Northern District of New York (Hurd, *J.*). The action was brought by plaintiffs-appellees, Susan Hallock and Femcliff [*sic*] Associates, Inc., d/b/a Multimedia Technology Center (collectively, the "plaintiffs"), under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) [hereinafter "*Bivens*"], for damages arising from the seizure of plaintiffs' computer equipment in violation of the Fifth Amendment of the United States Constitution.

The same plaintiffs had invoked the Federal Tort Claims Act in a previous action brought against the United States to recover for the same wrongful acts. That action was concluded by a judgment of dismissal for lack of subject matter jurisdiction. The defendants' assertion of that judgment as a bar to the present

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[1] It appears that Robert C. Bonner, Commissioner of Customs and Border Protection, did not hold office at the time of the events that form the subject of this lawsuit. Since he did not have direct involvement in these events, he should be dismissed from this action. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).

action was the basis for the motion that culminated in the order giving rise to this appeal. Rejecting the contention that this appeal is taken from a non-appealable interlocutory order, we affirm the determination of the District Court for reasons somewhat different from those given by that court.

BACKGROUND

The background of this case, at least for present purposes, is framed by the allegations of the complaint. Those allegations must be accepted as true at this stage of the litigation because defendants have moved for judgment on the pleadings. *See Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). Accordingly, the background facts that follow are taken from the complaint.

Plaintiff Susan Hallock, who resides with her husband, Richard Hallock, at 194 Ferncliff Road in the Village of Mohawk, Herkimer County, New York, is president and sole stockholder of Ferncliff Associates, Inc., d/b/a Multimedia Technology Center ("Ferncliff"). The corporate address is the same as the home address of the Hallocks. On June 8, 2000, defendants Jordan, Virgilio, and Harrison, along with others, executed at 194 Ferncliff Road a search warrant issued by the United States District Court for the Northern District of New York. The warrant authorized seizure of "all property, contraband, instrumentalities, fruits[,] or evidence of violation of Title 18, United States Code, § 2252 and § 2252A." The cited statutes proscribe activities relating to material involving the sexual exploitation of minors and activities relating to material constituting or containing child pornography.

Pursuant to the search warrant, defendants seized all computer equipment, software data, and hard disk drives located at the Ferncliff Road location. Because of the nature of the data stored on the hard disk drives, the seizure included "all Computer Software Intellectual Property, all [C]omputerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records, all Computerized Accounts, Client Files and Business as well as Technological Trade Secrets belonging to Plaintiffs, both primary and archival backups."

Apparently, Richard Hallock was the victim of identity theft, and no evidence of any violation of the cited statutes was found in the materials seized. In any event, no charge of any kind was filed against Richard or Susan Hallock, and the items seized, or what was left of them, were returned to the plaintiffs on December 21, 2000. Proposed agreements acknowledging the receipt of the seized items were presented to the plaintiffs by the United States Attorney for the Northern District of New York. The proposed agreements included a representation by Richard Hallock that the data images in the computers returned were "complete and accurate reproduction[s]" and had "not been altered." The agreements also included a clause whereby Richard Hallock would agree to save harmless the Customs Service, Treasury and Justice Departments, and their agents from any claims relating to the seizure and detention of plaintiffs' property. It appears that Richard Hallock did not execute the proposed agreements.

When Richard Hallock received the computer equipment and hard disk drives on December 21, after the items had been in the custody of the defendants since

June 8, he examined the equipment and observed that four of the nine computer systems seized were totally unusable. One of the four was returned to its owner, a client of Ferncliff Associates, Inc., and the loss of the other three resulted in the termination of the plaintiffs' business operations. It also was discovered that five of the hard disk drives seized were so damaged that all stored data were lost. Data previously described as included in the seizure—including documents, records, accounts, files, and trade secrets—had been stored on the hard drives.

In the complaint that we examine on this appeal, plaintiffs allege that "[d]efendants intentionally caused total and permanent damage to the computer equipment resulting in the complete loss of all stored computer data as well as loss of computer equipment, all critical to the continued business operations of [p]laintiffs." Asserting a violation of the Fifth Amendment, plaintiffs seek damages in excess of $4.4 million. The alleged loss and destruction of the plaintiffs' computer equipment was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, and dismissed for lack of subject matter jurisdiction. *See Hallock v. United States*, 253 F. Supp. 2d 361 (N.D.N.Y. 2003) [hereinafter "*Hallock I*"].

In *Hallock I*, the District Court was confronted with a complaint in which the plaintiffs put forth claims of negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury. The FTCA waives the sovereign immunity of the United States to allow civil actions

> 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).

There are various exceptions to this waiver of sovereign immunity, and it is the following exception, set forth in 28 U.S.C. § 2680(c), which the District Court was constrained to apply in *Hallock I:* "Any claim arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer . . . ." *Hallock I*, 253 F. Supp.2d at 365 (quoting 28 U.S.C. § 2680(c)) (emphasis removed). Rejecting arguments that the exception applies only to officers performing tax or custom duties and that plaintiffs' claims arose from the seizure rather than the detention of goods, the court in *Hallock I* granted the motion to dismiss the amended complaint in accordance with the Government's motion filed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In its memorandum-decision and order dated March 21, 2003, the District Court concluded as follows: "Pursuant to § 2680(c), plaintiffs are precluded from pursuing their claims under the Federal Tort Claims Act. All of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred." 253 F. Supp. 2d at 368. A judgment of dismissal was entered shortly thereafter. No appeal was taken from that judgment.

The *Bivens* action subject of the instant appeal was commenced while the Government's motion to dismiss in *Hallock I* was pending. Here, the plaintiffs joined as defendants all the government agents and employees alleged to have been involved in the seizure and detention of plaintiffs' property. Defendants' motion for judgment on the pleadings, culminating in *Hallock v. Bonner*, 281 F. Supp. 2d 425 (N.D.N.Y. 2003) [hereinafter "*Hallock II* "], centered on the judgment-bar rule found at 28 U.S.C. § 2676. That statute provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim." *Hallock II*, 281 F. Supp. 2d at 426 (internal quotation marks omitted).

In its memorandum-decision and order dated August 19, 2003 in *Hallock II* denying judgment on the pleadings, the District Court found a difference between various cases cited for the proposition that any FTCA judgment precludes a later *Bivens* action under the judgment-bar rule and the case at hand, where the *Bivens* action was brought after the filing of an FTCA action that was dismissed for lack of subject matter jurisdiction. *Id.* at 427. Noting defendants' argument "that there is no limit to the judgment bar and that the moment any judgment is entered on an FTCA claim a *Bivens* claims is precluded," the District Court opined that "[t]his broad reading would have the practical effect of foreclosing the enforcement of substantive rights for no other reason than the commission of an earlier procedural error." *Id.* Rejecting such a "broad reading," the District Court in *Hallock II* concluded that "plaintiffs' earlier procedural loss [did] not prevent

them from pursuing enforcement of their substantive rights against the proper defendants." *Id.* at 428.

By order dated October 6, 2003, the District Court denied the defendants' application to certify for appeal, pursuant to 28 U.S.C. § 1292(b), its order of August 19. The District Court found no controlling question of law involving a substantial basis for difference of opinion, a requirement for such certification. The rationale for that finding went as follows: "Defendants have failed to cite even one case—Circuit or District Court—in which a prior FTCA judgment dismissing a complaint for lack of subject matter jurisdiction would bar a subsequent *Bivens* action." The District Court added that its finding "would not, of course, bar an appeal as of right under the collateral order doctrine, if it is applicable."

This timely appeal, taken by the defendants from the order denying judgment on the pleadings, followed the denial of certification.

DISCUSSION

I. *Of Appealability*

We first address plaintiffs' argument that the order appealed from is interlocutory and non-final and, therefore, not appealable in accordance with the statutory provision conferring upon this Court "jurisdiction of appeals from all final decisions of District Courts." 28 U.S.C. § 1291. Generally, a final order is an order of the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) (internal quotation marks omitted). Clearly, the order under examination here is not such an order.

There are some narrowly drawn exceptions to the finality requirement, however. These exceptions allow an appeal to be taken from an interlocutory order where: (1) the order relates to injunctions, receiverships, and certain admiralty matters, 28 U.S.C. § 1292(a); (2) the district court has certified for immediate appeal an order (i) that involves a controlling question of law, (ii) as to which there exists a substantial ground for difference of opinion, and (iii) the disposition of which may materially advance the ultimate termination of the litigation, 28 U.S.C. § 1292(b); and (3) the order of the district court expressly directs the entry of a partial judgment in a multi-claim or multi-party action upon a determination that there is no just reason for delay. Fed. R. Civ. P. 54(b); *see Kahn v. Chase Manhattan Bank, N.A.*, 91 F.3d 385 (2d Cir. 1996). Here, the order under review does not fit within any of these three exceptions to the rule of finality.

There is yet a fourth exception to the rule of finality. It is the so-called "collateral order doctrine" that had its genesis in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). In *Cohen*, a stockholder's derivative action was founded on diversity of citizenship. The defendant corporation sought to apply a state statute that required certain plaintiffs in such actions to post a bond as security for court costs. The district court order there in question held that the statute was not applicable to the plaintiffs. Holding that order appealable, the Supreme Court wrote: "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to

require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S. Ct. 1221.

The collateral order doctrine is said to provide "a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right." *Schwartz v. City of New York*, 57 F.3d 236, 237 (2d Cir.1995). "To fit within the collateral order exception, the interlocutory order must '[i] conclusively determine the disputed question, [ii] resolve an important issue completely separate from the merits of the action, and [iii] be effectively unreviewable on appeal from a final judgment.' "*Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir.1999) (allowing an appeal from a denial of an attorney's motion to withdraw as counsel) (quoting *Coopers & Lybrand v. Livesay*, U.S. at 468, 98 S. Ct. 2454).

We conclude that the order under review falls within the collateral order exception. First, there is no question that the order constitutes a conclusive determination of the disputed issue, viz. whether the judgment bar prescribed by Section 2676 derails the *Bivens* action at bar. Second, that issue is completely separate and distinct from the merits of the action, which pertain to the liability of the individual defendants, as agents of the Government, for their acts and omissions in regard to the detention of the plaintiffs' goods. Finally, the order is one that will not be *effectively* reviewable on appeal from a final judgment.

The reason that the order will be effectively unreviewable after final judgment is that Section 2676, which the order addresses, confers statutory immunity from suit. As in the case of qualified immunity, the immunity claimed by the defendants here provides an

"entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L. Ed. 2d 411 (1985). In short, " 'the essence' of the claimed right is a right not to stand trial," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524, 108 S.Ct. 1945, 100 L. Ed.2d 517 (1988), and an order adjudicating that right is therefore effectively unreviewable on appeal, *see Murphy v. Reid*, 332 F.3d 82, 84 (2d Cir. 2003).

While no case in this Circuit is directly on point, the Tenth Circuit, in a factually analogous context, determined that "all three prongs of the collateral order doctrine [had been] plainly satisfied by the district court's holding that Section 2676 [did] not bar [plaintiffs'] *Bivens* claim." *Farmer v. Perrill*, 275 F.3d 958, 961 (10th Cir. 2001). We stand with the Tenth Circuit in that determination. To the extent that *Brown v. United States*, 851 F.2d 615, 619 (3d Cir. 1988), is to the contrary, based on the determination that the denial of a Section 2676 judgment bar is not unreviewable on appeal, we reject it. We also reject plaintiffs' contention that the order here is not appealable under the collateral order doctrine because it does not "present a question that is substantial, i.e., not doomed to failure under controlling precedent." *Lawson v. Abrams*, 863 F.2d 260, 262 (2d Cir. 1988). The "doomed to failure" language applies only to an argument that has been considered and rejected in a prior case. Here, the application of the judgment bar to the dismissal of an FTCA claim by virtue of a statutory exception is a matter of first impression in this Circuit and, therefore, cannot be described as "doomed to failure" in either this Court or the District Court.

II. ***Of the Judgment Bar Provision***

The FTCA provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. The bar was intended to prevent dual recovery from both the Government and its employees and to avoid the waste of Government resources in defending repetitive suits. *See Gasho* v. *United States*, 39 F.3d 1420, 1437-38 (9th Cir. 1994). Moreover, "[s]ince a judgment in an action against the United States under the FTCA will constitute a [judgment bar] in favor of the employee whose act gave rise to the claim," the rule increases the likelihood "that claims for torts [will] be made against the United States rather than, as *Bivens* suits, against the employee." *Birnbaum v. United States*, 588 F.2d 319, 333 (2d Cir. 1978). And "[t]hat is as it should be." *Id.* A Government agent should not "be made to suffer alone an ignominious financial ruin." *Id.* Indeed, "[c]ompensation for incidental harm resulting from the Government's pursuit of its . . . interests is more justly borne by the entire body politic than by agents of the Government[ ] who, out of [excess] zeal, exceeded the outer limits of their delegated authority." *Id.*

In addition, "Congress . . . was concerned about the [G]overnment's ability to marshal the manpower and finances to defend subsequent suits against its employees." *See Gasho*, 39 F.3d at 1437 (noting that "[t]he prevention of dual recovery . . . is not the only purpose of the statute"). At the Congressional hearings on the statute, "[o]ne witness testified that multiple suits imposed a 'very substantial burden' on the [G]overn-

ment." *Id.* (quoting Hearings Before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 90 (1942)). Moreover, included in the legislative history is a statement that "'[i]t is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls.'" *Gilman v. United States*, 206 F.2d 846, 848 n. 3 (9th Cir. 1953) (quoting S. Rep. No. 1196, at 5 (1942) (statement of Francis Shea, Assistant Attorney General)).

In reaching its conclusion that Section 2676 did not apply in the present context, the District Court drew a distinction between cases in which claims are dismissed for a "procedural error" (as the court characterized a dismissal for lack of subject matter jurisdiction under the FTCA) and cases in which claims are dismissed on the merits. *See Hallock II*, 281 F. Supp.2d at 427 (citing, e.g., *Gasho*, 39 F.3d at 1436 (determination on summary judgment), and *Farmer*, 275 F.3d at 962 (dismissal pursuant to Fed. R. Civ. P. 41(b))); *see also Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (FTCA claims determined pursuant to a bench trial); *Arevalo v. Woods*, 811 F.2d 487, 488 (9th Cir. 1987) (same); *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986) (FTCA claims determined in a jury trial). Although the Government cites *Gasho* for the proposition that Section 2676 "speaks of 'judgment' and suggests no distinction between judgments favorable and judgments unfavorable to the Government," 39 F.3d at 1437, the District Court was correct to cite *Gasho* as a case decided on the merits.

In *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996), however, the Seventh

Circuit affirmed the district court's decision applying Section 2676 to bar a *Bivens* claim on the basis of a prior judgment dismissing an FTCA claim for lack of subject matter jurisdiction. The Circuit Court "join[ed] the conclusion that *any* FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in the prior judgment." *Id.* at 185 (internal quotation marks omitted). We do not stand with the Seventh Circuit in its analysis of the issue before us, nor do we adopt the District Court's characterization of the dismissal of plaintiffs' FTCA claim for lack of subject matter jurisdiction as a "procedural loss." *Hallock II*, 281 F. Supp. 2d at 428 ("[P]laintiffs' earlier procedural loss does not prevent them from pursuing enforcement of their substantive rights against the proper defendants.").

As we see it, an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a "judgment in an action under section 1346(b) [the Federal Tort Claims Act]." 28 U.S.C. § 2676. This is so because the action was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity. We hold that for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Tort Claims Act. In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event.

We reject the District Court's approach because any number of *procedural* defects and/or reasons having nothing to do with the merits of the claim may justify dismissal of an action properly brought under the Federal Tort Claims Act. For example, in an action *properly* pleaded under the FTCA, a judgment of dismissal based on the statute of limitations, laches, release, res judicata, or improper venue will justify the assertion of the judgment bar in a subsequent *Bivens* action. Indeed, even where an involuntary dismissal without prejudice is ordered pursuant to Fed. R. Civ. P. 41(b), the judgment entered thereon will constitute a complete bar if the action was one properly invoking jurisdiction under the FTCA. *Cf. Farmer*, 275 F.3d at 963-64.

CONCLUSION

The order of the District Court is affirmed for the foregoing reasons.

MARRERO, United States District Judge, concurring.

I concur in the holding of the majority opinion, but write separately to offer alternative grounds for affirmance that I find more compelling. I would affirm based on the reasoning of the District Court that a procedurally-based, rather than merits-based, ruling against a plaintiff on an FTCA claim does not trigger 28 U.S.C. § 2676's bar against a subsequent *Bivens* action.

The majority opinion states that a dismissal for lack of subject matter jurisdiction of a claim brought under the FTCA does not bar a later *Bivens* suit because such a claim "was not *properly* brought *under*" the FTCA and therefore is a "nullity." (*See supra* at 155, emphasis

in original.) The majority also writes that many types of procedural dismissals of FTCA claims may validly bar subsequent *Bivens* claims.

Both the majority's reasoning and the alternative approach I propose read an implied term into § 2676 to give the statute reasonable meaning; we merely choose to rely upon different words. The majority's construction finds, before the word "under," an implicit requirement that an action be "properly brought." Like the District Court in this case and in two other precedents cited below, the implied term under the alternative approach would interpret a requirement of "on the merits" after the word "judgment" in § 2676.

As the majority opinion correctly notes, the principal purposes of § 2676 are to prevent double recovery by a plaintiff from the Government and individual employees, and to avoid duplicative litigation. A *Bivens* action brought after a dismissal for lack of subject matter jurisdiction against an FTCA plaintiff does not present such dangers,[1] but neither do most other procedurally-based dismissals of FTCA claims. The majority concludes that certain procedurally-based dismissals of FTCA claims may legitimately bar subsequent *Bivens* actions, presumably under § 2676, but that dismissals for lack of subject matter jurisdiction do not. But prohibiting a subsequent *Bivens* action because a plaintiff's earlier FTCA claim was dismissed by reason of, for instance, improper venue or laches, would work an unduly harsh result on that plaintiff. Moreover, to cite another example, one could argue that an FTCA claim brought after the expiration of the rele-

[1] At most, such a ruling imposes some additional litigation burdens on the Government.

vant statute of limitations would be likewise "improperly brought" under the FTCA and should not bar a subsequent *Bivens* suit otherwise timely filed.

Significantly, there is no requirement that a *Bivens* plaintiff also bring an FTCA claim. Dismissing a *Bivens* suit because of a good-faith procedural error in a plaintiff's litigation of an earlier FTCA action—an action that the plaintiff need not have brought at all to maintain a *Bivens* claim—does not advance Congress's goals in enacting § 2676 and unduly penalizes that plaintiff. To take an extreme example, if a plaintiff brings a *Bivens* action and an FTCA claim together in the same lawsuit and early in the litigation a court were to dismiss the FTCA claim on procedural grounds such as lack of proper venue, and not for lack of subject matter jurisdiction, the majority's analysis here would apparently accept the application of § 2676 to that plaintiff's *Bivens* suit. Under the alternative reading I would apply, such a bar would not require blanket dismissals in every such situation.

