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Obtaining Remedies for INS Misconduct

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Practical Analysis of Immigration and Nationality Issues

OBTAINING REMEDIES FOR INS MISCONDUCT

by

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REPORTS OF NEGLIGENT, ABUSIVE, and violent behavior by agents of the Immigration and Naturalization Service (INS) are on the rise, fueling charges that the INS has become a large and well-armed — but ill-trained and inadequately supervised — federal police force. Publicized incidents of illegal "sweeps" in immigrant communities,[1] shootings by the Border Patrol,[2] and deadly high-speed chases[3] have led to criticism that the INS ignores, with impunity, abuse by overzealous officers and lacks the internal mechanisms needed to curb violence.[4]

Organizations monitoring the INS and the Border Patrol have reported numerous incidents of abuse. In a 1992 report, the American Friends Service Committee (AFSC) Immigration Law Enforcement Monitoring Project (ILEMP)[5] cited 1,274 complaints between 1989 and 1991, ranging from verbal abuse to physical assaults, shootings, and sexual assault.[6] Human Rights Watch/Americas has issued three reports on human rights abuses committed by INS officers along the U.S.-Mexico border.[7] The group's 1992 report charged the INS with serious and systemic abuses and an unwillingness to address such problems. In its most recent report, published in April 1995, Human Rights Watch/Americas found little improvement: "Border Patrol agents are committing serious human rights violations, including unjustified shootings, rape, and beatings, while enjoying virtual impunity for their

The Issue In Brief

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actions."[8] The human rights organization further charges that the INS's efforts to address these problems have been "limited, misguided and ineffective."[9]

The allegations of abuse have prompted a number of government hearings. Following hearings in the late 1970s, the U.S. Commission on Civil Rights published its report, *The Tarnished Golden Door and Civil Rights Issues in Immigration*, charging the INS with civil rights violations. When it conducted additional hearings in 1993, the U.S. Commission on Civil Rights again received reports of abuse at the hands of INS agents. In 1990 and 1992 the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Relations also conducted hearings, prompting Rep. Xavier Becerra (D-Cal.) and six other concerned members of Congress to introduce legislation in 1993 to create a commission for the independent review of INS abuse.[10] The House of Representatives never considered the bill.[11]

There is growing concern among human rights organizations and advocates that the dramatic increase in the INS's enforcement efforts on the U.S.-Mexico border will spawn increased violence and abuse toward undocumented aliens as well as toward U.S. citizens and legal residents who reside along the border and in the communities targeted by the INS.[12] Congressional appropriations for the INS are at an all-time high. Funding and staffing for the enforcement arm of the INS, particularly the Border Patrol, rose dramatically under the Immigration Reform and Control Act of 1986 (IRCA)[13] and the Anti-Drug Abuse Act (ADAA) of 1988.[14] The Immigration Act of 1990 (1990 Act or IA 90)[15] authorized the addition of 1,000 Border Patrol officers each year through 1996, and expanded INS officers' authority to arrest. Congress is focusing renewed attention on the INS. Proposals pending before Congress at press time would bring an additional 1,000 Border Patrol agents to the border each year from 1996 to the year 2000.[16] Observers note that while the INS mushrooms, little attention is paid to human rights concerns and to the proper training of officers and the discipline of abusive officers.[17]

Congressional action to curtail foreign nationals' access to courts has also prompted much concern. On April 24, 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[18] The AEDPA includes provisions prohibiting the use of class actions to challenge the new expedited exclusion process.[19] Congress also has considered an amendment to the Equal Access to Justice Act (EAJA)[20] to prohibit the award of attorneys' fees to any plaintiff who is not a citizen or a legal permanent resident.[21] Because the courts have played a critical role in protecting the constitutional and statutory rights of foreign nationals,[22] these provisions, which would impede the ability of persons subjected to abuse and unreasonable action by the INS to obtain relief, would likely have a significant impact on efforts to stem the tide of INS misconduct.

The important role courts play in safeguarding the rights of foreign nationals can be seen in *Murillo v. Musegades*.[23] In that 1992 case, the U.S. district court found that over the course of several years, the Border Patrol in El Paso, Texas had kept the largely Latino Bowie High School and its surrounding neighborhood under close watch, regularly stopping, detaining, and questioning students and staff without reasonable suspicion of an illegal presence in the U.S.[24] Moreover, the *Murillo* court concluded that the INS's procedures for reporting and investigating incidents of abuse on the part of the INS were ineffective.[25] The *Murillo* court further held that the Border Patrol had ignored the court's prior 1982 injunctive order in *Mendoza v. INS*,[26] in which the U.S. District Court for the Western District of Texas had found widespread Fourth Amendment violations.

Seeking to end the abuse, *Murillo* combined a number of remedies: claims for damages under the Federal Tort Claims Act (FTCA),[27] and *Bivens v. Six Unknown Named Agents* [28] (*Bivens* claims); declaratory and injunctive relief; and the award of attorneys' fees under the EAJA. *Murillo* represents one of several recent lawsuits challenging enforcement practices and policies of the INS.[29] In areas such as El Paso, where *Murillo* succeeded

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Mendoza, repeated lawsuits underscore the need for greater attention to the problem of constitutional violations on the part of the INS.[30]

Legal action to redress INS misconduct presents practical and substantive difficulties. For example, some injuries, even those based on constitutional violations, may not give rise to large damage awards. Enormous costs are involved in bringing a lawsuit against a well-financed governmental agency — costs that may surpass the damage award. Moreover, the payment of attorneys' fees through fee-shifting statutes may not be available in some cases. In addition, maintaining contact with the injured party and eyewitnesses during the course of prolonged litigation frequently is difficult. Often the plaintiffs and witnesses in INS abuse cases are indigent, unable to speak English, and unfamiliar with the U.S. legal system. Migrants, particularly those who are deported, may be unavailable to pursue litigation or serve as witnesses to others who are injured.

Despite these difficulties, the pursuit of administrative and court actions to redress INS misconduct often brings relief, focuses attention on the problem, and helps to deter future misconduct. In cases where there is a significant injury, a damage suit may be appropriate.

This IMMIGRATION BRIEFING provides a practical guide to the remedies for the misconduct of INS officers, including: (i) damage claims brought under *Bivens* and the FTCA; (ii) actions for declaratory and injunctive relief; and (iii) administrative complaints.[31] Following a discussion of constitutional and state protections, the BRIEFING examines *Bivens* actions, which enable an individual whose federal constitutional rights have been violated by the INS to bring a claim for damages against the offending individual officer(s).[32] The BRIEFING then looks at the complementary form of relief[33] available under the FTCA, which waives sovereign immunity for the tortious conduct of federal officers, and provides for damages under certain circumstances against the U.S. for personal injury and/or damage to property. The BRIEFING next addresses suits for declaratory and injunctive relief where the lawsuit may benefit a large group of aggrieved individuals. A section examining administrative complaints follows. The BRIEFING also includes a section of practice points.

CONSTITUTIONAL AND STATE PROTECTIONS

- **Constitutional Claims**

The most common constitutional claims brought against INS officers involve violations of the Fourth and/or Fifth Amendments. Immigrants and other aliens are afforded constitutional protection despite the extensive statutory and regulatory powers given the INS to stop, arrest, detain, and expel aliens unlawfully present in the U.S. While enforcement of the INA has been delegated to the INS, the "federal judiciary has been vested with the ultimate authority to determine the constitutionality of the actions of the other branches of the federal government."[34] Damage actions charging INS misconduct customarily concern illegal stops and searches by the INS[35] and challenges to the denial of due process rights during the course of detention or deportation proceedings.[36]

In most situations, the rights asserted are based on clearly established constitutional principles that a reasonable INS officer should know. Practitioners should keep in mind, however, that while many well-established constitutional standards remain, courts have eroded some constitutional protections — particularly those enjoyed by aliens. For example, in most deportation cases, aliens may not rely on the exclusionary rule to challenge Fourth Amendment violations.[37] Indeed, recently Chief Justice Rehnquist questioned whether the Fourth Amendment applies to undocumented aliens.[38] Recent cases also have undermined the Fifth Amendment protections available to foreign nationals.[39]

Foreign nationals also enjoy protections under state tort laws. Generally, fact patterns that give rise to constitutional claims for illegal stops and searches and challenges to detention also give rise to tort claims. Intentional torts, such as assault, battery, false arrest, and false imprisonment, commonly form the bases for remedies under state law.

