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Suing federal agencies such as ICE/DHS utilizing the Federal Tort Claims Act

A LOOK AT FTCA DAMAGES, HOW TO CIRCUMVENT COMMON EXCEPTIONS, AND HOW A *BIVENS* CLAIM APPLIES IN A CASE AGAINST THE FEDERAL GOVERNMENT



The federal government's recent mistreatment of immigrants and marginalized people has caused unprecedented civil-rights violations. Unfortunately, unlike civil-rights claims such as Section 1983 claims against a state or local public entities such as a city or county, and their corresponding agencies, the Federal Tort Claims Act (hereinafter "FTCA") is the only remedy for money damages against the federal government.

This article will provide an overview of the FTCA and how to sue the federal government for injuries caused by Immigration and Customs Enforcement (hereinafter "ICE"), Department of Homeland Security (hereinafter "DHS") or any other federal government agency for money damages. This article will provide a general overview of the Federal Tort Claims Act and how to bring an FTCA case, including presentation of a tort claim against the appropriate federal agency. The article will also discuss other aspects of an FTCA claim such as damages and how to circumvent common exceptions. Finally, the article will discuss how a *Bivens* claim applies in a case against the federal government.

The Federal Tort Claim Act

The United States government "cannot be sued without its consent" (i.e., in the absence of a waiver of sovereign immunity). (*United States v. Navajo Nation* (2009) 556 U.S. 287, 289.) "Before 1946, that sovereign immunity generally prevented those injured by Government employees from receiving compensation through lawsuits." (*United States Postal Service v. Konan* (2026) 607 U.S. ---, 146 S.Ct. 736, 740.)

The FTCA, enacted in 1946, "was designed primarily to remove the sovereign immunity of the United States from suits in tort." (*Richards v. United States* (1962) 369 U.S. 1, 6.) The FTCA gives federal district courts exclusive jurisdiction over claims against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of federal employees acting within the scope of their employment. (28 U.S.C. § 1346(b)(1).)

In substance, the FTCA makes the United States liable "to the same extent as a private individual under like circumstances," 28 U.S.C. section 2674, under the law of the place where the tort occurred, 28 U.S.C. section 1346(b)(1), subject to enumerated exceptions to the immunity waiver, 28 U.S.C. sections 2680(a)–(n).

The FTCA is the "supreme" federal law addressing the United States' liability for torts committed by its agents. Indeed, the FTCA supplies the "exclusive remedy" for damages claims arising out of federal employees' official conduct. (*Martin v. United States* (2025) 605 U.S. 395, 409.)

In practice, to bring a claim against a federal agent or the federal government, a plaintiff must proceed in federal court pursuant to the FTCA, naming the United States of America as a defendant. The causes of action will be dependent on the forum state's law as further discussed below.

Two year and six-month statute of limitations – Tort-claim requirement

The first step in initiating an FTCA claim is presenting a tort claim to the appropriate federal agency. A plaintiff must present a claim against the federal government before filing suit to exhaust administrative claims. Section 2675(a) of title 28 of the United States Code provides that "[a]n action shall not be instituted upon a claim 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."

Under the FTCA, a claim must be presented to the appropriate federal agency for administrative review "within two years after [the] claim accrues." (28 U.S.C. § 2401(b).) Thereafter, if the agency denies the claim, the claimant may file suit in federal

court “within six months” of the agency’s denial. (*Ibid.*) An ‘action shall not be instituted upon a claim against the United States for money damages’ unless the claimant has first exhausted his administrative remedies.” (*McNeil v. United States* (1993) 508 U.S. 106, 107.)

The tort claim will be “forever barred” unless a plaintiff complies with the tort claim requirements outlined in 28 U.S.C. section 2401(b).

In practice, a plaintiff must use the Standard Form 95 (SF 95) and present it to the appropriate federal agency. (The SF 95 form can be found at United States General Services Administrative Website: <https://www.gsa.gov/reference/forms/claim-for-damage-injury-or-death>.)

The appropriate federal agency depends on the nature of the case. For example, if the injury or death occurred in prison, the appropriate federal agency would be the Federal Bureau of Prisons. Therefore, a plaintiff must present the claim directly to the Federal Bureau of Prisons. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Clearly, it is critical to comply with the tort-claim requirement and present it to the appropriate federal agency within two years of the injury.