I have found only one other district court other than the District Court in this case that has apparently considered the precise question before this Court, and that court likewise ruled in two different opinions that the judgment bar in § 2676 does not block a *Bivens* suit when a prior FTCA claim was dismissed on procedural grounds. *See Michalik v. Hermann*, 2002 WL 31844910 (E. D. La. Dec. 16, 2002); *Michalik v. Hermann*, 2002 WL 1870054 (E. D. La. Aug. 12, 2002). Thus, while I join the judgment of this Court affirming the decision of the District Court, I would do so for the reasons stated above and to be consistent with the rulings of the only two other courts that have squarely considered this issue.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 5:03-CV-195

SUSAN HALLOCK AND FERNCLIFF ASSOCIATES, INC., DBA MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

ROBERT C. BONNER; RICHARD WILL; DENNIS P. HARRISON; MARGARET M. JORDAN; THOMAS VIRGILIO; UNKNOWN NAMED AGENTS OF UNITED STATES CUSTOMS AND TREASURY; UNKNOWN NAMED AGENTS OF UNITED STATES JUSTICE DEPARTMENT; UNKNOWN NAMED AGENTS OF UNITED STATES POSTAL SERVICE; UNKNOWN NAMED AGENTS OF UNITED STATES MARSHAL SERVICE; AND JOHN & JANE DOE 1-25, DEFENDANTS

Aug. 19, 2003

MEMORANDUM-DECISION AND ORDER

HURD, District Judge.

I. *INTRODUCTION*

Susan Hallock ("Hallock") and Ferncliff Associates, Inc. (collectively "plaintiffs"), filed suit under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) ("*Bivens*"), against Robert C. Bonner, Richard

Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, and other unnamed employees of the United State Customs and Treasury, the United States Justice Department, the United States Postal Service, and the United States Marshal Service (collectively "defendants"). In response, defendants answered and filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Plaintiffs opposed. Oral argument was heard on August 8, 2003 in Utica, New York. Decision was reserved.

II. *BACKGROUND*

Hallock owned Ferncliff Associates, Inc., located in Herkimer, New York. On June 8, 2000, in the course of a child pornography investigation, defendants detained several of plaintiffs' computer systems. No criminal charges were filed against them, and the property was eventually returned to plaintiffs on December 21, 2000. According to plaintiffs, four out of the nine computer systems that were seized were unusable when returned, and various stored data, including client, business and personal records, intellectual property, proprietary designs, and trade secrets, were not recoverable. Plaintiffs claim that these losses forced them to close their business, and accordingly, they incurred further financial loss.

After unsuccessful attempts to restore the situation through administrative and informal channels, plaintiffs filed a complaint for damages against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et. seq*. The government filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction due to an exception to the FTCA, 28 U.S.C. § 2680(c), and Fed. R. Civ. P. 12(b)(6),

for failure to state a claim upon which relief may be granted. The government's motion was granted pursuant to section 2680(c)[1] and plaintiffs' complaint was dismissed. *See Hallock v. United States*, 253 F. Supp. 2d 361 (N.D. N.Y. 2003).

However, while the government's motion to dismiss was pending, plaintiffs filed the instant *Bivens* action against defendants, all government employees allegedly involved in the seizure and detention of plaintiffs' property. After plaintiffs' action against the United States was dismissed, defendants moved to dismiss this action, alleging lack of subject matter jurisdiction pursuant to the judgment bar in 28 U.S.C. § 2676, and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

III. *DISCUSSION*

A. *Applicability of the Judgment Bar*

Defendants argue that the judgment entered in the government's favor on plaintiffs' FTCA claim bars plaintiff from proceeding against the individual defendants in the instant suit. Title 28 U.S.C. § 2676 provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The bar was intended to prevent dual recovery from both the government and its employees, and the waste of government resources in defending repetitive suits. *Gasho v. United*

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[1] Section 2680(c) is an exception to the United States' waiver of immunity under the FTCA. It precludes claims against the government arising from "the detention of any goods or merchandise by any officer of customs or any other law enforcement officer." 28 U.S.C. § 2680(c)

States, 39 F.3d 1420, 1437-38 (9th Cir. 1994) (citing *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992)).

As an initial matter, defendants argue that plaintiffs' FTCA complaint was dismissed pursuant to both Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(1). The dismissal was expressed as follows: "Pursuant to § 2680(c), plaintiffs are precluded from pursuing their claim under the Federal Tort Claims Act. All of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred." *Hallock*, 253 F. Supp. 2d at 368. Because it was determined that § 2680(c) deprived the court of subject matter jurisdiction, the dismissal was pursuant to Fed. R. Civ. P. 12(b)(1), not Fed. R. Civ. P. 12(b)(6).[2] *See Rhulen Agency, Inc. v. Alabama Ins. Guar. Assn.*, 896 F.2d 674, 678 (2d Cir.1990); *see also Hostetler v. United States*, 97 F. Supp.2d 691, 695 (E.D. Va. 2000) ("Federal courts . . . lack subject matter jurisdiction to review actions falling within any one of the exceptions to the FTCA.").

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[2] Defendants' argument that the dismissal was also pursuant to Rule 12(b)(6)—for failure to state a claim—is taken from one sentence in the opinion. *See Hallock*, 253 F. Supp. 2d at 363 ("While 'the court should consider the Rule 12(b)(1) challenge first[,] since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined' when a party moves pursuant to both subsections of Rules 12, the United State's motion is well taken under the more lenient Rule 12(b)(6).") (citation omitted). As is obvious from the remainder of the opinion, Rule 12(b)(6) was not a basis used to dismiss the complaint. At no time were the merits of plaintiff' claims discussed. The sole issue determined in the opinion—*i.e.*, whether § 2680(c) barred suit—was a legal one. The above-quoted language was mere dicta, inserted to demonstrate that even if the allegations are taken as true, § 2680(c) nonetheless prohibited plaintiffs from proceeding.

Defendants have cited numerous cases for the proposition that any FTCA judgment precludes a subsequent *Bivens* action. However, unlike the instant case, the courts in those cases were not confronted with *Bivens* actions filed subsequent to a FTCA claim dismissed for lack of subject matter jurisdiction. *See Gasho*, 39 F.3d at 1436 (prior determination on summary judgment); *Farmer v. Perrill*, 275 F.3d 958, 962 (10th Cir. 2001) (prior dismissal pursuant to Fed. R. Civ. P. 41(b)); *Arevalo v. Woods*, 811 F.2d 487, 488 (9th Cir. 1987) (FTCA claims determined pursuant to a bench trial); *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986) (FTCA claims determined pursuant to a jury trial); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (FTCA claims determined pursuant to a bench trial).[3] Defendants nevertheless claim that there is no limit to the judgment bar and that the moment any judgment is entered on an FTCA claim a *Bivens* claim is precluded. This broad reading would have the practical effect of foreclosing the enforcement of substantive rights for no other reason than the commission of an earlier procedural error.