Fourth Amendment. The INA permits INS officers to question an individual, believed to be an alien, about her or his "right to be or to remain in the United States."[40] The scope of this provision is limited by the Fourth Amendment. The right to be secure and free from unreasonable searches and seizures in the context of a confrontation with the INS is firmly established, and is the subject of a past BRIEFING.[41]

When the INS is cited for abuse, the claim is frequently based on Fourth Amendment intrusions. Since 1975, the limitations on the authority of INS officers to detain and question aliens have been well-settled. The INS may not question an individual without the existence of a reasonable suspicion based on specific available facts—involving more than mere ethnic appearance—

that he or she is a foreign national.[42] It is also firmly established that agents may not seize an individual for interrogation unless there is a reason to believe that the individual is an alien in the U.S. illegally.[43] As the Supreme Court has made clear: "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person . . . and the Fourth Amendment requires that the seizure be 'reasonable.'"[44]

The INS may approach and question an individual without a reasonable suspicion of illegal presence,[45] but the individual has a right to decline to answer questions.[46] The INS may not infer suspicious conduct from a refusal to cooperate.[47] Absent a sufficient reason that is not based solely on an occupant's foreign appearance, INS officers may not stop a vehicle and question its occupant(s).[48] A stop is justified only when INS officers are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[49] When arresting an individual without a warrant, the INS must have probable cause that the individual is unlawfully present in the U.S. or has violated immigration law.[50] Under the INA, a warrant for arrest is required unless the suspected alien is likely to flee "before a warrant can be obtained."[51]

The Fourth Amendment also limits searches by the INS. Without a warrant, the INS may not search an individual, or her or his vehicle, unless the search is made pursuant to a lawful arrest, or unless it is necessary to prevent the destruction of evidence, and there is probable cause to search.[52] Unreasonable or excessive force during the course of an arrest, investigatory stop, or other seizure will violate the Fourth Amendment's guarantees against illegal searches and seizures.[53] Injury resulting "directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was objectively unreasonable,"[54] may be actionable as a violation of the Fourth Amendment.

Despite established guarantees against unreasonable searches and seizures, an increasingly conservative Supreme Court has limited the Fourth Amendment rights of aliens, particularly regarding the government's efforts in the wars on drugs and illegal immigration. As noted above, in *INS v. Lopez-Mendoza*,[55] the Supreme Court ruled that the exclusionary rule does not apply in deportation proceedings — restricting the availability of an effective remedy against INS agents who overstep the boundaries set by the Fourth Amendment.[56] Recently, the Court ruled that a non-resident alien did not enjoy the Fourth Amendment protection from the search and seizure of her or his property abroad.[57] In *U.S. v. Verdugo-Urquidez*,[58] the Court upheld the seizure of property in Mexico of a Mexican national, and questioned whether Fourth Amendment protections extend beyond those who "come within the territory of the United States and developed substantial connections with this country."[59] These cases may mark the beginning of a redefinition of the Fourth Amendment protections available to aliens,[60] and possibly a bar to protections for undocumented aliens.[61]

Fifth Amendment. Paralleling the erosion of Fourth Amendment protections for undocumented aliens, recent cases have undermined the extension of the full protections of the Fifth Amendment to foreign nationals. Practitioners should keep in mind, however, that some firmly established constitutional protections for aliens nevertheless remain.

While the Supreme Court has consistently held that Congress and the executive branch have plenary power over the admission and exclusion of aliens,[62] the Court has nevertheless made clear that Fifth Amendment protections against deprivation of life, liberty, and property without due process of law[63] apply to "[e]ven one whose presence in this country is unlawful, involuntary, or transitory."[64] In a view long held by the Supreme Court, the Fifth Amendment applies to "persons," not exclusively to citizens, and, accordingly, some constitutional protections extend even to excludable aliens.[65]

Substantive and procedural due process protections are firmly in place for individuals within the U.S.[66] The Fifth Amendment also protects the liberty interests of permanent residents seeking to reenter the U.S.[67] More limited protections are available to those aliens who have not entered the U.S. The rights of unadmitted aliens are defined by procedures established by Congress and the attorney general.[68] Moreover, those who have not reached the U.S. may enjoy no statutory or constitutional protections. As Justice Anthony M. Kennedy noted in his concurrence in *U.S. v. Verdugo-Urquidez*[69]: "the Constitution does not create . . . any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."[70]

In recent cases concerning Haitians and Cubans interdicted and detained by the U.S. Coast Guard, courts have declined to extend statutory and procedural safeguards. In *Sale v. Haitian Ctrs. Council, Inc.*,[71] the Supreme Court denied statutory protection and access to INA §

243(h) withholding of deportation to Haitians interdicted on the high seas. In *Cuban American Bar Ass'n, Inc. v. Christopher*,[72] the U.S. Court of Appeals for the Eleventh Circuit denied interdicted Cubans and Haitians the Fifth Amendment right to confer with counsel.[73] *Sale*, however, did extend due process protection to interdicted Haitians who were "screened in" to allow for processing of their asylum claims. The *Sale* court rejected government arguments that unadmitted refugees confined at a U.S. base had no right to access to counsel and no right to protection from deplorable conditions of confinement.[74]

- **State Torts**

State laws may provide remedies to those who have suffered abuse by the INS. In FTCA cases, the court must rely on state law to determine whether a tort has been committed. Torts commonly raised in FTCA cases are assault, battery, false arrest, and false imprisonment.[75]

An assault occurs when the perpetrator intentionally causes offensive physical contact or bodily injury, or threatens an individual with bodily injury. An assault cause of action acknowledges an individual's right to be free from the anxiety of harmful or offensive contact.[76]

Like assault, battery violates the right to personal security. Battery differs from assault only in the extent of the resultant injuries. A cause of action exists where an individual intentionally places another in apprehension of harmful or offensive physical contact, and acts to cause some bodily harm.[77]

False arrest and false imprisonment are closely tied.[78] A false arrest is an unlawful arrest.[79] False imprisonment is generally defined as the unlawful confinement of another, against the consent of the detained party.[80]

BIVENS ACTIONS

Bivens claims represent a judicially created avenue by which individual federal agents are held accountable for the violation of constitutional rights. While a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees,"[81] Congress has never provided a specific statutory remedy for an individual who suffers a constitutional violation at the hands of a federal officer. Although a *Bivens* claim may provide an effective avenue for obtaining damages, practitioners should keep in mind that exceptions, as well as the availability of the qualified immunity defense to defendant officers, can frustrate such claims. The injured plaintiff also must establish that a constitutional right has been violated. Recent court decisions, particularly in drug cases, have limited Fourth Amendment protections, and raised questions regarding the applicability of the Fourth Amendment to undocumented aliens.[82]

- **The Basis for a *Bivens* Claim**

In *Bivens*, several federal narcotics agents, acting under color of federal authority, illegally searched the apartment of an innocent family. Webster Bivens charged that the agents entered his home without cause or a warrant, manacled him in front of his family, and searched the entire apartment. After federal agents threatened his family with arrest, Mr. Bivens was arrested on a narcotics charge, taken to the federal courthouse, questioned, and subjected to a strip search. The plaintiff brought his lawsuit under the Fourth Amendment.

