



**Defending Liberty
Pursuing Justice**

**A LEGAL GUIDE FOR INS
DETAINEES:**

***ACTIONS BROUGHT AGAINST INS OR OTHER
LAW ENFORCEMENT OFFICIALS FOR
PERSONAL INJURY OR PROPERTY
DAMAGE OR LOSS***

American Bar Association
Commission on Immigration Policy, Practice, and Pro Bono
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**ACTIONS BROUGHT AGAINST
INS OR OTHER LAW
ENFORCEMENT OFFICIALS
FOR PERSONAL INJURY OR
PROPERTY DAMAGE OR LOSS**

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II. FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (“FTCA”), originally adopted in 1946, permits recovery for claims for “injury or loss of property, or personal injury or death caused by the *negligent or wrongful act or omission* of a government employee while [the employee] is acting within the scope of his office or employment.” 28 U.S.C. § 1346(b) (emphasis added). Claims for wrongful acts or failures to act resulting in personal injury or property loss or damage are generally known as torts. The FTCA is a limited waiver of U.S. sovereign immunity.¹ The FTCA thus holds the United States responsible for the actions of its agencies and employees that injure another person in the same way a private person would be held responsible for such acts. 28 U.S.C. § 2674. The laws of the state in which the act or omission occurred determine whether the United States will be held responsible for a particular act or omission committed by a government employee or official.

A. CONSIDER THE FOLLOWING FACTS ABOUT FTCA SUITS

- A FTCA complaint is a lawsuit against the United States for the wrongful conduct of its employees.
- FTCA claims may proceed **ONLY** against the United States as the named defendant, **NOT** against the specific government agency or the federal employee (in his official or individual capacity). 28 U.S.C. § 2679(d)(2).
- FTCA actions against the United States may only be brought in federal courts, **NOT** state courts.
- The FTCA **INCLUDES** claims for the following torts (wrongful acts):
 - **Negligence:** the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation.
 - **Intentional torts, including:**
 - **Assault:** the threat or use of force on another that causes a reasonable fear of imminent harmful or offensive contact.
 - **Battery:** the application of force on another resulting in harmful or offensive contact.
 - **False Imprisonment:** a confinement or restraint of a person to a bounded area without justification or consent.
 - **Abuse of process:** improper use of a legitimately issued court process to obtain a result that is either unlawful or beyond the person’s scope.

¹ In general, the U.S. Government may not be sued **unless** it permits individuals to do so. Congress therefore passes statutes like the FTCA in order to recognize specific circumstances in which private individuals may sue the U.S. Government.

- **Malicious prosecution:** institution of criminal or civil proceedings for an improper purpose without probable cause, when the conduct is committed by investigative or law enforcement officers, including INS and Border Patrol agents.
- The tort law of the *state in which the act or omission (the cause of the injury or harm to you) occurred* determines whether a cause of action exists as a result of the particular act or omission. 28 U.S.C. § 1346(b).
- Both citizens and aliens are eligible to obtain FTCA relief. No FTCA provision prevents non-U.S. citizens from suing under the Act.
- The FTCA bars suits against the United States for the acts or omissions of **independent contractors** working for the federal government. Precisely who qualifies as an *independent contractor* is complicated and is discussed in greater detail below.
- A FTCA claim must be filed in writing with the appropriate government agency within **two years** of when the action causing injury to the detainee occurs.²
- FTCA claims are **always** tried by a judge without a jury. 28 U.S.C. § 2402.
- The FTCA is strictly interpreted: all ambiguities are usually resolved in favor of the United States.

B. ADMINISTRATIVE REQUIREMENTS

Prior to filing a lawsuit in federal court, you must file a written administrative claim against the United States with the agency employing the person who caused the injury, or the case will be dismissed.

- *All* FTCA claims **must** first be submitted for administrative settlement before litigation begins. **Government Standard Form 95** (attached at the end of this section and available from federal agencies) should be used for the initial administrative claim. Other forms of written notification may also be accepted if a copy of **Form 95** is unavailable. **Again**, the administrative

² The FTCA contains a special statute of limitations: “a tort claim shall be *forever barred* unless it is presented in writing to the appropriate Federal agency within *two years* after such claim accrues.” 28 U.S.C. § 2401(b) (emphasis added). As a general rule, “a tort claim accrues at the time of the plaintiff’s injury,” but might extend in medical malpractice cases “until the plaintiff has discovered both his injury and its cause.” *United States v. Kubrick*, 444 U.S. 111, 120 (1979).

claim **MUST BE** filed within **two years** of the act or omission causing injury to the detainee.

- Filing a written administrative claim is likely to be the easiest and quickest way to receive compensation from the United States. If approved, there is no need for a lawsuit or additional litigation.
- The administrative claim must include a **specific dollar request** for damages and enough information to support an agency investigation.
- The agency then reviews the merits of the claim, deciding whether (1) to accept it and reach a monetary settlement; or (2) to deny it. Agency heads are authorized to settle or compromise such claims in any amount, but written approval of the Attorney General is required for amounts exceeding \$25,000. 28 U.S.C. § 2672.
- A detainee *must* wait for a **final agency denial** to initiate a FTCA case in federal district court. 28 U.S.C. § 2675(a). An agency's failure to issue a final ruling on an administrative claim **within six months** of its filing is considered a final denial. A detainee has **six months** to file a claim against the United States after the **final agency denial**. 28 U.S.C. § 2401(b).