It is true that many courts, presumably focused on preserving resources and avoiding duplicative lawsuits, have stated that the proper way to avoid the judgment bar is to include claims against the government and

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[3] Defendants also cite *Hoosier Bancorp v. Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996). However, the Seventh Circuit in that case simply stated that the district court "entered judgment for the defendants in that case." *Id.* Neither party provided a copy of the lower court's decision dismissing the case and this court's search for the same was unsuccessful. Regardless, the court in *Hoosier* does not address the issue presented here, i.e., the legal effect of dismissal for lack of subject matter jurisdiction under § 2676.

individual government employees in the same lawsuit.[4] *See e.g.*, *Gasho*, 39 F.3d at 1438.; *Arevalo*, 811 F.2d at 487. Using this tactic, even if the claims against the government are dismissed—i.e., it is determined that an exception to the waiver of sovereign immunity applies—the claims against the individual defendants would survive since such claims are brought at the same time and are not therefore subsequent. Defendants's interpretation of § 2676, of course, rejects even this position. Defendants, pointing to the absence of qualifying language in the statute, argue that any judgment in favor or against the government precludes suit against the individual government employees allegedly involved in the constitutional deprivation.

To demonstrate the potential destructiveness of defendants' interpretation of § 2676, consider the following example drawn from the view of the courts cited above. Plaintiff files suit in federal district court, alleging an FTCA claim against the government and a *Bivens* claim against individual government employees allegedly involved in the deprivation of plaintiff's constitutional rights. The government quickly files a motion to dismiss for lack of subject matter jurisdiction, contending that sovereign immunity was not waived on the particular facts before the court. The court agrees with the government, dismissing the claim against the government and entering judgment in its favor. The individual defendants thereafter move to dismiss the

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[4] It should be noted that the filing of claims against both the government and its employees in these situations is not statutorily required. The example simply serves to illustrate the effect of defendants' interpretation of the judgment bar statute on facts even more favorable than those presented in this lawsuit.

claims against them, contending that this judgment, pursuant to § 2676, bars suit against them.

Under defendants' interpretation of the statute, the individual defendants' motion would be granted, despite the fact that no repetitious litigation transpired, as the merits of the claims against the government were not reached and the claims against the individual defendants were brought in the same lawsuit, and despite the fact that no possibility of dual recovery is presented. In fact, concerns regarding that purpose of the judgment bar statute have been entirely eliminated by granting the government's motion to dismiss. Further, resources are not wasted. In the scenario, assume the plaintiff, like the ones here, had a good faith, albeit ultimately incorrect, basis for believing that sovereign immunity was waived. In such a situation, a plaintiff's attorney is not only encouraged, but duty-bound to pursue the claim. That the court ultimately rules against the plaintiff should not serve as a penalty for making the argument. Defendants' interpretation of § 2676 is therefore rejected, and plaintiffs' earlier procedural loss does not prevent them from pursuing enforcement of their substantive rights against the proper defendants.

B. *The Bivens Claim*

"The standard for granting a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings is identical to that of a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim. In both postures, the district court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor. The court will not dismiss the case unless it is satisfied that the complaint cannot state any set of facts that would

entitle him to relief." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (citations omitted). As the Supreme Court explained in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), "[T]he Federal Rules of Civil Procedure (Rules) do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give a defendant fair notice of what a plaintiff's claim is and the grounds upon which it rests. [Fed. R. Civ. P. 8(a)(2)]." *Id.* at 47, 78 S. Ct. 99.

In order to state a cause of action under *Bivens*, plaintiffs must allege that defendants acted under color of law to deprive them of their constitutional rights. *Barbera v. Smith*, 654 F. Supp. 386, 394 (S.D.N.Y. 1987). Plaintiffs' Amended Complaint alleges that defendants, employees of various departments of the government, "intentionally caused total and permanent damage to the [plaintiff's] computer equipment resulting in the complete loss of all stored data as well as loss of computer equipment, all critical to the continued business operations of the plaintiff," (Pls' Compl. ¶ 14 C.), in violation of plaintiffs' Fifth Amendment due process rights. These allegations, if true, provide a basis for relief and are sufficient to put defendants on notice as to the nature of the claim against them.[5]

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[5] No opinion is expressed as to whether plaintiffs can survive further motion practice. For example, if it turns out that plaintiffs did simply just substitute the word "intentional" for the word "negligent" in amending their complaint, and are unable to procure any evidence in support of their belief in the intentional nature of defendants' alleged conduct, summary judgment may well be appropriate. However, at this stage of the litigation, where all plaintiffs' allegations are taken as true, dismissal is inappropriate.

IV. *CONCLUSION*

Because plaintiffs' FTCA suit against the government was dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, and allowing plaintiffs to proceed does not offend the purposes of § 2676, the judgment bar statute does not bar plaintiffs' *Bivens* suit. Furthermore, under the liberal rules for notice pleading, plaintiffs have sufficiently stated a claim for which relief may be granted.

Accordingly, it is

ORDERED that defendants' motion for judgment on the pleadings is DENIED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 02-CV-942

SUSAN HALLOCK, AS PRESIDENT AND 100% STOCKHOLDER OF FERNCLIFF ASSOCIATES, INC., D/B/A MULTIMEDIA TECHNOLOGY CENTER; AND FERNCLIFF ASSOCIATES, INC., D/B/A MULTIMEDIA TECHNOLOGY CENTER, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

March 21, 2003

MEMORANDUM-DECISION AND ORDER

HURD, District Judge.

I. *INTRODUCTION*

Plaintiffs, Susan Hallock ("Hallock"), as President and sole shareholder of Ferncliff Associates, Inc., d/b/a Multimedia Technology Center, and Ferncliff Associates ("Ferncliff"), Inc., d/b/a Multimedia Technology Center, brought suit against defendant United States of America ("United States") pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, alleging six causes of action: (1) negligent destruction of property; (2) conversion of property; (3) negligent bailment;

(4) larceny; (5) misfeasance; and (6) personal injury (mental pain and suffering).

The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6). Sovereign immunity is the grounds for this relief. Plaintiffs oppose. Oral argument was heard February 14, 2003, in Utica, New York. Decision was reserved.

II. ***FACTUAL BACKGROUND***

The following are the facts, taken from the pleadings, or, where undisputed, from the moving papers.