Finding that "[a]n agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own,"[83] the U.S. Supreme Court in *Bivens* held that an individual who has suffered an injury to constitutionally protected interests could bring a cause of action for damages directly under the Constitution, via a U.S. district court's jurisdiction over federal questions.[84] Despite the absence of any statutory authority, the Supreme Court in *Bivens* found, in its equitable jurisdiction, a remedy grounded in the Fourth Amendment's proscription against unreasonable searches and seizures.[85] Although the defendant federal officers argued that the Fourth Amendment provided individuals with no independent federal right, and that Mr. Bivens could only recover under state law, the Court found that individuals enjoyed an absolute right to Fourth Amendment protection, and concluded that federal courts can "use any available remedy to make good the wrongs done,"[86] and to guarantee full protection against unreasonable searches and seizures.[87]

After *Bivens* laid the groundwork for a damage remedy for Fourth Amendment violations, the Court extended the right to claims under other amendments to the Constitution. In *Davis v. Passman*,[88] the Court found that the Due Process Clause of the Fifth Amendment compelled a damage remedy in a sex discrimination claim brought by a staff member of Rep. Otto Passman.[89] The Eighth Amendment gave rise to a cause of action in *Carlson v. Green*,[90] brought by the estate of a deceased prisoner denied adequate medical care.

The *Bivens* Court cautioned against the creation of a

constitutional damage remedy in conflict with a congressional scheme. The judicially created damage claim will not be inferred in cases where there are both: (i) "special factors counseling hesitation"[91] and (ii) "another remedy, equally effective in the view of Congress."[92] Applying this two-part test in *Davis*[93] and *Carlson*,[94] the Court looked for the absence of both limiting factors before imposing the constitutionally inferred remedy. In *Davis*, the Court found that Rep. Passman's position was a "special factor counseling hesitation," but because Congress had provided no remedy, one would be inferred.[95] Applying the test in *Carlson*, the Court concluded there were no special factors to preclude a *Bivens* claim. The *Carlson* Court found that defendant prison officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate,"[96] and that there was no remedy in place to redress the Eighth Amendment violation.[97] The Court reasoned that a *Bivens* claim, brought against an individual federal officer, was more effective than the FTCA in deterring violations of the Constitution.[98]

A* Bivens *remedy is available to recover for violations of constitutional rights, even where the allegations forming the basis for the* Bivens *claim also support a separate claim for intentional tort under the FTCA.

In *Chappell v. Wallace*[99] and *Bush v. Lucas*,[100] the Court shifted its position and began placing more emphasis on the "special factors" prong of the two-part test, thus narrowing the bases for a claim. In *Chappell*, the Court denied relief to five Navy enlisted men who brought a *Bivens* action charging racial discrimination. The Court found that the need for military discipline was a "special factor," and even though there was no statutory remedy available to the servicemen, the Court refused to infer a basis for a *Bivens* claim.[101] In *Bush*, a NASA engineer brought suit, alleging a First Amendment violation, and again, the Court acknowledged that a damage remedy would be more effective than the existing civil service protection, but, nevertheless, found that the presence of "special factors" favored the comprehensive civil service scheme that Congress had constructed for federal employees.[102] The Court has continued to give added weight to the special factors prong, refusing to grant a damage remedy to a military officer injured following the administration of experimental drugs,[103] and to a disabled citizen denied disability benefits.[104]

Despite the Supreme Court's recent reluctance to expand *Bivens*, constitutional claims continue to be available where Fourth and Fifth Amendment rights are implicated. No "special factors" have been held to preclude relief against INS officers who enjoy some protection through a qualified immunity defense. A *Bivens* remedy, therefore, is available to recover for violations of constitutional rights, even where the allegations forming the basis for the *Bivens* claim also support a separate claim for intentional tort under the FTCA.[105]

- **Scope of Liability**

A *Bivens* claim can only be brought against a federal agent as an individual, who is "acting under color of his authority"[106] as a federal agent. Officers in their official capacities and the federal agency for whom they work are protected by sovereign immunity and cannot be held accountable in a *Bivens* action.[107] As discussed below, the U.S. may be liable for damages under the FTCA, but is never liable under *Bivens*.[108]

Bivens actions are the federal counterpart to 42 USC § 1983 of the Civil Rights Act whereby individuals may seek redress for violations of constitutional rights against state and local officials acting under color of law. Guidance as to the scope of *Bivens* liability often comes by reference to § 1983 cases.[109]

Bivens claims are generally brought against the officer directly responsible for the injury.[110] Superior officers are not vicariously liable for the actions of subordinate federal officers,[111] but liability can be found when there is some "affirmative link" between the injury to the claimant and the actions of a superior INS officer.[112] A supervisor is liable when he or she is directly involved in the matter at issue and: (i) has exercised control, and (ii) has personally participated in the action(s) at issue or has failed to supervise the relevant action(s) of the subordinate.[113] The Supreme Court noted in *Monell v. Department of Social Services of New York*,[114] a § 1983 claim, that the "mere right to control without any control or direction [having] been exercised and without any failure to supervise is not enough to support... liability."[115] A supervisor's failure to supervise will lead to liability when he or she fails to perform an affirmative duty,[116] correct a problem,[117] or train subordinates.[118]

- **Qualified Immunity**

A significant obstacle to obtaining recovery in a *Bivens* claim is the qualified immunity defense, which in certain cases shields the federal officer from liability. In

Scheuer v. Rhodes,[119] the Supreme Court extended immunity to state officials who act in good faith.[120] For federal officers, immunity was established in *Butz v. Economou*.[121] The qualified immunity defense is viewed as a balancing of competing interests, the protection of the constitutional rights of individuals and the government's interest in the "vigorous exercise of official authority."[122] The qualified immunity doctrine protects federal officers performing discretionary functions where the threat of liability may limit the ability of officers to perform "with the decisiveness and the judgment required by the public good."[123] At the very least, the assertion of the qualified "good faith" immunity defense imposes a substantial burden on the plaintiff because it limits her or his discovery efforts and delays the prosecution of her or his case. Even more seriously, if the defendant officer is successful, qualified immunity extinguishes the plaintiff's claim to damages.[124]

Qualified immunity is an affirmative defense, which the defendant must plead.[125] A government officer, who knew, or reasonably should have known, that the action he or she took within the sphere of her or his official responsibility would violate the constitutional rights of the plaintiff,[126] is not immune from liability. Initially, the Supreme Court held that the officer's good faith had both objective and subjective components.[127] Then, in *Harlow v. Fitzgerald*,[128] the subjective element was held to be "incompatible with [the Court's] admonition . . . that insubstantial claims should not proceed to trial."[129] The Court found that the burden of discovery and the distractions attendant to determining subjective good faith claims required a redefinition of the immunity defense. Accordingly, under *Harlow*, allegations of malice would no longer be sufficient to compel the government to participate in discovery and a trial. *Harlow* makes clear that federal officers are shielded from liability if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[130] Under *Harlow*, the appropriate inquiry involves the objective reasonableness of the officer's actions under the circumstances of the case.[131]

To be "clearly established," the right asserted need not be supported on all fours by precedent. The law established at the time of the act is controlling.[132] The law may be so obvious that a decision precisely on point, mirroring the circumstances at issue, is not necessary.[133] Rather, if "in light of pre-existing law the unlawfulness is apparent," the violation is clearly established for the purposes of offsetting a qualified immunity defense.[134]

In most cases, the federal defendant will respond to a *Bivens* action, and raise the good faith immunity defense in a motion to dismiss or a motion for summary judgment.[135] The plaintiff in a *Bivens* action bears the burden of overcoming the defendant's immunity claim.[136] Plaintiffs need to allege specific facts to overcome the defendant's qualified immunity defense,[137] and must demonstrate with specificity that the constitutional claim is clearly established, that is, that any reasonable officer would have understood the right being asserted. Denial of a claim to qualified immunity, "to the extent it turns on an issue of law,"[138] is a final decision, and as such, is appealable to the appropriate circuit of the U.S. courts of appeals.[139]

