



## **PRACTICE ADVISORY<sup>1</sup>**

### **FEDERAL TORT CLAIMS ACT: FREQUENTLY ASKED QUESTIONS FOR IMMIGRATION ATTORNEYS<sup>2</sup>**

February 17, 2021

#### ***Introduction***

#### **1. What is the Federal Tort Claims Act?**

The Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity and authorizes suits for money damages based on the negligent acts or omissions of federal employees, and, in some instances, intentional misconduct of such employees.<sup>3</sup> FTCA actions proceed in two steps. First, the individual files an administrative claim with the relevant federal agency or agencies.<sup>4</sup> If the agency does not elect to settle the claim, and, instead, makes a “final denial” of the claim (i.e., denies the claim or fails to act on it within six months), the claimant then may file a complaint in federal district court.<sup>5</sup>

#### **2. Why should immigration attorneys file FTCA claims?**

A claim under the FTCA enables recovery of damages from the United States. In the immigration context, the FTCA authorizes money damages to noncitizen and citizen victims of misconduct by employees of federal agencies, including the U.S. Department of Homeland Security (DHS).

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<sup>2</sup> This advisory was originally drafted in 2013 by Priya Patel, a law student at the time, under the supervision of Trina Realmuto, formerly the litigation director at NIPNLG. This update was authored by NILA attorneys Trina Realmuto, Mary Kenney, Tiffany Lieu, and Kristin Macleod-Ball, and NIPNLG attorneys Joseph Meyers, Amber Qureshi, Cristina Velez, and Matthew Vogel. Special thanks to Jonathan Feinberg for his review in 2013 and 2021.

<sup>3</sup> See 28 U.S.C. §§ 1346(b), 2671 *et seq.*; 28 C.F.R. §§ 14.1-14.11.

<sup>4</sup> 28 U.S.C. §§ 2672, 2675; 28 C.F.R. §§ 14.2-14.4.

<sup>5</sup> 28 U.S.C. § 2675; 28 C.F.R. § 14.9.

Bringing an FTCA claim also may improve a noncitizen's immigration options. Within DHS, U.S. Immigration and Customs Enforcement (ICE) is responsible for the enforcement of immigration laws within the interior, while U.S. Customs and Border Protection (CBP) enforces the Immigration and Nationality Act (INA) along the border. Historically, DHS (and its predecessor Immigration and Naturalization Service (INS)) adopted policies authorizing immigration officers to exercise prosecutorial discretion in their enforcement of the INA. These policies have changed with each administration.

For example, under the Obama Administration, ICE policy encouraged its officers, agents, and attorneys to exercise prosecutorial discretion "to minimize any effect that immigration enforcement may have on the willingness and ability of . . . [plaintiffs pursuing litigation to protect their civil rights and liberties] to call police and pursue justice."<sup>6</sup> This included declining to deport "individuals in the midst of a legitimate effort to protect their civil rights or civil liberties."<sup>7</sup> Thus, under then-existing ICE policy, because an FTCA claim sought vindication of a noncitizen's civil rights and liberties, filing such a claim provided a basis to ask ICE to stay or defer removal, release from detention, withdraw a detainer, issue a Notice to Appear, seek termination of proceedings, or join a motion to administratively close a case.<sup>8</sup>

The Trump Administration all but eliminated the use of prosecutorial discretion, including in cases in which noncitizens pursued FTCA claims to remedy unlawful conduct by an immigration officer.<sup>9</sup> On the Biden Administration's first day, the Acting DHS Secretary issued a memorandum adopting interim priorities to govern a broad range of immigration-related discretionary enforcement actions while DHS undertook an assessment of enforcement policies, including policies on prosecutorial discretion.<sup>10</sup> Practitioners should watch for future policies and evaluate if and how they may support settling of FTCA claims to include immigration relief.

Additionally, an FTCA claim may increase a person's chances of obtaining certification for a U visa, which provides lawful status and a path to permanent residency for undocumented crime victims who cooperate with law enforcement.<sup>11</sup> The federal agency whose conduct the FTCA

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<sup>6</sup> John Morton, ICE, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, ICE, at 1 (June 17, 2011), available at <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *See, e.g.*, John Kelly, Enforcement of the Immigration Laws to Serve the National Interest, DHS, at 2, 4 (Feb. 20, 2017), available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) (rescinding almost all prior prosecutorial discretion guidance and directing that "prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of [noncitizens] from enforcement of the immigration laws").

<sup>10</sup> David Pekoske, Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities, DHS (Jan. 20, 2021), available at [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf).

<sup>11</sup> *See* 8 U.S.C. §§ 1101(a)(15)(U), 1184(p).

claim implicates may sign the certification as part of a settlement agreement. Alternatively, if the FTCA claim succeeds in federal court, the noncitizen could file a motion asking the district court judge to sign the certification.<sup>12</sup>

An additional reason to consider bringing an FTCA case is to promote agency and officer accountability for misconduct. FTCA litigation can contribute to other advocacy efforts to improve agency-wide practices. It also can call public attention to officer misconduct and abuse and serve as a catalyst for public pressure for reform.

### **3. How is an FTCA action different from a *Bivens* action?**

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized the availability of damages and injunctive relief for constitutional violations committed by federal officers acting under color of federal law or authority. Unlike the FTCA, which explicitly provides a statutory cause of action for tort claims, *Bivens* actions provide an implied cause of action for violations arising directly under the Constitution. District courts have jurisdiction over *Bivens* actions pursuant to 28 U.S.C. § 1331 (federal question statute). Notably, *Bivens* suits are filed against federal officers in their individual capacities, not against the United States. While certain aspects of FTCA and *Bivens* litigation overlap, constitutional claims brought against individual defendants in a *Bivens* action are beyond the scope of this advisory, and, due to Supreme Court decisions narrowing the availability of such claims, present a host of legal and practical complexities that may counsel against the pursuit of such remedies. Claims against state and local entities and officials under 42 U.S.C. § 1983 or state law also are not covered in this advisory.

### **4. What immigration officers may be liable under the FTCA?**

The FTCA covers negligent conduct by officers or employees of federal agencies, as well as certain intentional torts committed by “investigative or law enforcement officers,” “acting within the scope of [their] office or employment, under circumstances where the United States, if a private person, would be liable . . . in accordance with the state law of the place where the act or omission occurred.”<sup>13</sup> As such, most immigration officers employed by DHS, including its component agencies ICE, CBP, and U.S. Citizenship and Immigration Services, are covered.<sup>14</sup> In addition, immigration-related FTCA claims may involve misconduct by employees of other federal agencies, such as the U.S. Marshals Service, the U.S. Public Health Service, or the Federal Bureau of Investigation. FTCA claims may implicate the misconduct of employees of

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<sup>12</sup> See, e.g., *Villegas v. Metro. Gov’t of Nashville & Davidson Cty*, 907 F. Supp. 2d 907, 914 (M.D. Tenn. 2012) (granting plaintiff’s motion for a U visa certification in damages action under 42 U.S.C. § 1983).

<sup>13</sup> 28 U.S.C. §§ 1346(b)(1), 2671 (defining “federal agency” and “employee of the government”), 2680(h) (defining “investigative or law enforcement officer”).

<sup>14</sup> 8 C.F.R. § 1.2 (defining immigration officers); see also 8 U.S.C. § 1357 (outlining powers of immigration officers and employees, including investigative and law enforcement functions); 8 C.F.R. § 287.5 (same).

more than one federal agency.<sup>15</sup>

The FTCA does not authorize actions against contractors with the United States.<sup>16</sup> However, the United States still may be liable under the FTCA if a federal employee fails to prevent tortious conduct by contract employees acting under federal supervision,<sup>17</sup> or negligently places a detained individual in the care of a contract employee or contract facility.<sup>18</sup> These distinctions may be especially relevant in the immigration context when suing the United States for abuse and medical malpractice in a contracted detention center.