On June 8, 2000, United States Customs Service agents, along with other federal agents acting in a law enforcement capacity, served and executed a search warrant on the premises located at 194 Ferncliff Road in Mohawk, New York. Said premises served as the residence of Hallock and her husband, and as business offices for Ferncliff. Hallock is the sole stockholder of Ferncliff, a corporation authorized to do business in New York State. Pursuant to the search warrant, the agents seized computer equipment, software, and hard disk drives that allegedly had been, or were being, used by Hallock's husband to commit certain child pornography offenses in violation of 18 U.S.C. §§ 2252, 2252A.[1] Plaintiff alleges that the property taken

[1] Plaintiffs allege that the information used as a basis for the search warrant was mistaken. According to plaintiffs, while in the course of making lawful credit card purchases on the Internet, Hallock's husband was the victim of "identity theft," whereby his identifying information was used to establish a child pornography web site. As of this date, Hallock's husband has not been charged with any criminal offense.

included their "Computer Software Intellectual Property, all computerized Proprietary Computer Software Design Documents, all Computerized Personal Records, all Computerized Business Records, all Computerized Accounts, Client Files, and Business as well as Technological Trade Secrets belonging to [p]laintiffs." (First Restated and Amended Complaint for Damages, Docket No. 10, ¶ 6).

After some disputes regarding the terms of the return of the property, on December 21, 2000, plaintiffs' property was returned to Hallock's husband. Upon arriving home, plaintiffs allege that Hallock's husband discovered that "four of the nine computer systems [seized] were damaged to the extent of being totally unusable and that the loss of three of these computers necessitated the discontinuance of normal business operations of plaintiffs." (Plaintiffs' First Amended Memorandum of Law in Opposition to the United States' Motion to Dismiss, Docket No. 20, pp. 2-3). Further, plaintiffs allege that "five computer hard disk drives were damaged to the point of complete loss of all stored data," which included all of plaintiffs' "intellectual property, software design documents, and business and personal files." (*Id.* at 3). Plaintiffs claim that "[i]ndependent third party reviews by fully qualified and licensed hard drive data recovery companies indicate the data stored on [the] hard disk drives is completely lost and unrecoverable for all time." (First Restated and Amended Complaint for Damages, Docket No. 10, ¶ 9).

After being unable to resolve the issue with the United States Attorney's Office, plaintiffs filed an administrative claim for damages with the United States Customs Service, the United States Treasury,

the United States Department of Justice, the United States Postal Service, and the United States Marshals Service in the amount of $3,219,670.00. (*See* Administrative Claim for Damage, Injury, or Death, attached as part of Exh. 1 to Docket No. 10). After no action was taken on the administrative claim, plaintiffs filed a Complaint for Damages against the United States. (*See* Docket No. 1). Plaintiff thereafter filed a First Restated and Amended Complaint for Damages, amending, inter alia, the amount of damages sought to $4,421,700.00. (*See* Docket No. 10).

III. *DISCUSSION*

A. *MOTION TO DISMISS STANDARD*

As noted above, the United States has moved, pursuant to both Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss the First Restated and Amended Complaint for Damages. While " 'the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined'" when a party moves pursuant to both subsections of Rule 12, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Assn.*, 896 F.2d 674, 678 (2d Cir.1990) (internal citations omitted), the United States' motion is well taken even under the more lenient Rule 12(b)(6). In deciding such a motion, a court "must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint 'unless it appears beyond a reasonable doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" "*Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994)

(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see also Kaluczky v. City of White Plains*, 57 F.3d 202, 206 (2d Cir. 1995). However, conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true. *See, e.g., Clapp v. Greene*, 743 F. Supp. 273, 276 (S.D. N.Y. 1990); *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir. 1988).

B. *SOVEREIGN IMMUNITY*

It is well established that the United States is entitled to sovereign immunity and can therefore not be sued without its consent. *See Honda v. Clark*, 386 U.S. 484, 501, 87 S. Ct. 1188, 18 L. Ed. 2d 244 (1967); *Wilson v. United States*, 959 F.2d 12, 14 (2d Cir. 1992) (citing *Lehman v. Nakshian*, U.S. 156, 160, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981); *Akutowicz v. United States*, 859 F.2d 1122, 1125 (2d Cir. 1988)). "To alleviate the harshness of this rule, Congress enacted the Federal Tort Claims Act which permits civil actions against the United States for personal injury and property damage 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.'" *Lambertson v. United States*, 528 F.2d 441, 443 (2d Cir. 1976). Because the FTCA is considered a waiver of the United States' sovereign immunity, it is "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). Indeed, several different claims against the United States cannot lie under the FTCA, pursuant to enumerated exceptions to its invocation found in 28 U.S.C. § 2680. *See Kosak v. United States*, 465 U.S. 848, 852, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984) ("[T]he

[FTCA]'s broad waiver of sovereign immunity is, however, subject to 13 enumerated exceptions"). Of particular interest in this case is the exception found in 28 U.S.C. § 2680(c) (" § 2680(c)").

Section 2680(c) provides, in relevant part, that the United States may not be sued for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the *detention* of any goods, merchandise, or other property by any officer of customs or excise or *any* other law enforcement officer[.]" 28 U.S.C. § 2680(c) (emphasis added). Plaintiff essentially makes two arguments against the applicability of this exception: (1) that the exception covers only officers performing tax or customs duties, and the duties being executed by the officers at issue here were not of those types; and (2) that plaintiffs' claims do not arise from the "detention" of goods, which is covered by the exception, but instead from the "seizure" of goods, which is not covered by the statute. Both arguments have their roots in the Sixth Circuit's opinion in *Kurinsky v. United States*, 33 F.3d 594 (6th Cir. 1994) .

1. *Officers covered by § 2680(c)*

Plaintiffs first argue that the officers in question were not performing customs duties when serving and executing the search warrant because the investigation of child pornography is not within the purview of the United States Customs Service. This position is rejected. As pointed out by the United States, "an officer of the customs may . . . execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States." 19 U.S.C. § 1589a(2). Under this language, in a general sense, customs officers may execute a search warrant for any

crime. The interstate transportation or receipt of child pornography is made a criminal offense by 18 U.S.C. §§ 2252, 2252A. Therefore, even if executing search warrants for suspected child pornography violations is not within the normal purview of what is traditionally thought to be a customs function, it is permissible so long as the Secretary of Treasury permits it.

In addition, executing such warrants is not inconsistent with customs officers' duties. According to 19 U.S.C. § 1589(4), the Secretary of Treasury essentially defines customs duties. It appears the duties have been so defined here to include the investigation of child pornography. Customs officers have been traditionally responsible for investigating wrongdoing on a national and even global stage, and have had substantial duties in investigating and serving search warrants upon alleged purveyors of child pornography. *See United States v. Demerritt*, 196 F.3d 138 (2d Cir. 1999); *United States v. Jasorka*, 153 F.3d 58 (2d Cir. 1998); *United States v. Harvey*, 991 F.2d 981 (2d Cir. 1993); *United States v. Swanson*, 1993 WL 372269 (N.D. N.Y. Sep. 15, 1993). The advent of the Internet expanded its role considerably beyond investigation of tangible items such as paintings being smuggled into and out of the country to the investigation of crimes involving computer imagery, such as the proliferation of child pornography. Therefore, as long as the officers at issue here were acting at the Secretary of Treasury's behest, and there is no argument they were not, the position that they were not engaged in customs duties cannot be sustained.

Even if it is assumed that customs duties were not being executed in serving the search warrant, and that another agency's tasks—such as the FBI's—were

instead being executed, the United States is still protected by § 2680(c). The Supreme Court has yet to rule whether § 2680(c) covers only law enforcement officers operating in a customs or tax capacity, *Kosak*, 465 U.S. at 852 n. 6, 104 S. Ct. 1519, and only two courts have held that it does. *See Kurinsky*, 33 F.3d at 598 (6 th Cir. 1994); *Bazuaye v. United States*, 83 F.3d 482 (D.C. Cir. 1996). The vast majority of courts, including the Second Circuit and lower courts therein, have interpreted the exception's protection to extend to all law enforcement officers performing any law enforcement function. Specifically, the exception has been applied to situations involving DEA officers,[2] USDA inspectors,[3] INS border patrol officers,[4] Federal Marshals,[5] FAA employees,[6] and Bureau of Prison officials,[7] all performing jobs outside of the traditional customs context. These applications square with the Supreme Court's broad reading of § 2680(c), *see Kosak*, 465 U.S. 848, 104 S. Ct. 1519, and are a reasonable interpretation of the statutory language. Therefore, no matter how one

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[2] *Formula One Motors, Ltd. v. United States*, 777 F.2d 822 (2d Cir. 1985); *United States v. $149,345 United States Currency*, 747 F.2d 1278 (9th Cir. 1984); *Rufu v. United States*, 876 F. Supp. 400 (E.D.N.Y. 1994; *Sterling v. United States*, 749 F. Supp. 1202 (E.D.N.Y. 1990).

[3] *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984).

[4] *Halverson v. United States*, 972 F.2d 654 (5th Cir. 1992); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988).

[5] *Schlaebitz v. United States Department of Justice*, 924 F.2d 193 (11th Cir. 1991).

[6] *United States v. Lockheed L-188 Aircraft*, 656 F.2d 390 (9th Cir. 1979).

[7] *Crawford v. United States Department of Justice*, 123 F. Supp. 2d 1012 (S.D. Miss. 2000).

classifies the duties executed by the officers in the instant case, the protection of § 2680(c) is available.

2. *"Seizure" versus "detention"*

Plaintiffs' other argument against the application of § 2680(c), the one to which more time is devoted, is that the exception covers only claims arising out of the "detention" of goods. According to plaintiffs, since the claims advanced here arise out of the "seizure" of goods, the exception is unavailable. In support of this argument, plaintiffs rely exclusively upon *Kurinsky*, 33 F.3d 594. In that case, the Sixth Circuit Court of Appeals contended that a "seizure" is "generally associated with a period of temporary custody or delay[,]" carrying with it "no connotation of permanent custody, nor . . . necessarily suggest[ing] an adversarial interest insofar as ownership is concerned." *Id.* at 597. On the other hand, stated the court, "a seizure has an 'after-the-fact' quality not associated with a detention. When goods are seized pursuant to a lawful search, their relevance to a legal proceeding already has been predetermined . . . The seizure is adversarial to the ownership interest of the person from whom the property is seized." *Id.* Thus, it was concluded that because the two words had such different meanings and Congress included only one—"detention"—in § 2680(c), claims arising out of "seizures" were not covered by the exception. *Id.*

At the outset, agreement is expressed with the *Kurinsky* court's contention that a detention is distinct from a seizure.[8] The words do have different meanings

[8] However, as to any notion that the consequence of this distinction is that claims arising out of the "seizure," as opposed to "detention," of property, escape the reach of § 2680(c), no opinion is herein expressed or should be inferred. As plaintiffs' claims

in legal circles,[9] semantics, and ordinary usage.[10] What is rejected, however, is plaintiffs' application of the distinction to the instant case. While plaintiffs intimate that the facts of *Kurinsky* are analogous to those of the case at bar, a cursory examination reveals this is not true. The plaintiffs in *Kurinsky* alleged that their property—seized by the FBI pursuant to a search warrant issued for suspicion of wire fraud and unauthorized reception of cable services—was "mishandled and damaged" *during* its seizure. *Id.* at 595. Accordingly, "the Kurinskys . . . alleg[ed] damages stemming from the *execution* of the search warrant." *Id.* (emphasis added). Here, plaintiffs are not alleging the damage was caused by the seizure and removal from the home of the computer equipment, software, and hard disk drives, or in any way by the execution of the search warrant. Instead, plaintiffs base their claims "on negligent acts *post- seizure* to a lawful search warrant." (Plaintiffs' First Amended Memorandum of Law in Opposition to the United States' Motion to Dismiss, Docket No. 20, p. 4) (emphasis added).

Use of the phrase "post-seizure negligent acts" is most fairly read to mean that the claims are based on

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clearly do not arise out of the "seizure" of their property, the question is not properly presented in this case.

[9] *Compare* BLACK'S LAW DICTIONARY 1363 (7th ed. 1999) (defining seizure as "[t]he act or an instance of taking possession of . . . property by *legal* right or process") *with* BLACK'S LAW DICTIONARY 459 (7th ed. 1999) (defining detention as "[t]he act or fact of holding a person [i.e. property] in custody").

[10] *Compare* WEBSTER'S NEW WORLD DICTIONARY 1216 (3d ed. 1988) (defining seize as "to take forcible legal possession[,]" or "to take forcibly and quickly"), *with* WEBSTER'S NEW WORLD DICTIONARY 375 (3d ed. 1988) (defining detention as "a keeping in custody").

damage allegedly inflicted during the "detention" of plaintiffs' property. By use of the prefix "post," plaintiffs are implicitly admitting that the alleged "negligent acts" occurred "after" the seizure. *See* WEBSTER'S NEW WORLD DICTIONARY 1054 (3d ed. 1988) (defining "post-" as meaning "after in time, later (than), following"). Simply put, "post-seizure" cannot be read to mean "seizure." Because § 2680(c)'s applicability turns on the classification of the time period in which plaintiffs allege their property was damaged or destroyed through the negligence of agents of the United States, such classification must be determined.

At the most fundamental level, it is known that the alleged damage and destruction occurred at some point "after" or "post-seizure," but before the property was eventually returned to plaintiffs. It is also known that plaintiffs are alleging such damage and destruction occurred while the property was in the possession, actual or constructive, of agents of the United States. The only time period that fits both of these criteria is when the property was being "detained" by the officers.

In summary, property was seized from plaintiffs' possession on June 8, 2000. The instant the property was seized and transported elsewhere, it was detained. There is simply no other way to classify it. In other words, the property seized was thereafter detained within the control and possession of agents of the United States from June 8, 2000, to December 21, 2000. It is within this time period that plaintiff alleges the damage and destruction occurred. However, as § 2680(c) provides protection during detentions, it is also within this time period that the United States retained its sovereign immunity. Therefore, though sym-

pathy is most certainly expressed for plaintiffs' situation, recourse through the FTCA is unavailable.[11]

3. *Claims barred*

It must finally be determined which of plaintiffs' claims are precluded pursuant to the applicability of § 2680(c). As noted, the exception bars any claim "arising in respect of" the detention of any goods or property by a customs officer or any law enforcement officer. Plaintiff has advanced claims for negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury. The Supreme Court has determined that "arising in respect of" "means 'any claim arising *out of* the detention of goods', and includes a claim resulting from negligent handling or storage of detained property." *Kosak*, 465 U.S. at 854, 104 S. Ct. 1519 (emphasis added).[12] All of

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[11] Indeed, this decision is not to be read as condoning the damage or destruction of any property seized pursuant to a search warrant. Though plaintiffs most certainly have suffered injury, assuming the truth of their allegations, the importance of the policy bases behind § 2680(c) cannot be undermined if the United States is to aggressively pursue criminals unrestrained by what would in other contexts be normal legal restraints on the treatment of others' property. By the same token, this decision is also not to be read as concluding that plaintiffs' property was damaged or destroyed by agents of the United States, through negligence or otherwise. The same is assumed only for the purposes of disposing of this motion.

[12] It should be noted that the Second Circuit has held that the "exception does not apply where the goods are no longer in possession of the government, and therefore cannot be regarded as being 'detained.'" *Mora v. United States,* 955 F.2d 156, 160 (2d Cir. 1992). While no opinion is expressed as to this holding's consistency or inconsistency with *Kosak*—namely because plaintiffs make no claims that the damage was inflicted after the United States' possession of their property ceased—*Mora* is not followed

plaintiffs' claims arise "out of the detention" of their property, and are thus precluded by § 2680(c). As the Court in *Kosak* noted, any argument "that § 2680(c) should not be construed in a fashion that denies an effectual remedy to many persons whose property is damaged through the tortious conduct of customs officials . . . has force, but it is properly addressed to Congress[.]" *Id.* at 862, 104 S. Ct. 1519.

4. *Lost business opportunities*

The United States has also moved to dismiss plaintiffs' claim for lost business opportunities and lost profits on the grounds that such claims are for "interference with contract right," and are excluded from the FTCA waiver of sovereign immunity pursuant to 28 U.S.C. § 2680(h). Because all claims must be dismissed as precluded pursuant to § 2680(c), a ruling need not be made on this point of the defendant's motion.

IV. *CONCLUSION*

Pursuant to § 2680(c), plaintiffs are precluded from pursuing their claims under the Federal Tort Claims

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to the extent it relies upon its prior decision in *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958), as the sole support for the above-quoted language. The Supreme Court specifically took issue with the statement by the court in *Alliance Assurance* that the exception does not bar actions based on the negligent destruction of property in the possession or control of customs officers and the Court's holding, on its face, seems very much to usurp, or at the very least contradict, the statement. *See Kosak*, 465 U.S. at 854-55, 104 S. Ct. 1519 (quoting and disagreeing with *Alliance Assurance*, 252 F.2d at 534). Therefore, to the extent *Mora* is inconsistent with *Kosak*, it is rejected. *See Haughton v. F.B.I.*, No. 98 Civ. 3418(BSJ), available at 1999 WL 1133346, at *6 n. 1 (S.D.N.Y. Dec. 10, 1999) (following *Kosak* over *Mora* and *Alliance Assurance*) (collecting cases).

Act. All of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred.

Accordingly, it is

ORDERED that the First Restated and Amended Complaint for Damages is DISMISSED.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date: 12/29/04

Filed
Jan. 4, 2005

Docket Number: 03-6221-cv
Short Title: Hallock v. Bonner
DC Docket Number: 03-cv-195
DC: NDNY (SYRACUSE)
DC Judge: Honorable David Hurd
Honorable David Homer

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the day of two thousand four.

Present:

Hon. Roger J. Miner, Circuit Judge

Hon. Renna Raggi, Circuit Judge

Hon. Victor Marrero, Distric Court Judge

Docket No(s): 03-6221

SUSAN HALLOCK, FERNCLIFF ASSOCIATES, INC., DOING BUSINESS AS MULTIMEDIA TECHNOLOGY CENTER,
PLAINTIFF-APPELLEE

v.

ROBERT C. BONNER, RICHARD WILL, DENNIS P. HARRISON, MARGARET M. JORDAN, THOMAS VIRGILIO, UNKNOWN NAMED AGENTS OF UNITED STATES CUSTOMS AND TREASURY, UNKNOWN NAMED AGENTS OF UNITED STATES JUSTICE DEPARTMENT, UNKNOWN NAMES AGENTS OF UNITED STATES POSTAL SERVICE, UNKNOWN NAMED AGENTS OF UNITED STATES MARSHALL SERVICE, JOHN & JANE DOE, 1-25,
DEFENDANTS-APPELLANTS

A petition for panel rehearing having been filed herein by John & Jane Doe et al. Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

For the Court,

Roseann B. MacKechnie, Clerk

By: [illegible]
Motion Staff Attorney

APPENDIX E

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

* * * * *

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

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

* * * * *

28 U.S.C. 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

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

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

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

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

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

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

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such

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

* * * * *

28 U.S.C. 2680. Exceptions

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

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other prop-

erty, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

* * * * *

[1] So in original.