In *Bivens* actions, the government will routinely request a stay of discovery pending a decision on the qualified immunity defense. A stay of discovery is not automatic; "qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad."[140] Courts will allow the party responding to a federal officer's motion for summary judgment to conduct limited discovery tailored to the issue of qualified immunity.[141] If discovery is stayed, a "greater tolerance of speculation and inference must be afforded" the plaintiff's challenge of the qualified immunity defense.[142]

- **Fourth Amendment Claims**

Bivens actions have been brought to recover damages for illegal stops by INS officers. In *Arevalo v. Woods*,[143] a U.S. citizen brought *Bivens* and FTCA claims following his arrest by INS officers. Arevalo was stopped and questioned, and when he refused to answer the agents' questions and produce identification, he was arrested and then assaulted.[144] In *Guerra v. Sutton*,[145] seven individuals of Mexican descent sued the Border Patrol when agents unlawfully entered and searched their homes. The INS argued that Border Patrol agents were immune from liability on the basis of their good faith belief that a warrant had been obtained prior to the raid. Holding that "[a]n INS agent who conducts a search or makes an arrest without knowledge of the details of the warrant under which he presumes to act violates clearly established law,"[146] the U.S. Court of Appeals for the Ninth Circuit denied the defendant's qualified immunity defense.[147]

Bivens claims also have been based on charges of excessive force in violation of the Fourth Amendment. In *Sanchez v. Rowe*,[148] an undocumented alien who refused to accept voluntary departure following his arrest in the North Texas town of Vernon, was beaten by the arresting officer as he was driven in and around Vernon, and then

was left on the side of the road. The alien, who suffered a broken eardrum, bruises, and abrasions, brought a *Bivens* suit based on the Fourth and Fifth Amendments. Finding that his injuries "were grossly disproportionate to the need for action under the circumstances,"[149] the court awarded damages to the alien.[150] In *Ramirez v. Webb*,[151] the court awarded *Bivens* damages to a U.S. citizen wrongfully detained by the INS. The court found that the arrest was unlawful, and also determined that the force used in grabbing the plaintiff, forcing him to walk to the patrol car and then shoving him against it, was unnecessary and unreasonable.[152]

- **Fifth Amendment Claims**

Due process violations are another source of *Bivens* damage actions. As the INS detains more aliens for longer periods,[153] conditions of confinement have become subject to judicial challenge. In *Lynch v. Cannatella*,[154] the U.S. Court of Appeals for the Fifth Circuit ruled that confined excludable aliens had a clearly established due process protection, and denied the defendants' request for qualified immunity. The plaintiffs were stowaways who charged that their captors, the New Orleans harbor police, denied them basic physical comfort and subjected them to assaults and other abuses.[155] Other courts, however, have denied relief based on the conditions of qualified immunity articulated in *Lynch*. In *Medina v. O'Neill*,[156] the court denied damage relief to stowaways confined by a private security firm, finding that the actions of the defendant officials were at most negligence, and that the plaintiffs failed to demonstrate a violation of due process rights: "The stowaways alleged neither that cruel treatment was maliciously inflicted upon them nor that they suffered gross physical abuse."[157] Similarly, in *Adras v. Nelson*,[158] the U.S. Court of Appeals for the Eleventh Circuit denied damages to Haitian refugees who alleged severe overcrowding and denial of medical treatment while confined at the Krome Detention Center, outside Miami, because the plaintiffs were unable to show gross physical abuse or malicious harm on the part of the INS.[159]

- **Damages and Attorneys' Fees**

Bivens suits are brought in federal court under a district court's federal question jurisdiction.[160] The parties may request a jury trial.[161] There is no requirement for any prior notice to the agency or for the exhaustion of administrative remedies, but practitioners must pay attention to any relevant limitations period. The lawsuit must be brought within the limitations provided by the law for personal injury suits of the relevant state or territory.[162] For example, in a case challenging an unlawful arrest by the INS, a *Bivens* claim was held to be barred by Puerto Rico's one-year statute of limitations on tort actions.[163]

A *Bivens* plaintiff may claim actual and compensatory damages, including medical expenses and lost wages, as well as emotional distress and humiliation.[164] Punitive damages may also be awarded in a *Bivens* action when the defendant officer has acted with evil intent or with callous disregard of the plaintiff's rights.[165] Viewed as an effective deterrent, punitive damages have been held "especially appropriate to redress the violation by a Government official" of an individual's constitutional rights.[166]

Attorneys' fees under the EAJA[167] are not available in a *Bivens* action, and there are no other provisions for fee shifting.[168] EAJA fees are awarded only in civil actions against the government, and *Bivens* claims are made against the individual officer — not the officer in her or his official capacity.[169] An agreement for a contingency fee is permissible in a *Bivens* action, however, and unlike claims made under the FTCA, there is no federal limit on the percentage of a *Bivens* action award that may be claimed for attorneys' fees.

FEDERAL TORT CLAIMS ACT (FTCA)

Under the traditional reading of the doctrine of sovereign immunity, a private individual could not sue the U.S. for damages, based on the common law principle that the "King can do no wrong."[170] Sovereign immunity precludes damage actions unless the sovereign consents to be sued. The FTCA, passed in 1946, waives sovereign immunity against the U.S. for certain torts committed by federal employees, and thereby allows individuals to obtain damages.[171] Under the FTCA, the U.S. is liable, to the same extent as a private party, "for the injury or loss of property . . . 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."[172] Indeed, the FTCA was designed to "provide [ ] much-needed relief to those suffering injury from the negligence of governmental employees."[173]

In 1974, Congress amended the FTCA to permit suits against the U.S. for injuries caused by intentional torts of law enforcement officers.[174] Most FTCA claims involving INS enforcement officers are based on this amended section. While the misconduct may also be actionable under *Bivens* for the purposes of an FTCA claim, the harm must be framed as negligence or an intentional tort.[175] If the abuse does not rise to a constitu-

tional level,[176] the FTCA will provide the only avenue for monetary damages.

- **The Basis for an FTCA Claim**

The FTCA does not confer substantive rights under a federal common law of torts, but instead relies on the law of the jurisdiction where the act at issue occurred in determining whether a cause of action exists.[177] Constitutional violations alone are not remedied by the FTCA.[178] For there to be a basis to bring a claim under the FTCA, the conduct challenged must be actionable under state tort law. In *Birnbaum v. U.S.*,[179] the plaintiffs, whose mail to the Soviet Union was opened and copied by the CIA, recovered damages under a New York common law claim of invasion of privacy, but the court found no separate liability under the First and Fourth Amendments.[180]

The misconduct of law enforcement officers is measured by the state law liability of government employees, rather than the state law liability of private individuals.[181] In such inquiries under the FTCA, a court will examine a state's application of the "power and authority to arrest, to maintain custody, and to lawfully restrict a person's liberty, [which is] unique to the law enforcement function."[182] In making such an examination, a court may refer to federal laws to determine the legal justification of an arrest or detention by a federal officer. In *Caban v. U.S.*,[183] a case concerning the detention of a U.S. citizen who applied for admission at the New York port of entry, the U.S. Court of Appeals for the Second Circuit held that federal law ultimately determined the liability for an INS detention.[184] The Ninth Circuit, in *Rhoden v. U.S.*,[185] made a similar ruling regarding the detention of a permanent resident seeking entry. In *Rhoden*, the court held that because California law did not provide standards for determining the detention of an excludable alien, the law to be applied must be the law the state courts would apply in analogous situations — which would be federal law.[186]

A claimant under the Federal Tort Claims Act must establish that he or she has suffered a legal wrong under state law.