## **5. Are attorneys' fees and costs available?**

The FTCA is not a fee-shifting statute. However, recovery of attorneys' fees on a contingent basis is governed by statute, *see* 28 U.S.C. § 2678, and provides as follows:

- If the claim is resolved administratively, attorneys' fees may not exceed 20% of the settlement.
- If the claim is resolved after district court litigation is initiated, whether by a judgment or settlement, attorneys' fees may not exceed 25% of the settlement or judgment.

The statute further provides that failure to abide by these rules could result in a fine of not more than \$2,000 or up to a year of imprisonment. Retainer agreements with clients should reflect these contingencies. It is also advisable that retainer agreements include the client's consent to assign payment of FTCA fees to counsel's Interest on Lawyer's Trust Account (IOLTA). Counsel then must directly provide the client's portion of recovery to the client.

### *Types of Claims and Applicable Law*

## **6. What types of immigration-related claims can be brought under the FTCA?**

Under the FTCA, the United States is liable for the negligent torts of its employees and for certain intentional torts committed by investigative and law enforcement officers.<sup>19</sup> All such acts must be within the scope of the employee's or law enforcement officer's employment or office.<sup>20</sup>

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<sup>15</sup> *See* 28 C.F.R. § 14.2(b)(2).

<sup>16</sup> 28 U.S.C. § 2671. For example, the Supreme Court has held that the United States is not liable under the FTCA for an independent contractor's negligence in operating a jail. *Logue v. United States*, 412 U.S. 521, 532–33 (1973).

<sup>17</sup> *See United States v. Shearer*, 473 U.S. 52, 56 (1985) (plurality opinion) (“[T]he Government may be held liable for negligently failing to prevent the intentional torts of a non-employee under its supervision.”).

<sup>18</sup> *Sandoval v. United States*, 980 F.2d 1057, 1059 (5th Cir. 1993) (noting that *Logue* “did not rule out liability based on the negligent acts of the Government's employees in placing [an] inmate into the care of [a] contractor”).

<sup>19</sup> 28 U.S.C. § 1346(b)(1) (negligent torts); 28 U.S.C. § 2680(h) (intentional torts).

<sup>20</sup> *Id.*; *see also infra* Questions 9 and 10.

The statute defines investigative and law enforcement officers as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.”<sup>21</sup> The Supreme Court has held that the intentional torts of investigative and law enforcement officers are covered by the FTCA if they arise within the scope of their employment, “regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.”<sup>22</sup>

An intentional tort is one in which the defendant acted with substantial certainty that their action would injure the plaintiff, or with a subjective motive to cause harm.<sup>23</sup> Intentional torts that may be brought against investigative or law enforcement officers include assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process.<sup>24</sup> The FTCA expressly prohibits claims against investigative or law enforcement officers for libel, slander, misrepresentation, deceit, or interference with contract rights.<sup>25</sup>

Immigration-based FTCA claims include, but are not limited to, unlawful detention, wrongful deportation, unlawful arrest, physical abuse, wrongful death, denial of medical services, family separation, and denial of religious freedom.<sup>26</sup> These claims are grounded in state law. *See infra* Questions 9 and 10. Wrongful conduct may implicate both intentional and negligence tort claims. For example, where ICE unlawfully detains a person, practitioners should consider a

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<sup>21</sup> 28 U.S.C. § 2680(h).

<sup>22</sup> *Millbrook v. United States*, 569 U.S. 50, 57 (2013).

<sup>23</sup> *Jandro v. Ohio Edison Co.*, 167 F.3d 309, 313 (6th Cir. 1999); *Miller v. J.D. Abrams Inc.*, 156 F.3d 598, 604 (5th Cir. 1998).

<sup>24</sup> 28 U.S.C. § 2680(h).

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g., Arce v. United States*, 899 F.3d 796 (9th Cir. 2018) (wrongful deportation in violation of court order); *Liranzo v. United States*, 690 F.3d 78 (2d Cir. 2012) (false arrest and imprisonment of U.S. citizen); *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) (deportation of U.S. citizen child); *Rhoden v. United States*, 55 F.3d 428 (9th Cir. 1995) (per curiam) (six-day detention of lawful permanent resident at port of entry); *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (shooting by border patrol agent); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987) (detention and mistreatment of U.S. citizen by INS investigator); *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982) (detention of U.S. citizen at port of entry); *Alvarado v. United States*, No. 16-5028, 2017 U.S. Dist. LEXIS 80894 (D.N.J. May 25, 2017) (detention conditions, including cold, crowded conditions, and constant lighting); *Avalos-Palma v. United States*, No. 13-5481, 2014 U.S. Dist. LEXIS 96499 (D.N.J. July 16, 2014) (wrongful deportation in violation of regulatory stay of removal); *Mayarov v. United States*, 84 F. Supp. 3d 678 (N.D. Ill. 2015) (failure to reasonably investigate citizenship claim); *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012); (wrongful deportation of U.S. citizen); *Badrawi v. DHS*, 579 F. Supp. 2d 249 (D. Conn. 2008) (unlawful arrest and detention of immigrant who was also denied religious freedom and access to medical treatment); *Araujo v. United States*, 301 F. Supp. 2d 1095 (N.D. Cal. 2004) (unlawful arrest and removal); *Adedeji v. United States*, 782 F. Supp. 688 (D. Mass. 1992) (false imprisonment and strip search by customs officials); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (arrest, detention and beating of immigrant by border patrol agent).

claim for false imprisonment (an intentional tort) and a claim for negligent infliction of emotional distress (a negligence tort). Similarly, if a federal officer physically injures a person, practitioners should consider bringing claims for assault and battery (intentional torts) as well as negligent infliction of emotional distress claims (a negligence tort).

The FTCA is the *only* available remedy for medical negligence by employees of the U.S. Public Health Service (PHS). *Bivens* suits cannot be brought against individual PHS employees for medical negligence in a detention facility.<sup>27</sup> As medical care in immigration detention facilities often is handled by private contractors, remedies regarding medical negligence generally are limited by the above discussion of the private contractor exception. *See supra* Question 4.

As further explained below, the United States may, and often does, raise defenses or exemptions to liability. Understanding these defenses and exemptions is critical to FTCA litigation.

**7. Can FTCA claims be filed on behalf of parents and children subjected to family separation policies? What if the two-year statute of limitations for filing an administrative claim has passed?**

Parents and children subjected to family separation carried out by the Trump Administration can file FTCA claims for the physical, mental, and emotional injuries they suffered. Immigration advocates have organized a mass effort to find counsel for these families, explain the FTCA process, and file administrative claims. For further information and assistance, please contact [info@immigrationlitigation.org](mailto:info@immigrationlitigation.org).

At the time President Biden took office on January 20, 2021, approximately 9 FTCA family separation cases had been filed in district court<sup>28</sup> and at least 500 FTCA administrative claims remained pending. It remains to be seen whether and, if so, how the Biden administration or Congress will provide redress to families. Given the extent of the harm, advocates believe families should receive individualized monetary compensation, immigration relief/status, and other appropriate remedial relief.

It is also unclear whether any potential compensation to families will be contingent on whether they filed an FTCA administrative claim. It is theoretically possible that an administrative claim may be required. If the administrative claim is filed after the two-year deadline has passed, the government has the authority to waive the deadline. The individual could also seek equitable tolling of the deadline. *See infra* Question 12 (addressing deadline for filing an administrative claim). For this reason, an administrative claim should be filed even if it is untimely.

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<sup>27</sup> *See Hui v. Castaneda*, 559 U.S. 799, 810–13 (2010). Although a *Bivens* remedy is not available for medical negligence committed by PHS employees, it may be available if the negligence was committed by another medical care provider.