C. DAMAGES IN FTCA SUITS

- In general, monetary awards in FTCA claims are controlled by state law and are limited to "money damages." Money damages include reasonable compensation for personal injury or loss of property.
- Damages may not exceed the amount requested in the prior agency administrative claim, **except** where the increase is based on new evidence not reasonably discoverable at the time of presenting the claim to the agency.
- In FTCA cases, the United States therefore may **NOT** be sued for *punitive damages* designed to punish intentional or egregious (bad) conduct. The United States is only liable for *actual damages* caused to the detainee.
- The Supreme Court has held that plaintiffs may be entitled to monetary compensation for "loss of enjoyment of life." These damages must be based solely on a government employee's simple negligence, **NOT** on the government employee's intentional or egregious conduct. However, state law determines how much money may be recovered and whether the *loss of enjoyment of life* claim fits within the state's definition of compensatory damages. *Molzof v. United States*, 502 U.S. 301 (1992).

- Attorneys' fees are **limited** to no more than 25% of any judgment or settlement after suit is filed, or 20% of any administrative settlement prior to litigation. The FTCA does not specifically empower the court to award attorneys' fees in the absence of an agreement between the client and the attorney. 28 U.S.C. § 2678.

D. FTCA EXCEPTIONS & EXCLUSIONS

The FTCA includes specific exceptions, and where one applies, the United States may NOT be sued – the case will be dismissed for lack of jurisdiction.

- ❖ **Foreign Country Exception:** The FTCA exempts from coverage “any claim arising in a foreign country.” Thus, if a detainee’s injuries occurred outside the United States, no FTCA claim may be made.
- ❖ **Intentional Torts Exception:** Only investigative or law enforcement officers may be sued for intentional torts like “assault, battery, false imprisonment, malicious prosecution, and abuse of process.”
 - FTCA suits for intentional torts against individuals who are **NOT** law enforcement INS employees are prohibited.
 - An investigative or law enforcement officer is defined as an officer “who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.”
 - INS officers and agents, as well as federal prison officials in some circumstances, are investigative or law enforcement officers within the meaning of 28 U.S.C. § 2680(h).
- ❖ **Other Torts Excluded from the FTCA:** Libel (publication of something that injures the reputation of another person); slander (saying something that injures the reputation of another person); misrepresentation (telling you something untrue); deceit; or interference with contracts.
- ❖ **Detention of Goods Exclusion:** Any claim arising from the detention of any goods, merchandise, or other property by any customs or tax officer or any other law enforcement officer is excluded. 28 U.S.C. § 2680(c).
 - This exception covers claims based on the wrongful detention of goods and those based on injury to or loss of goods while being detained. For example, claims that INS agent negligently lost a detainee’s personal property due to a failure to inventory it properly upon arrest are not

permitted. *See, e.g., Kosak v. United States*, 465 U.S. 848 (1984); *Halverson v. United States*, 972 F.2d 654 (5th Cir. 1992).

- Seizures by INS officers and Border Patrol agents fit within this exception. *Ysasi v. Rivkind*, 856 F.2d 1520, 1524 (Fed. Cir. 1988).
- ❖ **Discretionary Function Exception:** Precludes suits “based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, or based upon the performance or the failure to exercise or perform a discretionary duty.” 28 U.S.C. § 2680(a).
 - For the exception to apply, the challenged conduct must “be the product of judgment or choice” and does not include an employee’s mandatory acts according to “a federal statute, regulation, or policy [that] specifically prescribes a course of action.” *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Also, the conduct must be “based on considerations of public policy.” 29 U.S.C. § 2680(a).
 - Section 2680(a) specifically provides that the discretionary function exception applies “whether or not the discretion involved be abused.”
 - Detention decisions that are not directly mandated by statute are discretionary and fit within the exception. *Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001). For example, a detention facility’s policy decision to require sick or injured detainees to go to hospitals rather than to receive in-house treatment is discretionary. However, a slip and fall claim based on an INS facility’s failure to maintain a walkway to the hospital during inclement weather would not be barred (if the INS failed to maintain it safely).
 - As long as an officer’s decision to detain or parole a person is reasonable under state law, the discretionary function exception generally bars a FTCA claim for false arrest or imprisonment. “The United States has a privilege to protect its borders against unlawful entry . . . there is a heavy burden on would-be entrants to show a right to enter the U.S. without hindrance. The authorities may detain him with far less than probable cause to believe he has no right to enter.” *Caban v. United States*, 728 F.2d 68, 73 (2d Cir. 1984).
 - The INS may not detain an alien for more than six months after the alien is ordered removed if there is no significant likelihood that the detainee can be returned to his country of origin in the near future. *Zadvydas v. Davis*, 533 U.S. 678 (2001). If you believe that you fall into this category, see the ABA’s *A Legal Guide for INS Detainees*: