

## SUING GOVERNMENT OFFICIALS FOR DAMAGES

by Phillip Hwang\*

It's 6:00 am. Someone is pounding on your client's door. Through the peephole your client, a legal permanent resident, sees uniformed officers. When he unlocks the door, agents push it open, rush into the apartment, and round up everyone in the living room. When your client tells them to stop, they push him to the ground and handcuff him for over an hour. The agents finally identify themselves as immigration agents and local police officers searching for a fugitive (a person that your client has never heard of). They arrest your client's wife after learning she is undocumented. Your client, who is traumatized by the incident, asks for your help.

As an immigration attorney your first impulse may be to file a motion to suppress or explore potential immigration remedies for your client's wife. But you may also be wondering what remedies are available for your client. For example, can the immigration agents or police officers be sued for monetary damages for entering your client's home without a warrant?

This is just one of many fact patterns that you may have seen in your practice. This article describes when a lawsuit for damages may be a viable option for a client who has been mistreated. It provides an overview of the types of claims that have been brought against government officials and the legal issues that may arise.

### SAMPLE FACT PATTERNS

Following are various scenarios that have resulted in lawsuits against government officials:

- Unlawful arrest and detention of immigrants and U.S. citizens, including arrests of persons with lawful status, unlawful detentions at the border, and local police arrests for alleged immigration violations (without a warrant or an agreement under INA §287(g)).
- Unlawful deportation of immigrants and U.S. citizens, including deportations in violation of a stay of removal, federal regulation, or federal statute.
- Abusive treatment by immigration agents, including a coerced waiver of rights, excessive force, and harassment based on race, religion, or ethnicity.
- Abusive detention conditions, such as strip searches, interference with religious freedom, and denial of access to medical treatment.
- Illegal tactics during immigration raids, including warrantless entries, unlawful searches and seizures, and ethnic or racial profiling.

This is not an exhaustive list. There are other types of misconduct that can be the basis for a lawsuit. But keep in mind that a lawsuit is not always a viable or prudent option, even if your client's rights have been violated. The decision to go forward with a lawsuit should be made only after investigating all the facts (including both the positive and negative equities of your particular case), evaluating potential legal obstacles, and consulting with attorneys who are currently litigating or have litigated similar cases in the past.

### SUING THE UNITED STATES AND FEDERAL OFFICIALS

If your client has been mistreated by federal officials, you might be able to bring a lawsuit for damages, which includes both *Bivens* claims against the individual officials for violating your client's constitutional rights and tort claims against the United States under the Federal Tort Claims Act (FTCA). For example, in the raid scenario described at the beginning of this article, your client could bring a *Bivens* claim against the

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federal officials for violating your client's Fourth Amendment rights, as well as claims against the United States under the Federal Tort Claims Act for false arrest, battery, and intentional infliction of emotional distress.

### **Bivens Claims**

There is no federal statute that specifically authorizes a lawsuit for damages against federal officials for violating an individual's constitutional rights. But the Supreme Court held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>1</sup> that an action for monetary damages could be brought against federal officials for certain constitutional violations. These are known as *Bivens* claims, and they have been brought against immigration officials in a variety of contexts.<sup>2</sup>

*Bivens* actions are filed in federal court. Plaintiffs must meet venue, personal jurisdiction, and service of process requirements. There is no administrative claim process for *Bivens* actions, and there is no need to await a decision on a pending FTCA administrative claim before filing a *Bivens* suit (the complaint can subsequently be amended to add the FTCA claims once the administrative remedies have been exhausted). A state's personal injury statute of limitations provides the applicable time limit for filing a *Bivens* claim occurring in that state.<sup>3</sup>

While a *Bivens* action may be brought against individual officers, *Bivens* claims cannot be brought against the United States, a federal agency, or private entities acting under color of federal law.<sup>4</sup> In addition, supervisory officials are generally not vicariously liable for the unconstitutional acts of their subordinates. In some circuits, however, a *Bivens* action can be brought against a federal official who sets in motion or knowingly refuses to terminate a series of acts by others that the official knows or reasonably should know would cause others to inflict a constitutional injury.<sup>5</sup> If the identities of the key officials are unknown, plaintiffs may be able to bring *Bivens* claims against Doe defendants and substitute the names when the defendants' identities are ascertained; however, you should review the law of the state in which the incident occurred, in addition to the local federal court rules, to determine whether there are special Doe defendant pleading requirements or rules<sup>6</sup> and whether the statute of limitations will be tolled.<sup>7</sup>