<sup>28</sup> *See, e.g., C.M. v. United States*, No. CV-19-05217-PHX-SRB, 2020 U.S. Dist. LEXIS 164575, (D. Ariz. July 6, 2020) (denying government’s motion to certify the district court’s order denying its motion to dismiss).

## **8. What is the foreign country exception? What if the tort occurred in the United States and DHS subsequently deports the person?**

The FTCA’s foreign country exception, 28 U.S.C. § 2680(k), precludes recovery for “[a]ny claim arising in a foreign country.” The leading Supreme Court decision on the foreign country exception is *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which held that the exception bars suits based on any wrongful acts in a foreign country, even when the actions are a result of decisions made within the United States.

In FTCA litigation, government counsel often tries to argue that if a tort occurred in the United States and DHS subsequently deported the person, the claim is barred under this exception. However, for purposes of the foreign country exception, a claim arises in the place where the injury is suffered.<sup>29</sup> To determine where an injury is suffered, determine where the last event necessary to make an actor liable for the tort takes place.<sup>30</sup> The fact that the plaintiff’s damages arise, in part, from time spent abroad is irrelevant. If the damages flow from an injury suffered inside the United States, the foreign country exception should not apply.

## **9. What state law applies to FTCA claims?**

Under the FTCA, the United States is liable for certain torts to the same extent that a private individual would be liable under similar circumstances.<sup>31</sup> In determining liability, courts must apply the “law of the place where the act or omission occurred,” looking to state tort law.<sup>32</sup> In at least one case, however, a district court held that a state civil rights statute (not a tort statute) that would impose liability upon a private person for wrongful conduct could serve as the basis for an FTCA claim.<sup>33</sup>

## **10. What if there is no state tort that is an exact match?**

The FTCA grants jurisdiction for tort suits against the government “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.”<sup>34</sup> Similarly, the statute states that the United

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<sup>29</sup> *Sosa*, 542 U.S. at 705 (stating that the critical determination is locating the “jurisdiction in which injury was received”) (quotation omitted).

<sup>30</sup> *Id.* (“[A] cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred; i.e., the jurisdiction in which injury was received.”); see also *Roe v. United States*, No. 18-CV-2644 (VSB), 2019 U.S. Dist. LEXIS 43124, at \*13 (S.D.N.Y. Mar.15, 2019) (holding that, for purposes of wrongful deportation claim, the “last act necessary to establish liability” occurred within the United States).

<sup>31</sup> 28 U.S.C. §§ 2674, 1346(b)(1).

<sup>32</sup> 28 U.S.C. § 1346(b)(1); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 478 (1994) (“[W]e have consistently held that § 1346(b)’s reference to the ‘law of the place’ means law of the State—the source of substantive liability under the FTCA.”).

<sup>33</sup> *Sosa Segura v. United States*, 418 F. Supp. 3d 605, 609–13 (E.D. Wash. 2019) (denying motion to dismiss FTCA claim predicated on a violation of a state anti-discrimination law).

<sup>34</sup> 28 U.S.C. § 1346(b)(1).

States shall be liable “in the same manner and to the same extent as a private individual under like circumstances.”<sup>35</sup> Thus, while the FTCA does not waive sovereign immunity for claims based solely on alleged violations of federal law, courts look to whether the duty breached under federal law is *analogous* to a duty recognized under applicable state law.<sup>36</sup> For instance, while *federal* constitutional claims are not cognizable under 28 U.S.C. § 1346(b),<sup>37</sup> a court may consider FTCA claims predicated on a civil statute that imposes tort liability.<sup>38</sup> Courts should apply a broad level of generality in determining whether a state cause of action is analogous.<sup>39</sup> Courts have found such analogues in immigration-based FTCA claims.<sup>40</sup>

Importantly, where the conduct at issue involves “unique governmental functions,” the relevant state law inquiry is *not* whether there is liability on municipal or local governments for the conduct of their agents in similar circumstances, but rather whether the state imposes liability on private persons in similar circumstances.<sup>41</sup>

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<sup>35</sup> 28 U.S.C. § 2674.

<sup>36</sup> See, e.g., *Rayonier Inc. v. United States*, 352 U.S. 315, 318 (1957); *Liranzo v. United States*, 690 F.3d 78, 86 (2d Cir. 2012); *Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001).

<sup>37</sup> *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477–78 (1994) (finding that § 1346(b) does not provide a cause of action for constitutional tort claims because “[b]y definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right”).

<sup>38</sup> *Sosa Segura v. United States*, 418 F. Supp. 3d 605, 609–13 (E.D. Wash. 2019) (denying motion to dismiss FTCA claim predicated on a violation of a state anti-discrimination law).

<sup>39</sup> See, e.g., *United States v. Olson*, 546 U.S. 43, 46 (2005) (“[T]he words ‘like circumstances’ do not restrict a court’s inquiry to the *same circumstances*, but require it to look further afield.”) (quoting S. Rep. No. 1400, 79th Cong., 2d Sess., 32 (1946) (stating that the purpose of the FTCA was to make the tort liability of the United States “the same as that of a private person under like circumstance, in accordance with the local law”); *Belluomini v. United States*, 64 F.3d 299, 303 (7th Cir. 1995) (“Not to be confused with ‘identical circumstances,’ the ‘like circumstances’ standard is not overly stringent, and should be applied broadly so as to achieve the statute’s intended purpose of putting the federal government on equal footing with private entities.”).

<sup>40</sup> See, e.g., *Liranzo*, 690 F.3d at 90–97 (concluding that even though immigration is a “quintessentially federal function,” immigration detention has a private non-federal officer analogue); *A.P.F. v. United States*, No. CV-20-00065-PHX-SRB, 2020 U.S. Dist. LEXIS 247673, at \*6-7 (D. Ariz. July 27, 2020) (recognizing private analogue under Arizona law for FTCA claims based on family separation); *Roe v. United States*, No. 18-CV-2644 (VSB), 2019 U.S. Dist. LEXIS 43124, at \*14-17 (S.D.N.Y. Mar. 15, 2019) (finding private analogue under New York law for disregard or violation of a statutory duty); *Avalos-Palma v. United States*, No. 13-5481, 2014 U.S. Dist. LEXIS 96499, at \*26–37 (D.N.J. July 16, 2014) (recognizing private analogue under New Jersey law for negligence and infliction of emotional distress claims based on wrongful deportation); *but see Watson v. United States*, 865 F.3d 123, 134-35 (2d Cir. 2017) (finding no private analogue for claim that immigration officials failed to follow policy for investigating a claim to U.S. citizenship).

<sup>41</sup> See *Olson*, 546 U.S. at 45–46; *Indian Towing Co. v. United States*, 350 U.S. 61, 64



Because FTCA claims implicate state law, immigration attorneys may wish to consult with an attorney specializing in these areas.

## 11. What type of compensation is available under the FTCA?

Monetary damages are available under the FTCA,<sup>42</sup> and are assessed “in accordance with the law of the place where the act or omission occurred.”<sup>43</sup> In evaluating the claimant’s damages, the agency and/or the court may consider relevant evidence, including, but not limited to, medical reports and expenses and/or a statement of expected future expenses.<sup>44</sup>

The amount of damages recoverable in a federal lawsuit generally is limited to the amount stated in the FTCA administrative claim.<sup>45</sup> Exceptions to this cap exist where intervening facts or newly discovered evidence “not reasonably discoverable” at the time the claim was filed justify a larger recovery.<sup>46</sup> Further, a judgment on an FTCA claim is a complete bar to recovery against the employee for other claims based on the same conduct.<sup>47</sup> Judgment on an FTCA claim, therefore, bars recovery on *Bivens* claims.<sup>48</sup>

Punitive damages are not available under the FTCA.<sup>49</sup> In addition, the FTCA does not authorize a court to issue injunctive relief. However, nothing prevents the government from settling FTCA claims for immigration relief, e.g., providing a U visa certification, granting deferred action, foregoing initiation of removal proceedings, or staying deportation. *See also supra* Question 2.