Tolling of the statute

There are limited exceptions to the statute of limitations such as accrual date and equitable tolling. In terms of accrual, under the FTCA, a claim for medical malpractice does not accrue “until a plaintiff knows of both the existence of an injury and its cause.” (*Hensley v. United States* (9th Cir. 2008) 531 F.3d 1052, 1056 (citing *United States v. Kubrick* (1979) 444 U.S. 111, 122–23.))

The next potential exception is equitable tolling. The Supreme Court in *United States v. Kwei Fun Wong* (2015) 575 U.S. 402, 405, addressed whether the statute of limitations in the Federal Tort Claims Act was subject to equitable tolling. The Supreme Court concluded that equitable tolling applies to the FTCA, rejecting the government’s argument that equitable tolling was unavailable because the statute of limitations was jurisdictional.

“[A] court may pause the running of a limitations statute ... when a party ‘has pursued his rights diligently but some

extraordinary circumstance’ prevents him from meeting a deadline.” (*U.S. v. Wong* (U.S., 2015) 575 U.S. 402, 407 (quoting *Lozano v. Montoya Alvarez* (2014) 572 U.S. 1, 10).) “In applying equitable tolling, courts ‘follow a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.’” (*Kwai Fun Wong v. Beebe* (9th Cir. 2013) 732 F.3d 1030, 1052 (quoting *Holland v. Florida* (2010) 560 U.S. 631, 650).)

To obtain equitable tolling a litigant must establish “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.” (*Ibid.*)

The first element requires “the effort that a reasonable person might be expected to deliver under his or her particular circumstances,” and asks whether the plaintiff was “‘without any fault’ in pursuing his claim.” (*Ibid.*)

The second element requires the litigant to “show that extraordinary circumstances were the cause of his untimeliness and ... made it impossible to file the document on time.” (*Ibid.*) “Whether a particular untimely claim may be excused for a particular reason varies with the reason.” (*Id.* at 1051.)

Much like any exception to the statute of limitations, the applicability of such is dependent on the facts of each case. Clearly, the default statute of limitations is two years from the date of the injury.

In California, there are many exceptions to the California Tort Claims Act. (See Gov. Code, §§ 905; 905(m) [exempting childhood sexual assault from the claim presentation requirement]; see also Gov. Code, § 945.9(a) [“A claim arising out of an alleged sexual assault by a law enforcement officer if the alleged assault occurred while the officer was employed by a law enforcement agency is exempted from all state and local government claim presentation requirements”].)

However, although these exceptions may apply under California law, aside from certain exceptions, California exceptions do not extend to the FTCA. When the two-year limitations period begins to run is determined by federal law. (See, e.g., *Bonneau v. Centennial School Dist.* No. 287 (9th Cir. 2012) 666 F.3d 577, 581

[“federal, not state, law determines when a federal cause of action accrues”].)

An FOIA request should be issued as soon as possible

At the early stages of the case, a Freedom of Information Act (“FOIA”) request should be issued to the appropriate agency for relevant records. In California, we have the Public Records Act, which allows any person to request records from a public agency through a Public Records Act request. Under federal law, FOIA applies. Pursuant to FOIA, an agency “shall make the records promptly available to any person” upon “any request for records” which meets the statutory requirements. (5 U.S.C. § 552(a)(3)(A).) An FOIA request can be made with the relevant agency and through the FOIA website at <https://www.foia.gov>.

FTCA causes of action – Law of the forum state

A plaintiff may generally prevail in an FTCA suit by demonstrating that “the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward.” (*Carlson v. Green* (1980) 446 U.S. 14, 23.) The FTCA’s liability rule incorporates state law. (*Martin v. United States* (2025) 605 U.S. 395, 410.)

Violations of federal law are not actionable under the FTCA. (*Jachetta v. United States*, 653 F.3d 898, 904 (9th Cir. 2011). In fact, the United States simply has not rendered itself liable under 28 U.S.C. section 1346(b) for constitutional tort claims. (*FD.I.C. v. Meyer* (1994) 510 U.S. 471, 478.))

Therefore, in California, some claims that can be asserted against federal agents are negligence, battery, intentional infliction of emotional distress, and false arrest/false imprisonment. A Tom Bane Act claim can be asserted as well, but such claim cannot be predicated on a constitutional violation.