Defendants in *Bivens* actions often raise the defense of qualified immunity, arguing that (1) the plaintiff's constitutional rights were not violated or (2) the constitutional rights at issue were not clearly established at the time the alleged violation occurred. In determining whether a right was clearly established, courts will look first to binding precedent from the Supreme Court or the relevant circuit. When there is no binding precedent on point, courts may inquire whether the Supreme Court or the relevant circuit would have reached the same results as those reached in out-of-circuit opinions.<sup>8</sup>

A *Bivens* action can be tried before a jury or judge, and compensatory and punitive damages are available. However, because a judgment in a *Bivens* action is against the individual official, the judgment is recoverable

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<sup>1</sup> *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>2</sup> See, e.g., *Martinez-Aguero v. Gonzales*, 459 F.3d 618 (5th Cir. 2006) (false imprisonment and excessive force at port-of-entry); *Wong v. United States*, 373 F.3d 952, 968–75 (9th Cir. 2004) (strip search and interference with religious freedom); *Papa v. United States*, 281 F.3d 1004, 1010–11 (9th Cir. 2002) (death of INS detainee); *Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008) (denial of access to medical treatment); *Ramirez v. Webb*, 719 F. Supp. 610 (W.D. Mich. 1989) (improper detention and excessive force); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988) (unlawful seizure of vehicle); *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986) (warrantless search of home and arrest of occupants); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (arrest, detention, and beating of immigrant by border patrol agent).

<sup>3</sup> *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991).

<sup>4</sup> *FDIC v. Meyer*, 510 U.S. 471 (1994); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

<sup>5</sup> See, e.g., *Wong*, 373 F.3d at 966. If you are contemplating naming high-level officials as defendants in a *Bivens* action, you should review the Supreme Court's forthcoming decision in *Ashcroft v. Iqbal*.

<sup>6</sup> See, e.g., Cal. Code Civ. Proc. §474 (procedure for naming Doe defendants); C.D. Cal. Local R. 19-1 (complaint or petition may not include more than 10 Doe parties).

<sup>7</sup> Fed. R. Civ. P. 15(c)(1).

<sup>8</sup> *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004).

only against that person. Whether the government will ultimately indemnify the official is decided on a case-by-case basis.<sup>9</sup>

If only *Bivens* claims (not FTCA claims) are brought, there is no cap on an attorney's contingency fee arrangement with a client. But, as indicated below, there are often strategic advantages to including an FTCA claim. Attorney fees are not recoverable from defendants in *Bivens* actions.<sup>10</sup>

### Federal Tort Claims Act

The United States may be sued under the Federal Tort Claims Act for certain torts committed by federal employees.<sup>11</sup> The defendant in FTCA cases is the United States itself, not the individual officials or federal agencies. Under the FTCA the United States government may be held liable to the same extent that a private individual would be held liable under similar circumstances, applying the law of the state where the act or omission occurred.<sup>12</sup> For example, if your client was unlawfully detained by federal immigration agents in California, the United States could be held liable under the FTCA for committing torts, such as false imprisonment, that are recognized under California tort law<sup>13</sup> and possibly for state civil rights violations.<sup>14</sup>

Actions under FTCA have been brought in a variety of contexts involving misconduct by immigration officials.<sup>15</sup> But not every tort can be the basis for an FTCA claim. For example, claims for libel, slander, misrepresentation, deceit, and interference with contract rights are not actionable under the FTCA.<sup>16</sup> In addition, unlawful seizures of property may not be actionable.<sup>17</sup> Claims arising in a foreign country cannot be the basis for liability under the FTCA.<sup>18</sup> Moreover, assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process claims can only be brought against the United States when they involve acts or omissions of federal law enforcement or investigative officials.<sup>19</sup>