### *Filing an FTCA Administrative Claim*

## 12. What is the deadline for filing an FTCA administrative claim?

Before filing an FTCA lawsuit in federal court, a claimant first must exhaust administrative remedies by filing an administrative claim.<sup>50</sup> FTCA administrative claims must be filed within

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(1955) (rejecting the government’s contention that it was not liable “for negligent performance of ‘uniquely governmental functions’”); *Rayonier, Inc.*, 352 U.S. at 318–19 (rejecting the claim that the scope of FTCA liability for uniquely governmental functions depends on whether state law imposes municipal or government liability for negligence of their agents).

<sup>42</sup> 28 U.S.C. § 2674.

<sup>43</sup> 28 U.S.C. §§ 1346(b), 2672.

<sup>44</sup> 28 C.F.R. § 14.4.

<sup>45</sup> 28 U.S.C. § 2675(b); *see also infra* Question 14.

<sup>46</sup> 28 U.S.C. § 2675(b); *see also Zurba v. United States*, 318 F.3d 736, 738–44 (7th Cir. 2003) (analyzing when plaintiff may recover damages in excess of the amount stated in administrative claim); *Lebron v. United States*, 279 F.3d 321, 325–31 (5th Cir. 2002) (same); *Michels v. United States*, 31 F.3d 686, 687–89 (8th Cir. 1994) (same).

<sup>47</sup> 28 U.S.C. § 2676; 28 C.F.R. § 14.10(b).

<sup>48</sup> *See, e.g., Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994); *Sanchez v. Rowe*, 870 F.2d 291, 295–96 (5th Cir. 1989); *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987).

<sup>49</sup> 28 U.S.C. § 2674.

<sup>50</sup> 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2.

two years after the claim accrues.<sup>51</sup> That two-year deadline may be equitably tolled.<sup>52</sup>

Under the FTCA, a claim generally accrues when the injury occurs, but in some cases it may not accrue until a claimant knows or reasonably should know of an injury's existence and its cause.<sup>53</sup>

Federal courts lack jurisdiction over FTCA claims that have not been exhausted.<sup>54</sup>

### 13. How is an FTCA administrative claim presented?

A claim may be filed in writing, using Standard Form 95 (SF-95) or a letter.<sup>55</sup> The form or letter *must* provide both a written notification of the incident and a specific amount of monetary damages claimed (also called a sum certain).<sup>56</sup> Practitioners should carefully consider the amount of monetary damages claimed in the administrative claim because, with few exceptions, a judgment in federal court cannot exceed the amount stated in the administrative claim.<sup>57</sup>

If an attorney prepares the claim, it must be presented in the claimant's name, be signed by the attorney, and show the attorney's title or legal capacity with evidence of his or her authority to bring the claim on the claimant's behalf.<sup>58</sup> If filing administrative claims on behalf of a family, each family member must have a separate claim. If the claim is being filed on behalf of a minor, the claim should be signed by a parent or legal guardian.<sup>59</sup>

Importantly, an administrative claim need not identify the alleged torts under state law.

Sample administrative claims against CBP are available on [www.holdcbpaccountable.org](http://www.holdcbpaccountable.org). NILA and NIPNLG members may request samples by contacting [info@immigrationlitigation.org](mailto:info@immigrationlitigation.org) or [hbonilla@nipnlg.org](mailto:hbonilla@nipnlg.org).

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<sup>51</sup> 28 U.S.C. § 2401(b).

<sup>52</sup> *United States v. Kwai Fun Wong*, 575 U.S. 402, 405, 412 (2015).

<sup>53</sup> *See United States v. Kubrick*, 444 U.S. 111, 118–22 (1979); *Sanchez v. United States*, 740 F.3d 47, 52 (1st Cir. 2014); *Ortega v. United States*, 547 F. App'x 384, 387 (5th Cir. 2013); *Flores v. United States*, 689 F.3d 894, 901 (8th Cir. 2012). In a wrongful death case, a claim generally accrues at the time of death. *Id.* at 901.

<sup>54</sup> *See, e.g., Sanchez*, 740 F.3d at 50; *Flores*, 689 F.3d at 901; *Barrett v. United States*, 462 F.3d 28, 36–38 (1st Cir. 2006) (dismissing FTCA claim where plaintiff filed “the complaint in the absence of agency action and in less than six months of filing her administrative tort claim”).

<sup>55</sup> 28 U.S.C. § 2401(b); 28 C.F.R. § 14.2(a). Form SF-95 is available at: <http://www.gsa.gov/portal/forms/download/116418>.

<sup>56</sup> *Id.*; *see also Adams v. United States*, 615 F.2d 284, 292–93 (5th Cir. 1980) (finding presentation of claim satisfied provided the agency has sufficient notice of the incident to investigate and the claim states a sum of certain damages).

<sup>57</sup> 28 U.S.C. § 2675(b). Exceptions to this cap exist where intervening facts or newly discovered evidence “not reasonably discoverable” at the time the claim was filed justify a larger recovery. *Id.*; *see also supra* Question 11.

<sup>58</sup> 28 C.F.R. § 14.2(a).

<sup>59</sup> *Id.*

#### **14. How does one decide the amount of damages to seek in an administrative claim?**

Damages assessments can be challenging, particularly because the amount listed on the administrative claim generally acts as a cap on the amount of recovery, *see supra* Question 13, and, at the time of filing the administrative claim, counsel has not had the benefit of discovery. Indicating an amount that is too low may limit the amount of recovery if later developments or discovery reveal additional evidence of damages. However, indicating an amount that is too high may signal an unrealistic assessment of damages. Counsel should carefully weigh the specifics of each case, and should manage client expectations about ultimate recovery, particularly if listing a higher amount.

In calculating damages, it is advisable to conduct research into comparable awards.

The U.S. Treasury Department’s Judgment Fund, available at: <https://fiscal.treasury.gov/judgment-fund/> allows users to search administrative claim awards and settlement amounts. This can be a useful source to help inform the calculation of damages.

Westlaw and LEXIS have legal databases on jury verdicts and settlements that provide another useful source of information on damages amounts for the same or comparable torts awarded by the relevant state courts or in settlement agreements.

Prison Legal News also has a searchable database of articles on verdicts and settlements. It is available at: <https://www.prisonlegalnews.org/Search.aspx>.

#### **15. Where is an FTCA administrative claim filed?**

An FTCA administrative claim must be filed with the federal agency “whose activities gave rise to the claim.”<sup>60</sup> To ensure compliance with the statute of limitations, practitioners should file an administrative claim arising in the immigration context with (1) the DHS Office of General Counsel and (2) general counsel for the DHS subagency employing the officer at the time of the act or omission that forms the basis of the claim.

If the claim is related to medical care, send a copy of the claim to the Department of Health and Human Services if the medical care was or is believed to have been provided by the U.S. Public Health Service.

For service addresses, please see *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation* (May 28, 2020), a practice advisory by NILA, NIPNLG, and the

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<sup>60</sup> 28 C.F.R. § 14.2(b)(1). Although there are currently no specific regulations or written guidance for public distribution regarding where to send immigration-related FTCA administrative claims, such claims arguably fall under the regulations governing service of summonses and complaints in litigation against DHS and its subdivision agencies. *See also* 6 C.F.R. §§ 5.41, 5.42 (providing for service of litigation documents, including documents related to administrative actions, on the DHS Office of General Counsel).