Therefore, it is important to not allege a violation of constitutional rights under the Bane Act because violations of the California or Federal Constitutions are not permitted under the FTCA. “Permitting a plaintiff to sue the United States for a violation of a state constitutional provision, rather than a federal constitutional provision, would create the

same result the statute intended to prevent – holding the United States liable for a constitutional tort.” (*Blanchard v. Cnty. Of Los Angeles* (C.D. Cal. Aug. 25, 2022) No. 8:19-cv-02438 JVS (DFM), 2022 WL 17081308, at *3.)

Therefore, to state a Bane Act claim under the FTCA, a plaintiff can allege that the underlying right is a violation of rights under state law, not any state or federal constitutional right. The Bane Act civilly protects individuals from conduct aimed at interfering with rights that are secured by federal or state law, where the interference is carried out “by threats, intimidation or coercion.”

Accordingly, I typically use Civil Code section 43 as the underlying right; it provides, “[b]esides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.” In practice, I allege that a defendant interfered with my client’s right to be free from harm as protected by Civil Code section 43, and such interference was carried out “by threats, intimidation or coercion.”

Finally, in terms of naming defendants, the United States of America itself is the proper defendant. The FTCA only allows claims against the United States, and “an agency itself cannot be sued under the FTCA.” (*ED.I.C. v. Craft* (9th Cir. 1998) 157 F.3d 697, 706 (citing *Shelton v. U.S. Customs Serv.* (9th Cir. 1977) 565 F.2d 1140, 1141).)

Damages under the FTCA and attorney’s fees under Equal Access to Justice Act

The amount of damages to be awarded under the FTCA is governed by the law of the place of the wrongful act. (*U.S. v. English* (9th Cir. 1975) 521 F.2d 63, 70.) For example, if the case is a wrongful-death case, the district court will apply typical wrongful death damages as delineated in Judicial Council of California Civil Jury Instructions 3921 (“CACI 3921”). (See *Estrada-Mendoza v. Loma Linda University Health* (C.D. Cal., 2026) 2026 WL 440433, at *15 [finding in an FTCA case that “[t]hose Plaintiffs with standing to bring wrongful death actions

can recover economic and non-economic damages to compensate for the death of the decedent. Model Jury Instruction by the Judicial Council of California Civil Jury Instructions 3921”].)

Punitive damages and prejudgment interest are not recoverable under the FTCA. (28 U.S.C. § 2674.)

In terms of attorney’s fees, unlike section 1983 claims, attorney’s fees are not recoverable by a prevailing party as a matter of right under the FTCA. Even if a state law provides for attorney’s fees such as the Bane Act, the FTCA does not contain an express waiver of sovereign immunity for attorneys’ fees, and therefore, no waiver should be implied. (*Anderson v. United States* (9th Cir. 1997) 127 F.3d 1190, 1191.)

Although attorney’s fees are not available under the FTCA, practitioners should consider recovering attorney’s fees under the Equal Access to Justice Act (“EAJA”). The EAJA provides for an award of “fees and other expenses” to a prevailing party (other than the United States) in a judicial review of an agency action, “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.” (28 U.S.C. § 2412(d)(1)(A).)

The EAJA, 28 U.S.C. § 2412(b), states in pertinent part: “a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency . . . of the United States . . . The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law . . .”

This “liable under the common law” provision has been used to allow awards of attorney fees at market rates in cases involving “bad faith” by the United States or an agency of the United States. (*Brown v. Sullivan* (9th Cir. 1990) 916 F.2d 492, 495.)

Under the common law a court may assess attorneys’ fees against the government if it has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” (*Rodriguez v. United States* (9th Cir. 2008) 542 F.3d 704, 709 (quoting *Chambers v. NASCO, Inc.* (1991) 501 U.S. 32, 45–46.) Courts “hold the government to the same standard of good faith that

we demand of all non-governmental parties.” (*Ibid.*) The purpose of such an award is to “deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.” (*Copeland v. Martinez* (D.C. Cir. 1979) 603 F.2d 981, 984.)

Although a plaintiff may move for attorney’s fees if they prevail against the federal government under the EAJA, attorney’s fees are not awarded as a matter of right. In a section 1983 case, a prevailing party is entitled to attorney’s fees pursuant to 42 U.S.C. 1988. In a Bane Act case, a prevailing party is also entitled to attorney’s fees pursuant to Civil Code section 52. However, attorney’s fees in an FTCA case are not guaranteed and bad-faith conduct on behalf of the federal government has to be established.

Finally, in terms of damages, it is important to abide by the 25% attorney’s fees cap. Section 2678 of title 28 of the United States Code limits attorney’s fees at 25%. In fact, it is a criminal violation to charge more than 25% in attorney’s fees in FTCA cases. Therefore, it is important to adjust retainer agreements to comply with 28 U.S.C. section 2678.

The intentional-tort exception

The FTCA is subject to a number of exceptions as set forth in 28 U.S.C. section 2680, which are commonly raised in FTCA cases. One exception commonly raised is the intentional-tort exception that preserves the federal government’s immunity from suit for “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” (28 U.S.C. § 2680(h).)

However, in 1974, Congress carved out an exception to 28 U.S.C. section 2680(h)’s preservation of the United States’ sovereign immunity for intentional torts by adding a proviso covering claims that arise out of the wrongful conduct of law-enforcement officers. (*Millbrook v. U.S.* (2013) 569 U.S. 50, 52 (citing Act of Mar. 16, 1974, Pub. L. 93–253, § 2, 88 Stat. 50).) This carve-out to the exception is referred to as the “law enforcement proviso.” This provision extends the waiver of sovereign immunity to claims for six intentional torts, including assault and battery, that are based on the “acts

or omissions of investigative or law enforcement officers.” (*Ibid.* (citing 28 U.S.C. § 2680(h).) The proviso defines “investigative or law enforcement officer” to mean “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.” (*Ibid.*) Therefore, if a plaintiff alleges that a federal law enforcement officer committed one or more of those six torts, the proviso will ensure those claims survive an encounter with the intentional-tort exception. (*Martin v. United States* (2025) 605 U.S. 395, 401.)

Often, the government will attempt to assert the intentional-tort exception to attack intentional tort such as battery and false arrest. However, if the defendant federal agent is any law enforcement officer, the intentional tort exception will apply. If the lawsuit is filed against ICE or DHS agents, the intentional-tort exception will apply. Similarly, FBI agents are also “investigative or law enforcement officers.” (*Brian Javaade Meshkin v. United States of America* (C.D.Cal., 2025) 2025 WL 4678047, at *5 (finding that United States Attorneys are not “investigative or law enforcement officers,” but FBI agents are).)

Discretionary function exception

Another commonly raised exception is the discretionary-function exception which is codified at 28 U.S.C. section 2680(a) and retains sovereign immunity for “[a]ny 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.”

The exception follows a two-part test. Courts first ask whether the complained-of conduct is “discretionary in nature,” involving “an element of judgment or choice.” (*United States v. Gaubert* (1991) 499 U.S. 315, 322.) If the first element is met, then the second question is whether that judgment or choice is “of the kind that the discretionary function exception was designed to shield,” meaning conduct resting on public-policy considerations. (*Id.* at 322–23.) The inquiry is whether the officer’s acts were “susceptible to policy analysis,” not whether the officer considered such concerns. (*Id.* at 325.)

There are several examples of when the discretionary function exception has been applied. For example, “case law is clear that negligent hiring, supervision, or retention decisions ‘fall squarely within the discretionary function exception.’” (*Boules v. Doe 4* (C.D. Cal. June 16, 2025) No. 2:23-CV-08891-CBM-PVC, 2025 WL 2074489, at *3 (quoting *Nurse v. United States* (9th Cir. 2000) 226 F.3d 996, 1001.)

As another example, in *Herrera v. U.S.* (S.D.Cal., 2010) 2010 WL 4236974, at *4, the court granted summary judgment relying on the discretionary function exception in a case brought by the heirs of two passengers who died after border patrol agents pursued and struck a vehicle they were traveling in. The court ruled that “Plaintiffs allege that the United States acted negligently in failing to comply with the Pursuit Policy, that claim is barred by the discretionary function exception to the FTCA.” (*Ibid.*)

The court further ruled that “the second consideration of *Berkovitz* is satisfied for the same reasons as the Pursuit Policy.

That is, the underlying conduct is based upon social, economic, or political policy. As with the Pursuit Policy, the policy seeks to balance competing law enforcement policies against the safety concerns of the general public as well as to minimize economic losses and political concerns. Accordingly, 28 U.S.C. section 2680(a) bars any claims based upon negligence.” (*Ibid.*)

While the discretionary-function exception may apply where judgment is exercised or choice is made, decisions to knowingly lie under oath, tamper with witnesses, or fabricate evidence cannot be “grounded in” and are not “susceptible to” does not trigger the exception. (*Myles v. United States* (9th Cir. 2022) 47 F.4th 1005, 1012.) Put differently, the discretionary function exception “does not apply to law enforcement investigations when a federal employee’s tactics during an investigation had ‘no legitimate policy rationale.’” (*Ibid.* (quoting *Nieves Martinez v. United States* (9th Cir. 2021) 997 F.3d 867, 881.)

A *Bivens* claim should be alleged although the *Bivens* progeny has been weakened

In *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388, 397, the Supreme Court recognized an implied cause of action for damages against federal officers alleged to have violated the petitioner’s Fourth Amendment rights. In *Carlson v. Green* (1980) 446 U.S. 14, 17–19 and *Davis v. Passman* (1979) 442 U.S. 228, 230, the Supreme Court subsequently found such a remedy available for violations of an individual’s rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment.

A *Bivens* claim is the equivalent of a section 1983 claim, but against the federal government, and such a claim is violation of federal constitutional rights such as the Fourth, Fifth or Eighth Amendments. The Ninth Circuit has stated that “[a]ctions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*.” (*Van Strum v. Lawn* (9th Cir. 1991) 940 F.2d 406, 409.)

However, pursuing a *Bivens* claim has become much more difficult after recent Supreme Court decisions. After 1980, the Supreme Court has declined more than 10 times to extend *Bivens* to cover other constitutional violations. (*Goldey v. Fields* (2025) 606 U.S. 942, 942–43.) Those many post-1980 *Bivens* “cases have made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts.” (*Egbert v. Boule* (2022) 596 U.S. 482, 486.)

The Supreme Court has repeatedly emphasized that “recognizing a cause of action under *Bivens* is ‘a disfavored judicial activity.’” (*Egbert*, 596 U.S., at 491.) To determine whether a *Bivens* claim may proceed, the court has applied a two-step test. First, a court asks whether the case presents “a new *Bivens* context” – that is, whether the case “is different in a meaningful way” from the cases in which this Court has recognized a *Bivens* remedy. (*Ziglar v. Abbasi* (2017) 582 U.S. 120, 139; see *Carlson v. Green* (1980) 446 U.S. 14; *Bivens*, 403 U.S., 388.)

Second, if so, then the court must ask whether there are “special factors” indicating that “the Judiciary is at least arguably less equipped than Congress to ‘weigh the costs and benefits of allowing a damages action to proceed.’” (*Egbert*, 596 U.S., at 492.) That analysis is anchored in “separation-of-powers principles.” (*Ziglar*, 582 U.S., at 135.)

In 2022, the Supreme Court decided *Egbert v. Boule*, which further significantly restricted a *Bivens* claim. *Egbert* explained that the two-step analysis “often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” (596 U.S. at 492.) Since *Bivens* was decided, “expanding the *Bivens* remedy” to other contexts has become “a disfavored judicial activity.” (*Ziglar*, 582 U.S. at 135.) Under *Egbert*, “any rational reason (even one) to think that Congress is better suited to weigh the costs and benefits of allowing a damages action” precludes a *Bivens* claim. (596 U.S. at 496.)

In practice, if a case is “a new *Bivens* context” or “is different in a meaningful way” from *Bivens*, *Carlson*, and *Davis*, and particularly if it involves different constitutional rights than the foregoing cases, the second-step special factors analysis will apply, which will almost certainly preclude

a *Bivens* claim. Even in cases which are similar to *Bivens*, *Carlson*, and *Davis*, court may find that they “a new *Bivens* context.”

Although it may be difficult to establish a *Bivens* claim, it is important to at least allege *Bivens* in the complaint. A *Bivens* claim will be based upon a constitutional violation and the same elements of section 1983 should be alleged. Again, actions under section 1983 and those under *Bivens* are identical save for the replacement of a state actor under section 1983 by a federal actor under *Bivens*. It is important to understand the fact patterns in *Bivens*, *Carlson*, and *Davis* to avoid subjecting your case to it being “a new *Bivens* context” or “different in a meaningful way.”

In sum, as plaintiff’s attorneys, it is our duty and responsibility to vindicate the rights of people who have been injured by the government. Although cases against governmental entities are

always uphill battles, now, more than ever, it incumbent that we come to the aid of immigrants and marginalized people.

The FTCA is the exclusive remedy, aside from limited *Bivens* claims, to bring suit for money damages against the federal government. FTCA claims are not complicated given that the law of the forum state is applied (negligence, battery and so forth). However, it is important to understand the intricacies of the FTCA to ensure some semblance of justice is obtained for your client. 

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