Finally, the United States is not liable under FTCA where its employees are performing, or fail to perform, a "discretionary function," even if there has been an abuse of discretion.<sup>20</sup> To invoke this exception, the government must prove that (1) the conduct at issue involved an element of judgment or choice *and* (2) the judgment exercised by its employee was grounded in social, economic, or political policy.<sup>21</sup> The United

<sup>9</sup> See *U.S. Attorney Manual*, Ch. 4-5.412(F) (federal employees have no right to compel indemnification where there is an adverse judgment against employee in her or his individual capacity; however, some federal agencies may authorize indemnification of employees).

<sup>10</sup> *Kreines v. United States*, 33 F.3d 1105 (9th Cir. 1995).

<sup>11</sup> 28 USC §2671–80.

<sup>12</sup> 28 USC §2674. See also, *Logue v. United States*, 412 U.S. 521, 526–27 (1973); *United States v. Olson*, 546 U.S. 43 (2005).

<sup>13</sup> See *Rhoden v. United States*, 55 F.3d 428 (9th Cir. 1995).

<sup>14</sup> See *Waters v. United States*, 812 F. Supp. 166, 168–69 (N.D. Cal. 1993) (holding that United States could be sued under FTCA for violations of California Unruh Act and Fair Employment and Housing Act).

<sup>15</sup> See, e.g., *Castro v. United States*, 2009 WL 416983 (5th Cir. Feb. 20, 2009) (deportation of U.S. citizen child); *Rhoden v. United States*, 55 F.3d 428 (9th Cir. 1995) (six-day detention of LPR 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); *Badrawi v. DHS*, 579 F. Supp. 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); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (arrest, detention and beating of immigrant by border patrol agent); *Adedeji v. United States*, 782 F.Supp. 688 (D. Mass. 1992) (false imprisonment and strip search by customs officials); *Munyua v. United States*, 2005 WL 43960 (N.D. Cal. Jan. 10, 2005) (asylum seeker turned away by U.S. officials at port of entry).

<sup>16</sup> 28 USC §2680(h).

<sup>17</sup> 28 USC §2680(c); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988).

<sup>18</sup> 28 USC §2680(k); *Sosa v. Alvarez-Machain*, 542 US 692 (2004).

<sup>19</sup> 28 USC §2680(h); *Caban v. INS*, 671 F.2d 1230 (2d Cir. 1982) (INS officers considered law enforcement officials and therefore liable for intentional torts).

<sup>20</sup> 28 USC §2680(a).

<sup>21</sup> *Berkovitz v. United States*, 468 U.S. 531, 536 (1988); *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (border patrol officer's arrest and use of force not discretionary under FTCA).

States cannot rely on the exception, however, where federal statute, regulation, or policy prescribes a course of action for the employee to follow or where the conduct at issue violates the Constitution.<sup>22</sup>

There is a two-step process for bringing a claim under FTCA. The first step is to file an administrative claim with the appropriate federal agency (e.g., U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), or Customs and Border Protection (CBP)) within two years of the accrual of the claim.<sup>23</sup> A lawsuit must then be filed within six months of the administrative denial of the claim.<sup>24</sup> If the agency does not act on the claim, a lawsuit can be filed after waiting six months from the filing of the administrative claim—in other words, the agency's failure to act within six months can be treated as a constructive denial of the claim.

All FTCA claims are tried before a federal judge; there is no right to a jury trial under the FTCA. Compensatory damages are available, but punitive damages are not. Liability of the United States or its agencies may also be limited by the amount of loss stated in the administrative claim first presented to the agency.<sup>25</sup>

Recovery of attorney fees under a contingency fee agreement is limited by statute to 20 percent of the settlement if the case is settled administratively, or 25 percent of the judgment or settlement after the case is filed in federal court.<sup>26</sup> Attorney fees may also be available from the United States under the Equal Access to Justice Act if the government has acted in bad faith.<sup>27</sup>

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

But if you bring both FTCA and *Bivens* claims, you need to consider which claims, if any, you want to go to trial in the event that your case does not settle. If judgment is entered on the FTCA claims, that judgment may bar recovery on your *Bivens* claims.<sup>28</sup> You should review the law of your circuit to determine how to proceed.<sup>29</sup>

## SUING STATE OFFICIALS, LOCAL OFFICIALS, AND LOCAL GOVERNMENT ENTITIES

If state or local officials participated or engaged in misconduct, you may be able to bring claims against them. For example, in the raid scenario at the beginning of this article, in addition to bringing *Bivens* and FTCA claims, you could bring a section 1983 claim against the police officers and possibly against the city

<sup>22</sup> See, e.g., *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) (Postal Service lacked discretion to deny a hearing because doing so violated its own regulations and the Constitution); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (per curiam) (discretionary function exception did not apply where alleged conduct allegedly violated First and Fourth Amendments); *Munyua v. United States*, 2005 WL 43960 at \*4–\*7 (N.D. Cal. 2005) (discretionary function exception did not shield immigration inspector's conduct from liability where inspector's actions violated federal law and regulations); *Kim v. United States*, No. C90-1163 WD (W.D. Wash. 1993) (discretionary function exception rejected where persons eligible for legalization were wrongfully deported), reported in 70 No. 22 *Interpreter Releases IAA* (June 7, 1993).

<sup>23</sup> 28 USC §2675; 28 CFR §14.1 *et seq.* See also, AILF Practice Advisory, "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation" (updated April 7, 2006), [www.ailf.org/lac/lac\\_pa\\_topics.shtml](http://www.ailf.org/lac/lac_pa_topics.shtml).

<sup>24</sup> 28 USC §2401(b).

<sup>25</sup> *Salcedo-Albanes v. United States*, 149 F.Supp.2d 1240 (S.D. Cal. 2001).

<sup>26</sup> 28 USC §2678.

<sup>27</sup> *Rodriguez v. United States*, 542 F.3d 704 (9th Cir. 2008).

<sup>28</sup> 28 USC §2676.

<sup>29</sup> See, e.g., *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989); *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994).

itself for the unlawful entry into your client's home. Potentially you could also bring state tort claims and state civil rights claims, depending on the law of the state in which the incident occurred.

## 42 USC §1983

Federal law, *i.e.*, 42 USC §1983, creates a private right of action against "persons" who, acting under color of state law, violate federal constitutional or statutory rights. Local governing bodies and local officials acting in their official capacities are considered "persons" for purposes of section 1983 and can be sued for both monetary damages and injunctive relief.<sup>30</sup> By contrast, under section 1983, states and state officials can be sued in their *official* capacities only for injunctive relief (not damages).<sup>31</sup> But state officials may be sued in their *individual* capacities for monetary damages under section 1983.<sup>32</sup>

Section 1983 claims are often premised on Fourteenth Amendment violations, including violations of the Due Process Clause and Equal Protection Clause. Section 1983 may also extend to the enforcement of international treaty rights against state officials.<sup>33</sup>

As with *Bivens* claims, a state's personal injury statute of limitations provides the applicable time limit for section 1983 claims occurring in that state. The defense of qualified immunity is also frequently raised by defendants in section 1983 cases.

In general, there is no administrative exhaustion requirement for section 1983 claims.<sup>34</sup> Section 1983 actions may be tried before a jury or judge. Both compensatory and punitive damages are available in a section 1983 action. Attorney fees are available in section 1983 actions, which is a significant incentive for bringing such claims if warranted by the facts.<sup>35</sup>

## State Law Claims

In addition to a section 1983 claim, you may also be able to bring claims against state or local officials under the law of the state in which the incident occurred, including state tort claims<sup>36</sup> or state civil rights claims.<sup>37</sup> You should research the law of the state in which the incident occurred to determine what claims may be brought and the applicable procedures.

<sup>30</sup> *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

<sup>31</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

<sup>32</sup> *Hafer v. Melo*, 502 U.S. 21 (1991).