American Immigration Council (AIC).<sup>61</sup>

The receiving agency will designate a lead agency after receipt of an administrative claim.<sup>62</sup>

## **16. Can a claimant amend an administrative claim?**

Yes, a claimant may amend an administrative claim at any time before the agency's final disposition or before filing suit in federal court, provided that the amendment is in writing and signed by the claimant or counsel.<sup>63</sup> The agency has six months from the filing of the amendment to make a final disposition.<sup>64</sup>

## **17. What happens after the administrative claim is filed?**

After the administrative claim is filed with the appropriate agency or agencies, counsel may receive a letter acknowledging receipt of the claim and assigning a point of contact. Practitioners report that receipt of an acknowledgement notice is taking several weeks to months and that, in some cases, none is provided.

In general, the receiving agency may take one of the following three approaches to the claim:

- It may send a notice denying the claim. This final denial starts the six-month clock to file an action in federal court (*see infra* Question 18).
- It may do nothing. As long as there is no final denial of the claim, after the expiration of the agency's six-month review period, an action may be filed in federal court at any time without limitation.
- It may engage in settlement negotiations, e.g., making a settlement offer or asking for further information to assess settlement possibilities. This back-and-forth process can take the form of emails, letters, telephone calls, or some combination of the three. If settlement is reached, the parties sign a formal settlement agreement. If settlement is not reached, the agency issues a final denial notice (thus starting the six-month clock) or, in some circumstances, does nothing.

Counsel who wish to begin settlement negotiations have the option of affirmatively reaching out to agency counsel. In addition, if settlement negotiations are not proving fruitful and counsel is eager to file suit in federal court, counsel can ask agency counsel to issue a final notice denying the administrative claim.

If the agency denies a claim, a claimant may file a written request with the agency for

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<sup>61</sup> Available at: <https://immigrationlitigation.org/wp-content/uploads/2020/05/Sue-and-Serve-PA.5.29.2020-Update-FINAL-NILA.pdf>.

<sup>62</sup> *See generally* 28 C.F.R. § 14.2(b).

<sup>63</sup> 28 C.F.R. § 14.2(c).

<sup>64</sup> *Id.*

reconsideration.<sup>65</sup>

### *Litigating FTCA Claims in Federal Court*

#### **18. What is the deadline for filing an FTCA lawsuit in federal court?**

Federal lawsuits must be filed within six months after the date on which the agency mails, by certified or registered mail, written notice of the final denial of the claim.<sup>66</sup> This six-month deadline is non-jurisdictional and may be equitably tolled.<sup>67</sup>

If the agency fails to “make a final disposition of a claim” within six months of filing the administrative claim, an amended claim, or a request of reconsideration of a final denial, the claimant may deem the agency’s failure to act as a final denial of the claim.<sup>68</sup> There is no deadline for filing a lawsuit in federal court when the agency fails to make a final disposition.<sup>69</sup>

#### **19. Who is the defendant in an FTCA lawsuit and on whom is the complaint served?**

The United States is always the defendant in FTCA actions.<sup>70</sup> If an FTCA claim is brought against individuals or federal agencies, the court will dismiss them.

In lawsuits against the United States, counsel must serve the local U.S. Attorney’s Office, the U.S. Attorney General, and the U.S. agency or officer whose actions are implicated by the complaint.<sup>71</sup> To serve DHS or a DHS officer, the complaint and summons must be sent to the DHS Office of the General Counsel.

For more information on serving a federal complaint, *see* the NILA, NIPNLG, and AIC practice advisory on this topic.<sup>72</sup>

#### **20. Where is a federal FTCA lawsuit filed?**

FTCA lawsuits are filed in the U.S. district court where the plaintiff resides or where the relevant act or omission occurred.<sup>73</sup>

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<sup>65</sup> 28 U.S.C. § 14.9(b).

<sup>66</sup> 28 U.S.C. §§ 2401(b), 2675(a); 28 C.F.R. § 14.9(a).

<sup>67</sup> *United States v. Kwai Fun Wong*, 575 U.S. 402, 405, 412 (2015).

<sup>68</sup> 28 U.S.C. § 2675(a); 28 C.F.R. §§ 14.2(c), 14.9(b).

<sup>69</sup> 28 U.S.C. § 2675(a) (stating that the agency’s failure to make a final disposition within six months of filing “shall, at the option of the claimant *any time thereafter*, be deemed a final denial of the claim”) (emphasis added).

<sup>70</sup> *See* 28 U.S.C. § 1346(b)(1).

<sup>71</sup> Fed. R. Civ. P. 4(i)(1)(A)–(C).

<sup>72</sup> Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation (May 28, 2020), available at: <https://immigrationlitigation.org/wp-content/uploads/2020/05/Sue-and-Serve-PA.5.29.2020-Update-FINAL-NILA.pdf>.

<sup>73</sup> 28 U.S.C. § 1402(b) (setting forth venue requirements for FTCA claims); 28 U.S.C. § 1346(b)(1) (conferring district courts with exclusive jurisdiction over FTCA claims).

In some, though not all, FTCA cases which are filed in districts in which the noncitizen plaintiff resides, the United States has moved to dismiss or transfer the case for improper venue. It argues that noncitizens do not “reside” in the United States. Because 28 U.S.C. § 1402(b), the venue provision applicable to FTCA actions, does not define the term “reside,” some courts have looked instead to the general venue provision for actions in federal district courts.<sup>74</sup> This provision provides for “all” venue purposes that:

a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled.

28 U.S.C. § 1391(c)(1). At least two district courts have found this language to plainly include all noncitizens.<sup>75</sup> Both courts also rejected the United States’ additional argument that noncitizens who were not lawful permanent residents were not “domiciled” in the district because they could not show an intent to reside indefinitely in the United States. Instead, the courts found that the immigration status of each plaintiff—withholding of removal in one case and parole and a pending asylum application in the second—was sufficient to demonstrate the intent to remain in the United States.<sup>76</sup>

However, at least one court accepted the United States’ argument and transferred the portion of the plaintiff’s FTCA claims that arose in Texas to that district.<sup>77</sup>

In other cases, the United States has moved to transfer venue under 28 U.S.C. § 1404(a), which permits a court to transfer a case to any other district in which the case may have been brought if it serves the convenience of the parties and witnesses and is in the interest of justice. In reviewing such motions, courts consider several private and public interest factors.<sup>78</sup>

## 21. What is the judgment bar?

Designed to prevent duplicative lawsuits arising from a single event, the “judgment bar,” 28 U.S.C. § 2676, provides that “once a plaintiff receives a judgment (favorable or not) in an FTCA suit, [they] generally cannot proceed with a suit against an individual employee based on the same underlying facts.”<sup>79</sup> Specifically, the judgment bar “forecloses a claim against a federal employee when: (1) there is a ‘judgment’; (2) that judgment came in ‘an action under section 1346(b)’; and (3) that action was based on ‘the same subject matter’ as the claims against the

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<sup>74</sup> See, e.g., *Alvarado v. United States*, No. 16-5028, 2017 U.S. Dist. LEXIS 80894, \*5–9 (D. N.J. May 25, 2017); *Flores v. United States*, 108 F. Supp. 3d 126, 130–31 (E.D. N.Y. 2015).

<sup>75</sup> *Id.*

<sup>76</sup> *Alvarado*, 2017 U.S. Dist. LEXIS 80894, at \*9–12; *Flores*, 108 F. Supp. 3d at 131.

<sup>77</sup> *Hernandez Najera v. United States*, No. 1:16cv459 (JCC/JFA), 2016 U.S. Dist. LEXIS 162110 (E.D. Va. Nov. 22, 2016).

<sup>78</sup> See, e.g., *Alvarado*, 2017 U.S. Dist. LEXIS 80894, at \*13; *Doe v. United States*, No. 3:16-cv-0856, 2017 U.S. Dist. LEXIS 178567, \*4–5 (M.D. Tenn. Oct. 26, 2017).

<sup>79</sup> *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847 (2016).

federal employee.”<sup>80</sup>

The bar applies to claims brought in separate actions and to claims brought in the same suit,<sup>81</sup> regardless of whether the FTCA judgment is for or against the plaintiff.<sup>82</sup>

Importantly, the judgment bar does not prevent bringing claims against both the government and an individual federal employee.<sup>83</sup> Instead, it “implicate[s] whether one may pursue those claims to judgment.”<sup>84</sup> Therefore, the judgment bar will block claims against individuals if the FTCA claims reach judgment first. Thus, if the claims are brought in separate lawsuits, it does not matter which suit is filed first. Moreover, if the claims are brought in the same suit, at least six circuits have held that the judgment bar nevertheless applies to block the individual claims.<sup>85</sup> The Seventh Circuit even applied the bar retroactively to claims resolved before an FTCA claim.<sup>86</sup>

Whether the judgment bar applies is an active topic of litigation, so check the law of the applicable jurisdiction. In its last decision addressing the scope of the judgment bar, the Supreme Court decided that a district court’s dismissal of an FTCA action on discretionary function grounds under 28 U.S.C. § 2680(a) did not fit within the judgment bar and, thus, did not preclude *Bivens* claims in the same case.<sup>87</sup> As of this writing, the Supreme Court is considering whether the dismissal of FTCA claims for lack of a “private analogue” under relevant state law operates as a “judgment” within the meaning of the judgment bar, therefore precluding *Bivens* claims against the individual federal employees involved. The case also raises the question of whether the judgment bar applies to claims filed within the same suit, as opposed to claims filed in separate actions.<sup>88</sup>

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<sup>80</sup> *Elsharkawi v. United States*, No. 19-56448, 2020 U.S. App. LEXIS 32074, at \*2–3 (9th Cir. Oct. 9, 2020) (citing 28 U.S.C. § 2676).

<sup>81</sup> *Manning v. United States*, 546 F.3d 430, 434–35 (7th Cir. 2008); *see also Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991) (“The FTCA . . . imposes an election of remedies.”).

<sup>82</sup> *Hoosier Bancorp of Ind., Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996).

<sup>83</sup> *See Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (stating that 1974 amendments to the FTCA made “it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action”).

<sup>84</sup> *Manning*, 546 F.3d at 435.

<sup>85</sup> *See Unus v. Kane*, 565 F.3d 103, 121–22 (4th Cir. 2009); *Harris v. United States*, 422 F.3d 322, 333–35 (6th Cir. 2005); *Manning v. United States*, 546 F.3d 430, 434–35 (7th Cir. 2008); *White v. United States*, 959 F.3d 328, 333 (8th Cir. 2020); *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858–59 (10th Cir. 2005); *cf. Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (barring state tort claims against federal officers following FTCA judgment).

<sup>86</sup> *Manning*, 546 F.3d at 436–38.

<sup>87</sup> *Simmons*, 136 S. Ct. at 1847–48.

<sup>88</sup> *Brownback v. King*, No. 19-546 (argued Nov. 9, 2020).

## 22. Should FTCA and *Bivens* claims be brought together?

While the FTCA generally bars recovery in other civil actions for claims arising from the same conduct as that subject to an FTCA claim, *see supra* Question 21, it does not bar bringing a *Bivens* action against federal employees based on constitutional violations they committed.<sup>89</sup>

In the immigration context, FTCA and *Bivens* claims can be brought together but need not be. Because a judgment in an FTCA action will almost certainly bar recovery in the *Bivens* action, counsel should carefully consider whether it is necessary to bring both FTCA and *Bivens* claims and, if both claims are brought, which claim to pursue before trial. The following are factors counsel might consider when making these decisions:

- Payment of damages: FTCA damages are paid by the United States government, not the individual employee, and thus are more likely to result in actual payment of damages.<sup>90</sup>
- Amount of damages: State law limits on damages—such as caps on non-economic damages—apply to FTCA claims, whereas there are no such limits under *Bivens*.
- Adjudicator: FTCA claims are heard before a district court judge and may not be heard by a jury, while *Bivens* claims may be presented to a jury. If a jury is likely to be more favorable than the judge and/or if *Bivens* allows for greater damages recovery, then practitioners should take special care to avoid judgment bar implications (*see supra* Question 21).
- Circuit case law/nature of the claim: The availability of *Bivens* actions in the immigration context has become increasingly difficult since the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Counsel should research the state of *Bivens* law in the relevant circuit.
- Pleading strategy: When bringing both claims, consider filing the *Bivens* claims well in advance of the FTCA claims to allow time for resolution of the claim, as this may help avoid the judgment bar. If the *Bivens* claim is not resolved before the FTCA claims are ripe to include in an amended complaint, counsel should consider dismissing either the FTCA claims or *Bivens* claims without prejudice if there is a risk that the court might dismiss one of the claims on the merits.<sup>91</sup>

## 23. What are some other claims that can be brought with an FTCA claim?

Claims under other remedial statutes, such as the Torture Victim Protection Act and 42 U.S.C. § 1983 (against state or municipal defendants) also may be brought with an FTCA claim. It is

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<sup>89</sup> 28 U.S.C. § 2679(b); 28 C.F.R. § 14.10(b).

<sup>90</sup> *See* 28 C.F.R. § 50.15(c) (discussing circumstances in which the U.S. Department of Justice will indemnify employees for damage awards against them and when it will settle a personal damages claims against employees).

<sup>91</sup> *See* Fed. R. Civ. P. 41(a)(1).



important to remember, however, that a claimant must first file an administrative claim before filing an FTCA claim in federal district court. If the statute of limitations for other claims is approaching, it is advisable to timely file the complaint containing the non-FTCA claims and later move to amend the complaint to add the ripe FTCA claim or to file a separate action asserting the FTCA claims and move to consolidate the two actions.

### *Common Defenses to FTCA Claims*

#### **24. Are defenses available to the United States?**

Yes. The FTCA provides a limited waiver of sovereign immunity, 28 U.S.C. § 1346(b)(1), with limited exceptions set forth at 28 U.S.C. § 2680. The most common defenses asserted by the United States in immigration FTCA cases are lack of subject matter jurisdiction, the discretionary function exception, the due care exception, and the law enforcement proviso. Additionally, the United States frequently defends by asserting that there is no private analogue. Each potential government argument is discussed below.

In addition, the United States may assert any defense that otherwise would have been available to the employee whose act gave rise to the claim.<sup>92</sup> This includes defenses under applicable state law and any defense based on legislative or judicial immunity. For example, in a negligence claim, the United States would be able to assert any defense of comparative or contributory negligence that would have been available if the employee had been sued in that jurisdiction.

#### **25. What is the due care exception?**

Among the exceptions to the FTCA's waiver of sovereign immunity is the "due care" exception found in 28 U.S.C. § 2680(a), which, in relevant part, provides that the waiver of sovereign immunity shall not apply to:

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.

28 U.S.C. § 2680(a).

The government bears the burden of proving that the due care exception applies.<sup>93</sup> In general, courts apply a two-part test to determine whether the due care exception applies.<sup>94</sup> The due care

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<sup>92</sup> 28 U.S.C. § 2674.

<sup>93</sup> *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992); *Carlyle v. U.S. Dep't of Army*, 674 F.2d 554, 556 (6th Cir. 1982) (holding that United States has the burden with respect to the discretionary function exception, also found in § 2680(a)). *But see Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005).

<sup>94</sup> *See, e.g., Welch*, 409 F.3d at 652; *Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995); *Ferguson v. United States*, No. 15cv1253 JM (DHB), 2016 U.S. Dist. LEXIS 125115, at \*11–12 (S.D. Cal. Sept. 14, 2016).

exception will apply if, and only if, (1) “the statute or regulation in question specifically pr[e]scribes a course of action for an officer to follow,” and (2) “the officer exercised due care in following the dictates of that statute or regulation.”<sup>95</sup>

As a practical matter, the test is subject to a narrow construction. Absent a specific statute or regulation mandating the action or omission underlying the claim, the first prong is not met. As to the second prong, when considering whether federal officers acted with due care, courts must assess whether the officer acted reasonably in carrying out the statutory or regulatory obligation.<sup>96</sup> In general, the United States seldom invokes the due care exception in immigration cases. However, its more recent attempts to invoke the exception to seek dismissal of two cases involving family separation claims were unsuccessful.<sup>97</sup>

## 26. What is the discretionary function exception?

A federal district court has no jurisdiction under the FTCA for claims based on an agency’s or employee’s exercise or failure to exercise a discretionary function or duty, even if the discretion was abused.<sup>98</sup> Where this exception is found to apply, the case will be dismissed, and the government will not be held liable.

To invoke the discretionary function exception, some courts have recognized that the United States bears the burden of proof.<sup>99</sup> For the discretionary function exception to apply: (1) the alleged conduct must not be governed by mandatory law, but rather involve an element of judgment or choice; and (2) the judgment exercised must have been based on public policy considerations.<sup>100</sup> Courts examine whether the judgment was the kind of discretionary function

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<sup>95</sup> *Welch*, 409 F.3d at 652.

<sup>96</sup> *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (“‘Due care’ implies at least some minimal concern for the rights of others.”); *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1161 (1st Cir. 1987) (“The relevant question is one of reasonableness.”); *see also, e.g., Lyttle v. United States*, 867 F. Supp. 2d 1256, 1299-1300 (M.D. Ga. 2012) (finding that the due care exception did not apply where ICE officers were required to, but did not, take certain actions when the plaintiff made citizenship claims).

<sup>97</sup> *A.P.F. v. United States*, No. CV-20-00065-PHX-SRB, 2020 U.S. Dist. LEXIS 247673, at \*7–9 (D. Ariz. July 27, 2020); *C.M. v. United States*, No. CV-19-05217-PHX-SRB, 2020 U.S. Dist. LEXIS 164575, at \*9–12 (D. Ariz. July 6, 2020).

<sup>98</sup> 28 U.S.C. § 2680(a).

<sup>99</sup> *See, e.g., Merando v. United States*, 517 F.3d 160, 164 (3d Cir. 2008); *Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008). *But see, e.g., Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005) (holding that the plaintiff bears the burden of proof). *See also Walen v. United States*, 246 F. Supp. 3d 449, 456 n.6 (D.D.C. 2017) (discussing division of authority and listing cases).

<sup>100</sup> *United States v. Gaubert*, 499 U.S. 315, 322–27 (1991); *United States v. S.A. Empresa de Viacao Aera Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813–14 (1984). *See also Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987) (“[Law enforcement] decisions do not involve the sort of social, economic, and political policy choices that Congress intended to exempt from tort liability.”).

that the exception was designed to protect.<sup>101</sup>

The exception does not apply if a statute, regulation, or policy prescribes a course of action and does not permit an employee's exercise of discretion.<sup>102</sup> Thus, as courts commonly hold, it does not apply when the challenged government conduct is contrary to "a mandatory directive."<sup>103</sup> Moreover, the majority of courts have found that the exception does not apply if the alleged conduct violates the Constitution, on the basis that a federal employee has no discretion to violate the Constitution.<sup>104</sup> However, the Seventh Circuit has ruled otherwise.<sup>105</sup>

Several courts have applied the exception to bar immigration-related claims.<sup>106</sup> Other courts have rejected its application to certain claims.<sup>107</sup> It is advisable to research the exception's

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<sup>101</sup> *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

<sup>102</sup> *Id.*; see also *Munyua v. United States*, No. C-03-04538 EDL, 2005 U.S. Dist. LEXIS 11499, at \*13–21 (N.D. Cal. Jan. 10, 2005) (finding that the discretionary function exception did not apply where federal statutes and regulations imposed mandatory duties for certain actions on immigration officers).

<sup>103</sup> See, e.g., *Sanders v. United States*, 937 F.3d 316, 329 (4th Cir. 2019) (holding that even internal agency operating procedures may "remov[e] any discretion from the task at hand and articulat[e] a mandatory directive that must be followed at the risk of incurring liability").

<sup>104</sup> *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009); *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975); *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988), cert. denied, 487 U.S. 1235 (1988); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (per curiam); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986).

<sup>105</sup> *Kiiskila v. United States*, 466 F.2d 626, 627–28 (7th Cir. 1972) (per curiam).

<sup>106</sup> See, e.g., *Ayala v. United States*, 982 F.3d 209, 215-18 (4th Cir. 2020) (finding that "[d]iscretion lies at the heart of DHS law enforcement" and barring tort claims arising from the arrest, detention and deportation of a U.S. citizen); *Tsolmon v. United States*, 841 F.3d 378, 383 (5th Cir. 2016) (finding that investigation into plaintiff's immigration status fell within exception because it involved numerous discretionary choices); *Castro v. United States*, 608 F.3d 266, 268 (5th Cir. 2010), cert. denied, 562 U.S. 1168 (2011) (barring claim for negligent deportation claim of U.S. citizen child where allowing citizen child to "accompany" father was a policy choice not governed by regulation or law); *Xue Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010) (applying discretionary function exception to supervisor's failure to discipline where discipline not required); *Medina*, 259 F.3d at 226-29 (barring claims for assault, battery, malicious prosecution and false arrest based on finding that ICE agents' arrest and detention decisions were discretionary); *Adras v. Nelson*, 917 F.2d 1552, 1555-57 (11th Cir. 1990) (barring claim by Haitian refugees for unlawful detention based on INS's discretion to detain).

<sup>107</sup> See, e.g., *Vickers v. United States*, 228 F.3d 944, 951-53 (9th Cir. 2000) (finding that failure to institute an investigation into a shooting was not discretionary conduct); *Plascencia v. United States*, No. EDCV 17-02515 JGB(SP), 2018 U.S. Dist. LEXIS 229246, \*17-24 (C.D. Cal. May 25, 2018) (denying motion to dismiss based on plausible allegations that the arrest violated the Constitution); *Mayorov v. United States*, 84 F. Supp. 3d 678, 689-93 (N.D. Ill. 2015) (finding that the exemption did not bar negligence claim related to issuance of a detainer);

applicability before filing an FTCA claim and assess whether the relevant conduct is the result of either a constitutional violation or the violation of a mandatory legal/regulatory duty.

**27. What is the law enforcement proviso and how does it interact with the discretionary function exception?**

The law enforcement proviso is an exception to the exemption to the FTCA’s waiver of sovereign immunity over certain intentional torts. Under the proviso, the United States is liable for certain intentional torts committed by investigative and law enforcement officers.<sup>108</sup>

A number of courts have considered the interplay between this provision and the discretionary function exception. Five courts of appeals have held that the two provisions operate separately. Thus, these courts have concluded that the United States remains protected from liability for discretionary conduct even if committed by an investigative or law enforcement official.<sup>109</sup>

The Eleventh Circuit is the only court of appeals to have ruled that the discretionary function exception does not bar liability for intentional torts committed by investigative and law enforcement officers.<sup>110</sup> Finding that the two provisions conflicted, the court applied tools of statutory interpretation and concluded that the law enforcement proviso trumped the discretionary function exception.<sup>111</sup>

**28. Does the Immigration and Nationality Act bar jurisdiction over FTCA claims?**

The United States often files motions to dismiss FTCA actions based on a claim that the district court lacks jurisdiction under 8 U.S.C. § 1252(g). This section purports to bar jurisdiction over any case “arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen].”

As an initial matter, any such argument conflicts with Congress’ contemplation of the availability of civil actions for constitutional violations.<sup>112</sup>

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*Makowski v. United States*, 27 F. Supp. 3d 901, 918-19 (N.D. Ill. 2014) (denying motion to dismiss based on plausible allegations that DHS and ICE violated policies relating to detainees); *Mancha v. ICE*, No. 1:06-CV-2650-TWT, 2009 U.S. Dist. LEXIS 27620, \*9-14 (N.D. Ga. Mar. 31, 2009) (finding that exemption did not apply because plaintiff alleged that agents violated the Constitution); *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 274-75 (D. Conn. 2008) (denying motion to dismiss where allegation was that arrest violated the Constitution).

<sup>108</sup> 28 U.S.C. § 2680(h); *see also supra* Questions 4 and 6.

<sup>109</sup> *See Linder v. United States*, 937 F.3d 1087, 1089 (7th Cir. 2019) (citing and joining the Fourth, Fifth, Ninth, and D.C. Circuits in holding that “discretionary acts by law-enforcement personnel remain outside the FTCA by virtue of [the discretionary function exception]”).

<sup>110</sup> *Nguyen v. United States*, 556 F.3d 1244, 1250–57 (11th Cir. 2009); *accord Paret-Ruiz v. United States*, 943 F. Supp. 2d 285, 290 (D.P.R. 2013) (adopting the reasoning of *Nguyen*); *Moher v. United States*, 875 F. Supp. 2d 739, 766 (D. Mich. 2012) (same).

<sup>111</sup> *Nguyen*, 556 F.3d at 1252–53.

<sup>112</sup> *See Lanuza v. Love*, 899 F.3d 1019, 1030–31 (9th Cir. 2017) (citing 8 U.S.C. §

Moreover, as several courts have recognized, there are strong arguments that § 1252(g) does not bar review of FTCA actions. First, the Supreme Court held in *Reno v. American-Arab Anti-Discrimination Committee (AADC)* that § 1252(g) does not apply “to all claims arising from deportation proceedings.”<sup>113</sup> Instead, it must be read narrowly as applying only to the three discrete events itemized in the statute.<sup>114</sup> Moreover, the Court emphasized the discretionary nature of the three itemized events.

In accord with *AADC*, numerous courts have construed § 1252(g) narrowly.<sup>115</sup> In some instances, courts have concluded that the challenged action is too attenuated from the commencement or adjudication of removal proceedings or the execution of a removal order to “arise” from such an event.<sup>116</sup> Still, other courts have distinguished between challenges to an agency’s authority to act and discretionary decisions made pursuant to uncontested authority, concluding that § 1252(g) barred review of only the latter.<sup>117</sup> Thus, some courts have held that, because agents have no

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1357(g)(8)).

<sup>113</sup> 525 U.S. 471, 482 (1999).

<sup>114</sup> *Id.* at 482 (rejecting the “unexamined assumption that § 1252(g) covers the universe of deportation claims”); *id.* at 485 (“Section 1252(g) seems clearly designed to give some measure of protection to ‘no deferred action’ decisions and similar *discretionary* determinations.”) (emphasis added); *id.* at 485 n.9 (“Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.”); *id.* at 487 (“It is entirely understandable, however, why Congress would want only the discretion-protecting provision of § 1252(g) applied even to pending cases: because that provision is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings.”).

<sup>115</sup> *See, e.g., Jama v. INS*, 329 F.3d 630, 632-33 (8th Cir. 2003) (finding that § 1252(g) does not preclude review of the Attorney General’s interpretation of the removal statute), *aff’d on other grounds*, 543 U.S. 335 (2005).

<sup>116</sup> *See, e.g., Alvarez v. ICE*, 818 F.3d 1194, 1205 (11th Cir. 2016) (“Quite simply, a claim that arises from the decision to indefinitely detain [a noncitizen]—and thus, by definition, never to remove him—cannot arise from the decision to execute removal.”); *Artiga Carrero v. Farrelly*, 270 F. Supp. 3d 851, 877–78 (D. Md. 2017) (finding § 1252(g) barred review of arrest of plaintiff with a final removal order but did not bar review of claim related to agent’s entry of the final order into national crime database); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1068–69 (N.D. Ill. 2007) (finding § 1252(g) barred review of arrest and detention which were a “direct outgrowth of the decision to commence proceedings” but did not bar review of the 12-hour pre-arrest interrogation which preceded the decision to commence proceedings).

<sup>117</sup> *See, e.g., Arce v. United States*, 899 F.3d 796, 800–01 (9th Cir. 2018) (interpreting § 1252(g) narrowly and finding review over government’s removal of plaintiff in violation of Ninth Circuit’s stay order, explaining that plaintiff’s claims arise not from the execution of the removal order, but from its violation); *Garcia v. Att’y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009) (finding that § 1252(g) is “not implicated” where the petitioner was “challenging the government’s very *authority* to commence [removal] proceedings”); *United States v. Hovsepian*, 359 F.3d 1144, 1155-56 (9th Cir. 2004) (en banc) (same); *Madu v. Att’y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) (finding court had jurisdiction over a constitutional challenge to detention and impending removal because § 1252(g) “does not proscribe substantive review of the underlying legal bases for [ ] discretionary decisions and actions”); *see also Mustata v. U.S.*

authority to violate the law, the unlawful commencement of proceedings or execution of a removal order remains subject to judicial review.<sup>118</sup>

While these cases arise in a variety of procedural postures—habeas petitions, petitions for review, and claims for both injunctive and monetary relief—the interpretation of § 1252(g) does not depend upon the nature of the case.<sup>119</sup> Notwithstanding *AADC*'s instruction to read § 1252(g) narrowly, courts have found it to bar review in a number of cases.<sup>120</sup>

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*Dep't of Justice*, 179 F.3d 1017, 1022 (6th Cir. 1999) (holding § 1252(g) does not bar review of ineffective assistance of counsel claim and noting that petitioners “are not claiming that the Attorney General should grant them discretionary, deferred-action-type relief”); *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005) (finding that § 1252(g) does not bar jurisdiction over a challenge to the constitutionality of the statutory scheme allowing Attorney General the discretion to choose between regular and expedited removal proceedings).

<sup>118</sup> See, e.g., *Lanuza v. Love*, 134 F. Supp. 1290, 1297 (W.D. Wash. 2015) (holding that § 1252(g) did not bar review where a DHS official allegedly falsified an immigration form that resulted in a removal order because, inter alia, such action was not “discretionary”); *Avalos-Palma v. United States*, No. 13-5481, 2014 U.S. Dist. LEXIS 96499, \*18–26 (D.N.J. July 16, 2014) (holding that § 1252 does not bar review of government’s removal of plaintiff in violation of a mandatory stay).

<sup>119</sup> *Hovsepian*, 359 F.3d at 1155 (noting that “the same [statutory construction] principle applies” for the interpretation of § 1252(g) whether a case arises in the context of a habeas petition or a district court action for injunctive relief).

<sup>120</sup> See, e.g., *Silva v. United States*, 866 F.3d 938, 940–42 (8th Cir. 2017) (affirming § 1252(g)’s applicability to review of deportation in violation of an automatic stay regulation because the claim was “‘connected directly and immediately’ to a decision to execute a removal order” and thus arose from that decision) (quotation omitted); *Gupta v. McGahey*, 709 F. 3d 1062, 1065 (11th Cir. 2013) (per curiam) (concluding that the arrest of plaintiff and related actions by ICE agents arose from an action to commence removal proceedings); *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (finding § 1252(g) applied where plaintiff’s detention arose from a decision to commence expedited removal proceedings). *But see Silva*, 866 F.3d at 942 (Kelly, J., dissenting) (concluding that § 1252(g) was inapplicable because automatic stay divested the immigration agency of authority to execute the removal order); *Arce*, 899 F.3d at 801 (rejecting majority’s analysis in *Silva*); *Roe v. United States*, No. 18-CV-2644, 2019 U.S. Dist. LEXIS 43124, at \*7–11 (S.D.N.Y. Mar. 8, 2019) (following *Arce*).