The FTCA claimant must establish that he or she has suffered a legal wrong under state law. In a Fifth Circuit case, *Brown v. U.S.*,[187] the plaintiff charged that the FBI had given false testimony to a grand jury and brought an FTCA claim to recover for violations of the Constitution and Texas law. The constitutional claim was held not to be actionable under the FTCA. Moreover, the plaintiff could not recover for malicious prosecution under a Texas tort claim because he failed to prove, as required in Texas, that the FBI agent acted with a malicious intent.[188]

Tort liability has been found in a number of cases relating to INS misconduct. In *Arevalo v. Woods*,[189] a combined *Bivens* and FTCA case, the U.S. was found liable under state law for false imprisonment, battery, and outrageous conduct.[190] In connection with an arrest and beating in another *Bivens*/FTCA case, *Sanchez v. Rowe*,[191] the court held the U.S. liable under Texas law for assault and battery.[192] In a recent case, federal customs agents at a port of entry were found liable and awarded damages under Massachusetts law for false imprisonment. In *Adedeji v. U.S.*,[193] the plaintiff, a Nigerian citizen and longtime U.S. resident, was detained and subjected to a strip-search, body-cavity search, and x-rays without a reasonable suspicion that she was carrying contraband. In another recent case, *Kim v. United States*, a family of legalization applicants sued and recovered for wrongful detention and deportation.[194]

The court declined to find a state law duty in *Garza v. U.S.*[195] In that case, the plaintiffs, driving near the U.S.-Mexico border, were pursued by the Border Patrol and made to stop at a road block. They were forced from their car at gunpoint and searched. The court found no basis for the plaintiffs' claims of negligence, infliction of emotional distress, assault, false arrest, and false imprisonment.[196]

The U.S. has been shielded from liability in cases charging the negligent enforcement of immigration laws. In *Maffei v. Nieves-Reta*,[197] a case involving a Border Patrol inspector who failed to detect and stop an undocumented alien, California law provided no avenue for relief in a claim brought against the U.S. State law would have afforded no redress from a private individual engaged in the same conduct.[198] In *Flammia v. U.S.*,[199] the INS was held to have no duty toward a state policeman injured in a gun battle with a Mariel Cuban.[200] A woman whose U.S. citizen child was kidnapped and taken from the U.S. by her father filed an FTCA claim in *Dore v. Schultz*[201] charging the U.S. with negligence. The court found the U.S. owed her no duty in that situation.[202]

The U.S. may invoke state privileges and defenses. In *Garcia v. U.S.*,[203] when a Border Patrol agent shot an individual during an arrest, the Ninth Circuit found that the agent's right to self-defense was dictated by state law.[204] No liability against the U.S. was found when

Border Patrol agents drew and pointed their weapons in *Garza v. U.S.*[205] The court held the action to be privileged under Texas state law.[206] There is, however, general agreement that the U.S. may not invoke the official immunity available to state law enforcement officers — even under the premise that state law and defenses govern liability. Several courts have refused to rely on a state rule of government immunity to limit the liability of the U.S.[207]

FTCA claims are brought against the U.S. to redress the negligent or wrongful act of a federal employee, acting within the scope of her or his employment with the federal government.[208] FTCA claims are not filed against the individual officer or the federal agency involved. The conduct of an independent contractor does not establish liability.[209] In *Logue v. U.S.*,[210] the Supreme Court held that the U.S. is not liable for the negligence of an independent contractor operating a jail.[211] Nevertheless, the U.S. may be liable for its negligent failure to prevent the tort of a non-employee under its supervision,[212] as well as for the negligent placement of a detainee in a contract facility.[213] For example, an individual detained in a contract detention facility, who is injured and is able to demonstrate that federal officers were negligent in placing her or him in harm's way, may establish a claim for relief.[214]

- **Exemptions**

The FTCA provides 13 exemptions to federal tort liability,[215] that "are interpreted according to federal law."[216] The most common exceptions in the context of immigration-related cases are: (i) claims arising from the exercise of discretionary functions[217]; (ii) claims arising from the detention of goods or merchandise by a customs or law enforcement officer[218]; and (iii) claims arising in foreign countries.[219]

Discretionary functions or duties are based on generalized social, economic, and political policy choices made by federal officials — choices that Congress did not intend to be subject to tort liability.[220] In determining whether a particular act is an exempted discretionary function, the court must address the nature of the conduct, rather than the status of the federal employee.[221] The exception is meant to "insulate[ ] the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment."[222] The discretionary function exemption will not apply when a statute or regulation specifically guides a course of action.[223]

Decisions regarding the parole of aliens have been held to be discretionary functions and, accordingly, are shielded from tort liability. In *Adras v. Nelson*,[224] the decision to hold excludable Haitians without parole belonged to the attorney general and was held to be "clearly the exercise of discretion in its broadest sense."[225] Similarly, in *Flammia v. U.S.*,[226] the INS's decision to parole a Cuban refugee, who later injured a police officer, was held to be exempt as a discretionary function.[227]

While parole decisions have been held to be exempt, in *Caban v. U.S.*,[228] the court held that the decision to arrest and detain an alien at the port of entry was not a discretionary function. In *Garcia v. U.S.*,[229] the decision to detain and to use force was held not to be a discretionary function. Likewise, in *Sanchez v. Bellefeuille*,[230] the court found that the maintenance of a Border Patrol checkpoint was not a discretionary function.[231]

The exemption based on claims arising from the detention of goods was applied in *Ysai v. Rivkind*,[232] a case involving the seizure of a vehicle by the Border Patrol. The issue of the exemption for a claim arising outside the U.S. was raised in *Maffei v. Nieves-Reta*.[233] In that case, the court held not actionable, as a discretionary function and a decision made outside the U.S., a decision made ten years earlier to grant a visa to a Mexican citizen, who subsequently was involved in a traffic accident.[234]

While the FTCA generally prohibits claims arising from "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights,"[235] Congress amended the statute in 1974 to provide a remedy for injuries based on intentional torts (assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution) committed by federal law enforcement officers.[236] The terms "investigative officers" and "law enforcement officers," defined as individuals empowered by law to execute searches, seize evidence, or make arrests, include INS officers.[237]

- **Exhaustion of Administrative Remedies Requirement**

The statute outlines a process for the submission of FTCA claims for damages to the appropriate administrative agency and as a precondition to litigation. The filing of a written claim with the administrative agency responsible for the officer(s) alleged to be at fault is a jurisdictional prerequisite to any FTCA claim:

> An action shall not be instituted upon a claim against the United States . . . 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. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.[238]

The administrative claims provisions of the FTCA cannot be waived and the failure to file a prior administrative claim will lead to the dismissal of a subsequently filed lawsuit.[239]

The claimant has two years to file a claim under FTCA, and six months after the denial of a claim within which to bring suit.[240] Generally, a claim accrues when the claimant discovers the injury and its cause.[241] Minority or disability of the claimant does not toll the limitations.[242]

Administrative claims must be in writing and presented to the appropriate agency.[243] Claims charging the misconduct of an INS officer should be addressed to the INS Regional Commissioner. Standard Form 95 or any other written form may be used,[244] and may be filed by the claimant or any agent or legal representative of the claimant.[245] The notice must describe the injury to allow the agency to investigate the claim, and must set forth the amount claimed.[246] The agency may require proof of the injury by the submission of medical bills and reports documenting the loss of employment.[247]

The case law is unsettled on the issue of a claimant's failure to document an administrative claim. In *Swift v. U.S.*,[248] the court found that a plaintiff who did not respond to the agency's request for additional information had failed to exhaust administrative remedies.[249] Other courts have found that the claimant need only apprise the government of the facts of the claim. Under the statute, the claimant must "(1) give[ ] the agency written notice of his or her claim sufficient to enable the agency to investigate, and (2) place[ ] a value on his or her claim."[250] The failure to document a claim fully affects settlement, but does not defeat jurisdiction in a subsequent lawsuit.[251]

- **District Court Review of FTCA Claims**

U.S. district courts have jurisdiction over FTCA claims.[252] Suit may not be brought until the claim is presented to the agency and either: (i) the agency has denied the claim, or (ii) six months has passed since the claim was filed and the agency has not responded (at which time the claim may be treated as denied).[253] Action must be brought within six months of the agency's notice of denial — even though the two-year limitation on the presentation of a claim will not have been reached.[254]

While there is no dispute that the injured party must bring suit within six months of an agency denial of a claim, the limitation period for filing an FTCA lawsuit when the government fails to respond to a properly filed administrative claim is not clear. Several courts have held that the six-year limitation period found in 28 USC § 2401(a)[255] does not apply to FTCA claims,[256] and instead, the claimant must exercise her or his option to deem a claim to which no response has been made as final and file a lawsuit within a reasonable time.[257] Other courts rely on 28 USC § 2675(a), which provides that if the agency fails to respond to a claim within six months, the claimant may at "any time thereafter" deem the claim denied. In *Conn v. U.S.*,[258] the court declined to set a limitation period for bringing an FTCA lawsuit, finding that the six-month period for filing after an administrative claim is denied is tolled as long as the claim has not been denied by the agency.[259]

Venue is properly in the district of the plaintiff's residence.[260] An FTCA claim must be tried before the court because the statute precludes a jury trial.[261]

Actual and compensatory damages, including damages for pain, mental anguish, and emotional distress, may be awarded. Punitive damages and prejudgment interest are prohibited.[262] Injunctive relief is not available under the FTCA because 28 USC § 1346, which grants exclusive jurisdiction of civil actions on claims against the U.S., refers only to the remedy of money damages, and courts have interpreted this jurisdictional statute to limit awards against the U.S. to money damages. In *Talbert v. U.S.*,[263] the plaintiff brought suit against the U.S. under the FTCA on the grounds that his government employee personnel file contained false information. He sought correction of his records and money damages for injuries related to the allegedly improperly kept records.[264] The court found that "the only relief provided for in the [FTCA] is 'money damages.'"[265] Similarly, in *Birnbaum v. U.S.*,[266] the Second Circuit, while affirming a monetary judgment against the U.S. for wrongfully intercepting the plaintiffs' mail, overruled the district court's order requiring the U.S. to provide the plaintiffs with a letter of apology.[267]

The FTCA contains no fee-shifting provision. The EAJA provides that fees cannot be awarded to a claimant in a tort action.[268] The FTCA permits lawyers to recover

attorneys' fees from damages awarded to plaintiffs, but limits fees to 20% of the award if the case is settled administratively, and 25% of the award obtained after suit is filed.[269]

- **Combining *Bivens* Claims and FTCA Claims**

INS misconduct often may give rise to both a *Bivens* claim for a constitutional violation and an FTCA action for an intentional tort. For example, an individual assaulted by an INS officer may establish claims under the FTCA, based on the assault, and under *Bivens*, based on the Fourth and Fifth Amendments.[270] Both claims should be filed and pursued simultaneously.[271] Congress viewed the FTCA and actions based on *Bivens* as parallel, complementary avenues of relief.[272] The FTCA "contemplates that victims of [an] intentional wrongdoing . . . shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights."[273]

There are substantial differences between the two causes of action.[274] Punitive damages may be awarded in a *Bivens* action, while the FTCA bars a punitive damage award. The plaintiff in a *Bivens* action may request a jury trial, but cannot in an FTCA case.[275] There is no requirement that the plaintiff give advance notice to the agency in a constitutional claim; the FTCA requires the prior filing of an administrative claim. The individual officer sued in a *Bivens* action may assert a qualified immunity defense, but qualified immunity does not apply in a suit against the U.S. The greater damage relief available, the option of a jury trial, and the lack of a strict exhaustion requirement may make *Bivens* claims appear more attractive. Note, however, that overcoming a qualified immunity defense raised by the individual federal officer in a *Bivens* action encumbers the litigation and may preclude liability. A victim also may not be able to recover damages against an insolvent individual federal officer, but will likely collect a judgment obtained against the U.S.

If *Bivens* and FTCA claims are joined, and the plaintiff prevails on both claims, the court will decline to enter judgment against both the federal officer and the U.S. The FTCA specifies that any judgment against the government bars subsequent claims arising out of the same subject matter.[276] Courts have held that this provision bars judgment against a federal employee rendered simultaneous or subsequent to the entry of an FTCA-based judgment against the government.[277] In *Rodriguez v. Handy*,[278] the district court had rendered a judgment favorable to the plaintiff for both a Texas common law claim against U.S. Border Patrol agents and an FTCA claim against the federal government. On appeal, the Fifth Circuit Court " . . . determined that the plaintiffs . . . lost any claim[s] against [the agents] in the course of obtaining a judgment against the United States."[279] While the injured party is barred from recovering under both *Bivens* and FTCA, he or she should seek both forms of relief when appropriate, and elect one of the two claims at the time a judgment is to be entered. In *Sanchez v. Rowe*,[280] the plaintiff proved both his *Bivens* claim against the U.S. Border Patrol agents and his FTCA claim against the federal government. The district court ordered him to elect one of the two claims for purposes of entering judgment.[281]

DECLARATORY AND INJUNCTIVE RELIEF

Individuals also may sue the government for declaratory and injunctive relief to challenge the INS's policies and practices and to seek redress of individual and class-based grievances. Since 1980, a surge in affirmative challenges to INS misconduct has led to significant changes in INS policy and procedure.[282] This section of the BRIEFING identifies common themes in such INS litigation and discusses cases worthy of notice.

Litigation has centered on efforts to limit INS enforcement in violation of the Fourth and Fifth Amendments. In some cases, claims for injunctive relief have been combined with requests for *Bivens* and FTCA damages. Numerous cases have been brought challenging the arrest and detention without legal cause of persons residing or employed in neighborhoods targeted by the INS. Detention practices and procedures governing the processing of asylum applications have come under fire during the current era of refugee migration of Haitians and Central Americans.

There may be significant obstacles to obtaining injunctive relief. The INS vigorously defends against broadly based injunctive relief, arguing that it will interfere with the INS's operations and hamper efforts to enforce immigration law. Additionally, the government will invariably raise issues, such as standing, exhaustion of administrative remedies, and mootness, in an effort to have a lawsuit dismissed. Nevertheless, plaintiffs have successfully restrained the INS in a number of cases,[283] and have won substantial attorneys' fees awards — another factor that makes this form of relief both attractive and effective.[284]

- **U.S. District Court**

Actions against federal agencies, including the INS, may be brought in federal district court.[285] In bringing an affirmative challenge to INS conduct, jurisdiction is

commonly based on 28 USC § 1331. Jurisdiction may also be based on INA § 279, which confers jurisdiction to a district court over cases arising under Title II of the INA.[286]

Plaintiffs may seek declaratory judgment under 28 USC § 2001, either alone or in conjunction with injunctive relief. It is within a district court's discretion to decide whether to grant declaratory relief, and the court will balance the interests of the parties in making the determination.[287] To obtain a declaratory judgment, the plaintiff does not need to demonstrate irreparable injury.[288]

A request for injunctive relief may lead to the quick and permanent cessation of the challenged policy or practice. Injunctions may take the form of a temporary restraining order (TRO), a preliminary injunction, or a permanent injunction. For temporary and preliminary relief, a party must generally show the following: (i) probable success on the merits, or that serious questions are raised, (ii) irreparable injury to the plaintiff, (iii) that the threatened harm to the plaintiff outweighs any harm to the defendant, and (iv) that the injunction will serve a public interest.[289] Additionally, the party seeking an injunction must demonstrate that other legal remedies are inadequate to redress the harm claimed.

The issuance of a preliminary injunction will generally stop the harm to the individual or class, and place the plaintiff in a better bargaining position to obtain permanent relief. The grant of preliminary relief, however, will not guarantee the issuance of a permanent injunction, because the party must convince the court that permanent relief is necessary to prevent the danger of recurring violations.[290]

- **Questions Commonly Raised in INS Litigation**

The INS views injunctions as a serious threat to its operations and mandates, and will invariably raise a number of objections to any request for preliminary or permanent injunctive relief.

Standing. The INS frequently challenges a plaintiff's standing based on *Los Angeles v. Lyons*.[291] In *Lyons*, the Supreme Court held that Mr. Lyons, who had been injured once by a police chokehold, lacked standing to obtain an injunction against the city because he could establish only a hypothetical, rather than a "real and immediate threat," of being subject to further illegal chokeholds.[292] Additionally, in the interest of comity, the court found that restraint must be exercised in the issuance of an injunction against the state.

Lyons does not present an insurmountable bar to injunctive relief, however. The party able to demonstrate the likelihood of the recurrence of an injury can still obtain injunctive relief and successfully restrain the defendant. In *Hernandez v. Cremer*,[293] a Puerto Rican U.S. citizen denied entry by the INS, which was suspicious of his birth certificate, was entitled to an injunction given the likelihood he would travel again and the reasonable expectation he would be subject to the denial of due process.[294] Moreover, *Lyons* can be avoided in class actions and in cases challenging the federal intrusion of constitutional rights. For example, in *LaDuke v. Nelson*,[295] a class action challenging Fourth Amendment violations, an injunction was issued against searches of farmworker housing by the INS. The plaintiffs overcame the INS's objections to standing with evidence that the illegal stops and searches of the injured class members would likely recur, and that the INS had sanctioned the illegal conduct.[296] The court also found that the federal judicial hesitation to enjoin a state function had no bearing on a case concerning a federal agency.[297]

Exhaustion of administrative remedies. In cases that challenge deportation/exclusion procedures and policies or the denial of immigration benefits, the INS will assuredly raise exhaustion of administrative remedies as a defense. Courts, however, have held that there is no exhaustion requirement when the action challenges broad policies and procedures set by the INS.

In *Haitian Refugee Ctr. v. Smith*,[298] a class of Haitian asylum applicants brought suit challenging, as a violation of due process, the INS's procedures regarding the plaintiffs' asylum applications. The government claimed that the statutory requirement in 8 USC § 1105(a), that deportation orders be reviewed only by the appropriate circuit of the U.S. courts of appeals was a bar to the class action. The court distinguished review of an individual's deportation proceedings from the review of "a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens,"[299] and found the latter to be subject to U.S. district court review and the entry of declaratory and injunctive relief.

Similarly, the INS raised the exhaustion issue in *McNary v. Haitian Refugee Ctr.*,[300] a case challenging the INS's processing of the plaintiffs' legalization applications. The *McNary* Court dismissed the INS's arguments, finding that the plaintiffs did not seek review of individual legalization applications, but rather, challenged

the INS's practices and policies with regard to the adjudication of all such petitions.[301]

Mootness. Frequently, the INS will respond to a lawsuit by instituting changes that address some of the plaintiff's grievances. Thereafter, the government will argue that the controversy is moot and request the dismissal of the lawsuit.

Courts are generally wary of a defendant's attempt to moot a lawsuit by a voluntary cessation of challenged activities.[302] It is well-settled that a case should be dismissed only when it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[303] The defendant bears a heavy burden to establish that the case is moot.[304] The INS failed to meet its burden in *Hernandez v. Cremer*,[305] a case involving a Puerto Rican U.S. citizen who was denied entry into the U.S. because the INS suspected the authenticity of his Puerto Rican birth certificate. The court found that the INS had instituted a new policy in response to the dispute — but one based on an oral directive that could be easily withdrawn. Relief was granted because "[d]enial of injunctive relief might leave the INS 'free to return to [its] old ways.'"[306]

- **INS Cases for Equitable Relief**

Fourth Amendment challenges to the INS's enforcement activities. The INS has been enjoined from stopping, questioning, and detaining individuals without a reasonable suspicion of illegal presence in the U.S. in places of employment, neighborhoods, schools, and migrant labor camps.

In *Illinois Migrant Council v. Pilliod*,[307] migrant workers charged that they were routinely subjected to illegal stops and housing raids by the INS. The court permanently enjoined the INS from stopping and searching class members based on their appearance in violation of the dictates of the Fourth Amendment.[308] In *Ramirez v. Webb*,[309] Michigan farmworkers challenged stops and searches by the INS. The court issued a preliminary injunction enjoining the INS to cease the stopping of vehicles without a warrant or the reasonable suspicion that the vehicle contained individuals unlawfully present in the U.S. The court further stated that the subjective impressions of INS agents alone were not sufficient justification for a stop, and that the INS must record each vehicular stop it makes, and list the articulable facts on which the agent relied.[310]

Farmworkers have also won equitable relief for violations of their Fourth Amendment rights. In *LaDuke v. Nelson*,[311] the court found that armed INS agents, with no articulable suspicion or probable cause: "periodically cordoned off migrant housing during early morning or late evening hours, surrounded the residences in emergency vehicles... approached the homes... and stationed officers at all doors and windows. The agents would then conduct house-to-house searches . . . ."[312] Over the INS's objections that the plaintiffs lacked standing and that the injunction was overbroad, the court entered a permanent injunction.[313] In *Nicacio v. INS*,[314] 22 class members testified that they had been subjected to stops by the INS. The district court found that the agents stopped vehicles "under circumstances in which the occupants were of Hispanic appearance, dressed in work clothes and operating older vehicles," characteristics shared by citizens and immigrants, legally and illegally present in the U.S.[315] Finding the case for an injunction even stronger than it was in *LaDuke* because several of the plaintiffs had been subjected to repeated stops,[316] the court in *Nicacio* granted the plaintiffs' request for permanent relief.

Complaints have been lodged against the INS's enforcement practices at factories and other places of employment. In 1982, the INS's "factory surveys," part of the "Project Jobs" campaign, came under fire.[317] In *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*,[318] the plaintiffs charged that the INS blocked exits at work sites, questioned principally Latino workers, and used a general warrant to interrogate and seize workers. The INS defended against the charges by characterizing them as evidence of only "sporadic violations of official policy," but the court found "an evident systematic policy and practice of fourth amendment violations."[319]

In a number of suits, the INS has agreed to settlements that include innovative provisions to curb continued violations. Following the preliminary injunction in *Murillo v. Musegades*,[320] where the court prohibited the INS's enforcement efforts at Bowie High School, the parties agreed to a permanent injunction, implementation of a citizen complaint procedure, and additional community-based training of Border Patrol agents. In *Pearl Meadows Mushroom Farm, Inc. v. Nelson*,[321] a lawsuit involving "Operation Jobs," a series of INS factory raids, a preliminary injunction was issued to remedy persistent patterns of illegal entries into the plaintiffs' workplace. The case was later settled with provisions for an improved administrative complaint procedure.[322]

Procedural due process challenges. The Fifth Amendment has been invoked in several noteworthy cases where

the INS impeded access to immigration benefits.

Orantes-Hernandez v. Smith[323] was brought as a nationwide class action on behalf of detained Salvadorans seeking asylum. The plaintiffs charged that the INS coerced the Salvadorans into accepting voluntary departure, interfered with the detainees' efforts to obtain counsel, and otherwise discouraged the plaintiffs from applying for asylum, all in violation of the plaintiffs' due process rights. A comprehensive injunctive order was entered requiring, among other things, that: (i) Salvadorans be advised of their right to apply for asylum, (ii) detainees who had retained counsel not be transferred to other detention facilities, and (iii) the INS provide class members with a library, self-help legal materials, access to telephones and private spaces in which to consult with attorneys.[324]

The government's treatment of refugees fleeing Haiti also has come under repeated attack in a series of cases spanning the 1980's and 1990's. In *Haitian Refugee Ctr. v. Smith*,[325] a class of Haitian refugees charged that accelerated procedures for adjudication of their asylum applications violated the Fifth Amendment. These accelerated procedures included: arbitrary time limits for the completion of asylum applications, mass asylum hearings, the failure to maintain a verbatim record of proceedings, and the denial of asylum claims without explanation. The court found that the government's accelerated program of processing the plaintiffs' asylum applications violated the plaintiffs' due process rights, ordered the government to provide an orderly nondiscriminatory procedure for asylum adjudication, and enjoined the deportation of class members.[326]

In other cases, excludable aliens have been unsuccessful in their efforts to obtain equitable relief to protect their Fifth Amendment rights.[327] In *Haitian Ctrs. Council v. McNary*,[328] however, the Second Circuit affirmed the district court's grant of an injunction to protect Haitians interdicted and detained at a U.S. military base. Finding that the plaintiffs had a credible fear of returning to Haiti, the court held that the refugees were protected by due process and that the INS's procedures denied them access to counsel.[329] In a recent case, *Xiao v. Reno*,[330] involving a Chinese citizen paroled into the U.S. to testify in a drug trial, the district court enjoined the government from returning the plaintiff to China where he would face possible execution because of testimony he gave in a U.S. court regarding mistreatment by Chinese officials.[331]

In *American Baptist Churches v. Meese*,[332] Salvadorans and Guatemalans seeking asylum charged that the INS's adjudication of their applications for asylum was discriminatory and violated their Fifth Amendment rights to equal protection. A settlement reached in the case called for the government to revamp its asylum process and readjudicate the class members' applications.