<sup>33</sup> See *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (allowing noncitizen convicted of aggravated battery and deported to bring §1983 claim for failure of state officials to notify him of the right to consular assistance under Article 3611(b) of the Vienna Convention); *Standt v. City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) (allowing §1983 claim against New York City police for violation of the right to consular notification following arrest as provided by the Vienna Convention). But see, *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007) (article 36 does not create an independently enforceable right under §1983 for Mexican nationals who were not advised on their consular rights).

<sup>34</sup> Prisoners may be required to exhaust administrative remedies, pursuant to the Prison Litigation Reform Act (PLRA). 42 USC §1997e(a). However, immigration detainees are not considered "prisoners" for purposes of the PLRA. See *Ojo v. INS*, 106 F.3d 680, 682–83 (5th Cir. 1997); *Agyeman v. INS*, 296 F.3d 871, 885–86 (9th Cir. 2002); *LaFont v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998).

<sup>35</sup> 42 USC §1988.

<sup>36</sup> See, e.g., Cal. Gov't Code §810 *et seq.*

<sup>37</sup> See, e.g., Cal. Civ. Code §52.1.

### Comparison of Claims Against Domestic Officials

	<b>Bivens</b>	<b>FTCA</b>	<b>Section 1983</b>
<b>Type of Claim</b>	Constitutional violations	State torts (including possibly state civil rights claims)	Constitutional violations
<b>Against Whom</b>	Federal officials (in individual capacity)	United States	State officials (in individual capacity), local officials, and local government entities
<b>Statute of Limitations</b>	Based on forum state's personal injury statute of limitations	Two years to file an administrative claim; must file suit within six months of denial of administrative claim	Based on forum state's personal injury statute of limitations
<b>Exhaustion Requirement</b>	No	Yes	No
<b>Right to Jury Trial</b>	Yes	Not on FTCA claims (but Bivens/§1983 claims may still be tried before jury)	Yes
<b>Punitive damages available</b>	Yes	No	Yes
<b>Common defenses</b>	Qualified immunity	Discretionary function exception	Qualified immunity
<b>Cap on Contingency Fees</b>	No (but cap may apply if FTCA claims are also alleged)	Yes (20% if settled administratively; 25% if case resolved after suit filed)	No (but cap may apply if FTCA claims are also alleged)
<b>Attorney Fees Available from Defendants</b>	No	Possibly (under Equal Access to Justice Act if government acts in bad faith)	Yes (under 42 USC §1988)

### SUING FOREIGN OFFICIALS

What if your client was mistreated by officials in the client's native country? Can the client sue those foreign officials in U.S. courts? There is potential relief against foreign officials under the Alien Tort Claims Act and the Torture Victims Protection Act.

#### Alien Tort Claims Act

The Alien Tort Claims Act (ATCA), 28 USC §1350, was enacted in 1789 and grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATCA allows foreign victims of serious violations of international human rights laws to sue the perpetrators in U.S. courts.<sup>38</sup>

In *Sosa v. Alvarez-Machain*<sup>39</sup> the Supreme Court substantially narrowed the scope of claims that could be brought under ATCA, holding that the act creates a cause of action only in limited circumstances. The Court urged that "great caution" be used when considering new causes of action under ATCA and stated that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted."<sup>40</sup> The Court rejected the idea that sources of law such as the International Covenant on Civil and Political Rights created obligations in federal court and that unless it was a clear norm of international law, it may not be enforced.<sup>41</sup>

<sup>38</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>39</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>40</sup> *Sosa*, 542 U.S. at 732.

<sup>41</sup> *Id.* at 735; see also, *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 114–23 (2d Cir. 2008) (because Agent Orange was intended to be used as a defoliant and for destruction of crops only, its use did not violate international norms); *Cisneros v. Aragon*, 485 F.3d 1226, 1228–31 (10th Cir. 2007) (statutory rape and sexual assault does not violate the law of nations simply because it is criminalized, even if criminalized by all civilized nations, like auto theft); *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1246–50 (11th Cir. 2005) (post-*Sosa* finding that brief detention and kidnapping does not rise to a violation of the ATCA as cruel, inhuman, and degrading treatment); *Abdullahi v. Pfizer, Inc.* 2009 WL 214649 (2d Cir. Jan. 30, 2009) (unconsented medical experimentation on Nigerian children violated customary international law creating ATCA jurisdiction).

In ATCA cases, as in all federal cases, there must be service of process and personal jurisdiction.<sup>42</sup> Personal service may be obtained by publication, and personal jurisdiction may be obtained where the defendants directed malignant actions felt in the United States and the defendants could reasonably expect to be “hailed into court.”<sup>43</sup> There is a circuit split as to whether exhaustion of remedies applies to the ATCA.<sup>44</sup>

### Torture Victims Protection Act

In 1991 Congress passed the Torture Victims Protection Act (TVPA),<sup>45</sup> which added to ATCA the right to bring a claim for damages against persons who committed acts of torture. Unlike ATCA, which is limited to actions brought by aliens, TVPA allows U.S. citizens to sue as well.<sup>46</sup> It also allows a legal representative or claimant in a wrongful death action involving extrajudicial killing to bring an action.<sup>47</sup>

Under the doctrine of “command responsibility,” TVPA allows actions against commanders of persons who committed acts in violation of the statute.<sup>48</sup> It also permits an action for conspiracy and accomplice liability.<sup>49</sup> But for liability to attach under TVPA there must be a finding that the person acted under actual or apparent authority or color of law in committing or abetting the act.<sup>50</sup>

The relationship between ATCA and TVPA is not entirely clear.<sup>51</sup> In determining the statute of limitations for ATCA cases, some courts have borrowed the 10-year statute of limitations from TVPA rather than a shorter state statute of limitations,<sup>52</sup> and the 10-year statute of limitations for TVPA claims may be equitably tolled.<sup>53</sup> Exhaustion of remedies is an affirmative defense that must be pleaded and proven under TVPA.<sup>54</sup>

### Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (FSIA), enacted in 1976, generally grants immunity to foreign sovereigns, ministries of foreign sovereigns, and officials acting on behalf of foreign sovereigns unless there

<sup>42</sup> See *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Sisso v. Islamic Republic of Iran*, 448 F. Supp. 2d 76, 87–88 (D.D.C. 2006).

<sup>43</sup> See *Mwani v. Bin Laden*, 417 F.3d 1, 8–14 (D.C. Cir. 2005). But see, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004) (diplomatic immunity under Vienna Convention and UN Convention on Privileges and Immunities prevented service of process and judgment under ATCA against President Mugabe).

<sup>44</sup> Compare *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (“the exhaustion requirement does not apply to the ATCA”) with *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824–25 (2008) (en banc) (holding that courts should carefully consider exhaustion in ATCA cases where the U.S. nexus is weak and that do not involve matters of “universal concern”).

<sup>45</sup> PL 102-256, 106 Stat. 73 (1991); 28 USC §1350 note §1(a).

<sup>46</sup> *Chavez v. Carranza*, 413 F.Supp.2d 891, 899 (W.D. Tenn. 2005).

<sup>47</sup> TVPA §2(a)(2).

<sup>48</sup> *Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002) (for liability to attach, must prove that commander had effective control over his troops).

<sup>49</sup> *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1145–51 (E.D. Cal. 2004); *Cabello Barrueto v. Fernandez Lario*, 205 F. Supp. 2d 1325, 1331–33 (S.D. Fla. 2002).

<sup>50</sup> *Saravia*, 348 F.Supp. 2d at 1149–50 (E.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy*, 374 F.Supp.2d 331, 337–38 (S.D.N.Y. 2005). But see, *Khulumani v. Barclay Nat. Bank*, 504 F.3d 254 (2d Cir. 2007).

<sup>51</sup> See, e.g., *Enahoro v. Abubakar*, 408 F.3d 877, 886–93 (7th Cir. 2005) (Cudahy, J. dissenting) (discussing whether TVPA precludes or restricts action under ATCA). But see, *Aldana*, 416 F.3d at 1250–51 (ATCA and TVPA provide for separate claims for torture because they define torture differently).

<sup>52</sup> See *Papa v. United States*, 281 F.3d 1004, 1012–13 (9th Cir. 2002).

<sup>53</sup> *Jean*, 431 F.3d 776; *Doe*, 348 F.Supp.2d at 1146–483; *Cabello Barrueto*, 205 F.Supp.2d at 1330–313; *Collett v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 242 (D.D.C. 2005); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005).

<sup>54</sup> *Jean*, 431 F.3d at 781–83; *Sarei*, 487 F.3d at 1213–23; *Enahoro*, 408 F.3d at 886 (remanding case to district court to review exhaustion under TVPA); *Abiola v. Abubakar*, 435 F. Supp. 2d 830 (N.D. Ill. 2006) (exhaustion unnecessary under TVPA because Nigerian remedies would be futile).

is an exception to the FSIA under section 1605 or the foreign government has waived immunity.<sup>55</sup> The FSIA does not apply to individual defendants unless they were acting in their official capacity.<sup>56</sup>

Service on a foreign state or its subdivision, agency, or instrumentality is governed by 18 USC §1608. Service may be obtained in descending order: (1) by special arrangement between the plaintiff and the foreign state; (2) in accordance with applicable international conventions; (3) by requesting the clerk of the court to dispatch to the head of the ministry of foreign affairs of the foreign state, with translation, all documents by mail requiring a return receipt; or (4) by requesting that the clerk of the court send two sets of the documents to the U.S. secretary of state, who then shall transmit one copy of the papers through diplomatic channels to the foreign state and provide a certified copy of the diplomatic note that indicated when the papers were transmitted.<sup>57</sup>

Notwithstanding TVPA and subsequent legislation, foreign heads of state are protected from suit.<sup>58</sup> Deference to the executive may also extend to foreign ministers as well.<sup>59</sup>

## CONCLUSION

Before filing a lawsuit, you are strongly encouraged to talk through your case with others who have successfully brought suit. There are many experts across the country who can guide you through the process of suing government officials and help you determine how much your case is worth.

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<sup>55</sup> See, e.g., *O'Bryan v. Holy See*, 549 F.3d 431, 451–57 (6th Cir. 2008); *Doe v. Bin Laden, et al.*, 580 F. Supp. 2d 93 (D.D.C. 2008); *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007); *Doe I v. State of Israel*, 400 F.Supp.2d 86, 104–08 (D.D.C. 2005).

<sup>56</sup> *Enahoro*, 408 F.3d at 880–83 (FSIA does not give immunity to Gen. Abubakar in suit brought by relatives of persons who were tortured and killed while he was part of a committee governing Nigeria).

<sup>57</sup> *O'Bryan*, 490 F.Supp. 2d 826 (service of process must be strictly adhered to and plaintiffs need to refile); *Sisso v. Islamic Republic of Iran*, 448 F. Supp. 2d 76, 83–86 (D.D.C. 2006) (service perfected on Iran by diplomatic means); *Nikbin v. Islamic Republic of Iran*, 471 F. Supp. 2d 53, 63–67 (D.D.C. 2007).

<sup>58</sup> *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (rejecting plaintiffs argument that under customary international law the executive branch cannot provide immunity to the president of the People's Republic of China, who was accused of violating *jus cogens* norms); *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005) (Pope entitled to head-of-state immunity for acts allegedly committed before he was Pope in suit for abuses by Catholic priest and alleged cover-up); *Doe v. State of Israel*, 400 F. Supp. 2d 86, 110–11 (D.D.C. 2005) (where executive branch recognizes that a head of state is entitled to immunity, that determination is conclusive in U.S. courts); *Abiola*, 267 F. Supp. 2d 907 (dismissing part of claim against Abubakar for time he was head of state); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (dismissing action against Mugabe as head of state and country's foreign minister under UN Convention). *Lafontant v. Aristide*, 844 F. Supp. 128 (S.D.N.Y. 1994) (enactment of FSIA did not alter the role or binding effect of DOS's suggestions of immunity for foreign heads of state).

<sup>59</sup> *Weixum v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008) (ATCA and TVPA suit dismissed against former minister of commerce of the People's Republic of China on executive's suggestion).