RIGHTING WRONGS: HELPING YOUR CLIENTS CHALLENGE GOVERNMENT MISCONDUCT AND ABUSE

by David Antón Armendáriz and Philip Hwang*

In your legal practice, you may have heard stories of abusive practices by government officials targeted at immigrants. A lawsuit can be a great vehicle for exposing misconduct, obtaining a financial recovery for your client, and deterring future abuses. A lawsuit, however, is not always viable or prudent. Sometimes, filing an administrative grievance is appropriate. This article will help you assess key issues, advise clients about potential remedies, and take action to hold officials accountable.

FILING ADMINISTRATIVE GRIEVANCES AGAINST DHS AND EOIR EMPLOYEES

As employees of the Executive Branch, immigration judges (IJ),† trial attorneys,‡ and Department of Homeland Security (DHS) officers are subject to the executive branch-wide Standards of Ethical Conduct at 5 CFR §2635 and Employee Responsibilities and Conduct regulations at 5 CFR §735.³ As employees of the Department of Justice (DOJ), IJs are subject to the DOJ regulations at 5 CFR §3801, which supplement the Executive Branch standards. As licensed attorneys, IJs and trial attorneys are also subject to the rules of professional conduct governing the practice of law in their respective states of licensure. Therefore, in addition to the processes outlined below, you may file a complaint to the relevant state bar authority.

Immigration Judges

There is a relatively new centralized process for filing administrative grievances against IJs. The Office of the Chief Immigration Judge (OCIJ), which is in charge of monitoring IJ performance and conduct,⁴ has established a procedure to allow any person to file a complaint about the conduct of an IJ.⁵ You may file a formal complaint about an IJ with either the Assistant Chief Immigration Judge for Conduct and Professionalism (ACIJ C/P) or the appropriate supervisory Assistant Chief Immigration Judge (ACIJ) in charge of the particular court.⁶ Complaints may be made anonymously if necessary. All complaints should contain the full facts regarding who, what, where, when and why. Complaints may be sent either by e-mail to EOIR.IJConduct@usdoj.gov or by regular mail to the ACIJ C/P or the ACIJ at the addresses listed on the government website.⁷

Once the complaint is received, OCIJ may conduct an initial investigation of the complaint and, if necessary, refer it to either the Office of Professional Responsibility (OPR) or the Office of the Inspector General (OIG). OPR has jurisdiction over complaints where there is an appearance or allegation of professional misconduct. OIG has jurisdiction over allegations of criminal conduct or serious waste, fraud, or

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† Immigration judges (IJ) work for the Department of Justice, Executive Office for Immigration Review (EOIR).

‡ Trial attorneys are employees of Immigration and Customs Enforcement (ICE), Office of the Principal Legal Advisor.

§ 28 CFR §45.1.

⁴ 8 CFR §1003.9(b).


abuse. Complaints may result in non-disciplinary corrective action (e.g., oral or written counseling, individualized training, etc.) or formal discipline (reprimands, suspensions without pay, termination of employment, etc.).

8 A complaint may be also dismissed, as well, if it is deemed frivolous; the complaint relates directly to the merits of an IJ’s decision; the facts alleged were unsubstantiated; or the allegations do not constitute inappropriate conduct. If the complaint was not made anonymously, then OCIJ will report to the complainant the results of the investigation in a manner consistent with the privacy rights of the IJ.

ICE and CBP Employees

The Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR) investigates allegations of misconduct involving employees of ICE and Customs and Border Protection (CBP). OPR is tasked with overseeing ICE detention functions and ensuring that facilities adhere to the agency’s self-imposed detention standards. Complaints about trial attorneys may also be made to the OPR because they are ICE employees. You may contact OPR by phone at (877) 2INTAKE, via e-mail to Joint.Intake@dhs.gov, or by regular mail sent to: P.O. Box 14475, Pennsylvania Avenue, NW, Washington, D.C. 20044.

USCIS Employees

A report of any type of misconduct by USCIS employees may be submitted to the DHS Office of the Inspector General by phone at 800-323-8603, by fax at (202) 254-4292, by e-mail to dhsoighotline@dhs.gov, or by regular mail to Department of Homeland Security, Attn: Office of the Inspector General, 245 Murray Drive, Building 410; Stop: 2600, Washington, D.C. 20528.

SUING THE UNITED STATES AND FEDERAL OFFICIALS

In addition to filing an administrative grievance, you can potentially bring a lawsuit in appropriate circumstances. This includes: (1) Bivens claims against individual officials for violating your client’s constitutional rights; and (2) tort claims against the United States under the Federal Tort Claims Act (FTCA).

Bivens Claims

A claim for damages may be brought against federal officials in their individual capacity for certain constitutional violations under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. However, a Bivens claim cannot be brought against the United States itself, federal agencies, or private corporate contractors. In deciding whom to name as a defendant, you should review your circuit’s law to determine what level of personal involvement by an individual official is needed to establish liability. For example, while supervisory officials are not vicariously liable for subordinates’ unconstitutional acts, the U.S. Court of Appeals for the Ninth Circuit has held that a federal official may be liable for setting in motion or knowingly refusing to terminate a series of acts which he or she knows or reasonably should know would

8 The factors considered in imposing discipline are explained in Douglas v. Veteran’s Administration, 5 M.S.P.B. 313 (MSPB 1981) and include the nature and seriousness of the conduct, the official’s length of service and past disciplinary record, mitigating circumstances, the potential for future occurrences absent corrective action, the impact of the offense on the agency’s reputation, and how other such cases had been treated.


10 Current detention standards are available at www.ice.gov/detention-standards/2008/. However, the standards are currently said to be in the process of revision and overhaul. In August of 2009, ICE announced the creation of the Office of Detention Oversight, within Office of Professional Responsibility (OPR), “to conduct routine and random inspections more frequently of ICE detention facilities and to “investigate detainee grievances in a neutral manner.” See www.ice.gov/news/library/factsheets/reform-2009/reform.htm.

11 Immigration and Customs Enforcement, www.ice.gov/about/offices/leadership/opr/.


cause others to inflict a constitutional injury.\textsuperscript{15} If the identities of key officials are unknown, you may be able to bring \textit{Bivens} claims against \textit{Doe} defendants and substitute names when their identities are later ascertained in discovery. Review the law of the state in which the incident occurred and local federal court rules to determine whether there are special \textit{Doe} defendant pleading rules\textsuperscript{16} and whether the limitations period will be tolled.

The statute of limitations for \textit{Bivens} claims is the same as the personal injury statute of limitations for the state in which key events occurred.\textsuperscript{17} There is no administrative claim process for \textit{Bivens} actions. If you choose to file an FTCA administrative claim, you can choose to proceed on your \textit{Bivens} claims in federal court, without awaiting a decision on the FTCA administrative claim. \textit{Bivens} claims can be tried before a jury or judge, and both compensatory and punitive damages are available. A judgment in a \textit{Bivens} action is recoverable only against individual officials. Whether the government will ultimately indemnify officials is decided case-by-case.\textsuperscript{18} Attorney fees are not recoverable from defendants in \textit{Bivens} actions.\textsuperscript{19}

Be prepared for the defendants in your \textit{Bivens} suit to seek dismissal on the ground that your claim is too novel to be the basis for liability. For example, they may raise the defense of qualified immunity, arguing that: (1) the plaintiff’s constitutional rights were not violated, and/or (2) the constitutional rights at issue were not clearly established at the time of the events in question. They may also argue that \textit{Bivens} claims are generally unavailable in the immigration context. In response, you should cite cases in which \textit{Bivens} claims have been brought in the immigration context.\textsuperscript{20} You should also identify precedent, preferably within your circuit, which establishes the existence of the constitutional right at issue. Finally, please contact the authors for sample briefs on these and related issues.

**Federal Tort Claims Act**

The United States may be sued under the FTCA for certain torts committed by federal employees.\textsuperscript{21} In addition, the United States may potentially be sued for negligently entrusting an individual to the care of others, such as private contractors or local government officials.\textsuperscript{22} Under the FTCA, the United States may be held liable to the same extent that a private person would be liable under like circumstances, applying the law of the state where the act or omission occurred.\textsuperscript{23} For example, if your client was unlawfully detained by ICE in California, the United States could be held liable under the FTCA for committing torts recognized under California law, such as false imprisonment,\textsuperscript{24} and possibly for state civil rights violations.\textsuperscript{25}

\begin{footnotesize}
\begin{enumerate}
\item Wong v. United States, 373 F.3d 952, 966 (9th Cir. 2004); al-Kidd v. Ashcroft, 580 F.3d 949, 965 (9th Cir. 2009), reh’g denied, 598 F.3d 1129 (9th Cir. 2010), cert. granted on other issues, 131 S. Ct. 415 (2010).
\item See, e.g., Cal. Code Civ. Proc. §474 (procedure for naming \textit{Doe} defendants); C.D. Cal. Local R. 19-1 (complaint or petition may not include more than 10 \textit{Doe} parties).
\item Van Strum v. Lawn, 940 F.2d 406, 410 (9th Cir. 1991).
\item U.S. Attorney Manual, Ch. 4-5.412(F).
\item Kreines v. United States, 33 F.3d 1105 (9th Cir. 1995).
\item 28 USC §§2671–80.
\item 28 USC §2674.
\item Rhoden v. United States, 55 F.3d 428 (9th Cir. 1995).
\item Lu v. Powell, 621 F.3d 944, 950 (9th Cir. 2010).
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FTCA actions have been brought in a variety of contexts involving misconduct by immigration officials.\(^{26}\) However, not every tort can give rise to an FTCA claim. For example, claims for libel, slander, misrepresentation, deceit, interference with contract rights, and unlawful seizures of property may not be actionable under the FTCA.\(^{27}\) Claims arising in a foreign country also cannot be the basis for FTCA liability.\(^{28}\) Moreover, assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process claims can only be brought against the United States when they involve acts or omissions of federal law enforcement or investigative officials.\(^{29}\)

Finally, the United States is not liable under the FTCA where its employees are performing, or fail to perform, a “discretionary function,” even if there has been an abuse of discretion.\(^{30}\) To invoke this exception, the government must prove that: (1) the conduct at issue involved an element of judgment or choice; and (2) the judgment exercised by its employee was grounded in social, economic, or political policy.\(^{31}\) The United States cannot rely on the exception, however, where federal statute, regulation, or policy prescribes a course of action for the employee to follow or where the conduct at issue violates the Constitution.\(^{32}\)

There is a two-step process for bringing a claim under the FTCA. The first step is to file an administrative claim with the appropriate federal agency (e.g., USCIS, ICE, CBP) within two years of the accrual of the claim.\(^{33}\) The amount in your initial claim should not be too low; otherwise, this amount may cap your eventual recovery.\(^{34}\) A lawsuit must be filed within six months of the administrative denial of the claim.\(^{35}\) If the agency does not act on the claim, then a lawsuit can be filed after waiting six months from the filing of the


\(^{27}\) 28 USC §2860(c), (h); Ysasi v. Rivkind, 856 F.2d 1520 (Fed. Cir. 1988).


\(^{29}\) 28 USC §2680(h); Caban v. United States, 671 F.2d 1230 (2d Cir. 1982) (INS officers considered law enforcement officials and therefore liable for intentional torts).

\(^{30}\) 28 USC §2680(a).

\(^{31}\) Garcia v. United States, 826 F.2d 806 (9th Cir. 1987) (border patrol officer’s arrest and use of force not discretionary under FTCA); Caban v. United States, 671 F.2d 1230 (2d Cir. 1982) (agents’ six-day erroneous detention of U.S. citizen was not the type of discretionary policy decision exempt under FTCA).


\(^{33}\) 28 USC §2675; 28 CFR §14.1 et seq. See also T. A. Realmuto, Legal Action Center Practice Advisory, Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation (updated May 13, 2010), www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf.


\(^{35}\) 28 USC §2401(b).
administrative claim. In other words, the agency’s failure to act within six months can be treated as a constructive denial.

FTCA claims are tried only before a federal judge; there is no right to a jury trial on these claims (other claims may potentially be heard by a jury). Compensatory damages are available, but punitive damages are not. Recovery of attorney fees under a contingency fee agreement is limited by statute to 20 percent if the case is settled administratively, or 25 percent after the case is filed in federal court. Attorney fees may also be available from the United States under the Equal Access to Justice Act if the government has acted in bad faith.

There are at least two strategic advantages to including FTCA claims. First, making the United States officially a party to the action may expedite discovery. By contrast, if only Bivens claims are brought in a lawsuit, then only individual officials (not the United States) are the named defendants, which may delay your efforts to get broader discovery. Second, pre-trial rulings on the FTCA claims are not ordinarily the subject of interlocutory appeal. By contrast, in Bivens cases, the government has the right to bring an interlocutory appeal to challenge the denial of qualified immunity. If only Bivens claims are alleged in your case, then you may be precluded from engaging in discovery while the qualified immunity issue is on appeal.

However, if you bring both FTCA and Bivens claims, you need to consider which, if any, claims you want to go to trial, in the event that your case does not settle. If judgment is entered on the FTCA claims, then the FTCA judgment may bar recovery on your Bivens claims. You should review the law of your circuit to determine how to proceed.

SUITING STATE OFFICIALS, LOCAL OFFICIALS, AND LOCAL GOVERNMENT ENTITIES

If state or local officials participated or engaged in misconduct, then you may be able to bring claims against these officials. There may be strategic advantages to adding these defendants, assuming that you have viable claims. For example, they may be an additional source from which to recover damages and may also potentially be liable for attorney fees by statute.

Federal law creates a private right of action against “persons” who, acting under color of state law, violate federal constitutional or statutory rights. Local governing bodies and local officials acting in their official capacities are considered “persons” for purposes of §1983 and can be sued for both monetary damages and injunctive relief. By contrast, under §1983, states and state officials can be sued in their official capacities only for injunctive relief (not damages). State officials, however, may be sued in their individual capacities for monetary damages under §1983.

Section 1983 claims are often premised on Fourteenth Amendment violations, including violations of the Due Process Clause and Equal Protection Clause. As with Bivens claims, a state’s personal injury statute of limitations provides the applicable time limit for §1983 claims occurring in that state. The defense of qualified immunity is also frequently raised by defendants in §1983 cases. In general, there is no administrative exhaustion requirement for §1983 claims. Section 1983 actions may be tried before a jury or

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30 28 USC §2678.
37 Rodriguez v. United States, 542 F.3d 704 (9th Cir. 2008).
39 28 USC §2676.
40 See, e.g., Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987); Sanchez v. Rowe, 870 F.2d 291 (5th Cir. 1989); Engle v. McKe, 24 F.3d 133 (10th Cir. 1994).
4 See 42 USC §1983.
45 Steffel v. Thompson, 415 U.S. 452, 472–73 (1974). While prisoners may be required to exhaust administrative remedies under the Prison Litigation Reform Act, 42 USC §1997e(a), immigration detainees are not “prisoners” for these purposes.
a judge. Both compensatory and punitive damages are available in a §1983 action. Lastly, attorney fees are also available, which is a significant incentive for bringing such claims, if the facts warrant.46

In addition to a §1983 claim, you may also be able to bring claims against state or local officials under the law of the state in which the incident occurred, including state tort claims47 and/or state civil rights claims.48 You should research the law of the state in which the incident occurred to determine what claims may be brought and the applicable procedures.

CONCLUSION

Hopefully, this article will help you to advise clients about their options. However, we strongly encourage you to discuss your case with others who have successfully brought suit and can help you navigate the process and determine how much your case is worth.

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47 See, e.g., Cal. Gov’t Code §810 et seq.