In *Haitian Refugee Ctr. v. Nelson*,[333] a case involving INA § 210 special agricultural worker (SAW) applications, the plaintiffs alleged that the INS's procedures violated their due process right. The plaintiffs charged that the INS had acted arbitrarily, and had denied the plaintiffs the opportunity to rebut adverse information and to present witnesses; the district court granted the plaintiffs' motion for a preliminary injunction.[334]

While unadmitted refugees frequently have been denied the protections of the INA and the Constitution, equitable relief has benefited U.S. citizens and returning residents seeking entry into the U.S. In *Hernandez v. Cremer*,[335] the Fifth Circuit affirmed a district court's injunctive order imposing procedures for the expeditious handling of U.S. citizen claimants at the port of entry. The district court in *Hernandez v. Casillas*[336] issued a similar injunction and enjoined the INS from forcing returning permanent residents, alleged to be excludable, to relinquish their resident status without an administrative hearing.

- **Attorneys' Fees Under the EAJA**

The availability of a fee-shifting statute that will compensate the prevailing party in an action for declaratory and injunctive relief serves as an effective deterrent to unjustified INS actions. The EAJA, enacted as a temporary measure in 1981 and extended by Congress in 1985, waives sovereign immunity and authorizes attorneys' fees awards in lawsuits brought against the government. The EAJA provides for the award of fees in two settings. Under 28 USC 2412 (d)(1)(A), attorneys' fees may be granted to the prevailing party in civil actions (other than those "sounding in tort") unless the court finds the position of the government to have been substantially justified or special circumstances exist that make an award unjust.[337] In addition, 28 USC 2412(b) authorizes fee awards in situations where such awards would be available under common law.[338] While fee shifting ordinarily is not available under common law, a party's bad faith may prompt a court to award fees against the offending party.[339] Generally, courts have held that the EAJA should be construed liberally to serve its primary objective, which is to "eliminate financial disincentives for those who would defend against unjustified governmental ac-

tions and thereby to deter the unreasonable exercise of Government authority."[340]

EAJA fees are available even in cases where the prevailing party fails to achieve complete success during the litigation. In *Texas State Teachers Ass'n v. Garland Independent School Dist.*,[341] a 1989 case involving attorneys' fees under § 1988, the Supreme Court rejected lower court pronouncements requiring that before fees could be awarded, the prevailing party succeed on the central issue in the lawsuit and achieve the primary relief sought. *Texas State Teachers*, and later, *Sullivan v. Hudson*,[342] an EAJA case, established that to be awarded attorneys' fees, the prevailing party need succeed only on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit."[343]

Accordingly, fees may be awarded in cases where the parties did not obtain relief on every claim.[344] Attorneys' fees are available to the prevailing party following a settlement of the controversy.[345] The plaintiff also may be the prevailing party in a lawsuit rendered moot by the defendant's acquiescence to the claim sought, as long as there is a showing that the lawsuit was a catalyst that motivated the defendant to cease its unlawful conduct.[346]

In defending against EAJA fee requests under 28 USC § 2412(d)(1)(A), the government must make a "strong showing" that its position was "substantially justified."[347] The government must establish that its position in both law and fact was justified. Thus, courts will look not only at the government's legal position, but also "the action or failure to act by the agency upon which the civil action is based."[348] *Pierce v. Underwood*[349] established a reasonableness test and identified three factors considered helpful in evaluating the substantial justification of the government's position: "(1) the state at which the litigation was resolved; (2) views expressed by other courts on the merits; and (3) the legal merits of the government's position."[350] Attorneys' fees will be awarded for the time spent litigating the EAJA fee request without a separate consideration as to whether the government was justified in its opposition to the fees.[351]

Full compensation for attorneys' fees may be obtained even when the government's position has been found to be justified with regard to some claims raised in litigation. In *Haitian Refugee Ctr. v. Meese*,[352] following the challenge to the INS's program to accelerate processing of detained Haitian refugees, the court awarded attorneys' fees. While the government was found to have been justified in its position with regard to three counts in the lawsuit, the court further found that the legal and factual issues raised in the counts where the government position was justified were intertwined with the claims where the government position was decidedly not justified. The plaintiffs obtained fees for all their attorneys' work because the case could not be viewed as a "series of discrete claims."[353]

Plaintiffs have obtained awards of attorneys' fees in a number of other immigration-related cases where the INS's positions have not been found to be substantially justified. In *Jean v. Nelson*,[354] the INS's failure to abide by the instructions of its own general counsel and its consistent denials that it had changed detention policies prompted a finding that its position was not substantially justified. The court found that the government's legal position was inconsistent with that of its own counsel, and that the unreasonable factual position unjustifiably prolonged the litigation.[355] In *LaDuke v. Nelson*,[356] attorneys' fees were awarded to the plaintiffs when the court, concluding that Fourth Amendment proscriptions against unreasonable searches and seizures were clear, found that the INS had failed to follow its own policies and had prolonged the litigation by denying its illegal practices.[357] Similarly, in *Illinois Migrant Council v. Pilliod*,[358] the INS failed to justify its warrantless entries and searches of farmworker housing — conduct that the court concluded clearly violated the Fourth Amendment. The court found unpersuasive the INS's argument that it should not be made to pay attorneys' fees because it had complied with the court's preliminary injunction.[359]

The EAJA limits the fee amount that a court may award to the prevailing party to $75 per hour, unless the court determines "that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."[360] Cost of living increases are generally determined by the Consumer Price Index-Urban (CPI-U).[361] Some courts gauge the cost of living increase by the year in which the work is performed,[362] while in other courts the increase is determined at the time the EAJA fees are requested.[363] The limited availability factor for increased fees requires a showing that the attorney or attorneys had "some distinctive knowledge or specialized skill needful for the litigation in question."[364] Some courts require a showing that the number of attorneys handling cases in the specialized field is so limited that individuals with valid claims are unable to find representation.[365] The fee increase is justified to encourage more lawyers to take the cases, not as a reward for the specialized knowledge.[366] Immigration practitioners have suc-

cessfully argued that their specialized knowledge of immigration law and procedure was needed for the litigation and thereby justified an increased fee award. [367]

In cases where the defendant has litigated in bad faith, the prevailing party may elect to recover fees under 28 USC § 2412(b) where the fee award is not limited to the $75 amount set in 28 USC § 2412(d)(1)(A). In determining the issue of bad faith, a court may consider conduct both during and before the litigation, but in the Fifth Circuit, for instance, the award may not be based solely on conduct that led to the substantive claim.[368] In *Perales v. Casillas*,[369] a class action challenging the INS's failure to adjudicate employment authorization requests, the court considered a bad faith claim against the government, when during the course of the litigation, the INS disregarded its own regulations and announced to the court and the plaintiffs that it would change its policy, but then refused to comply.[370]

The EAJA not only permits an award of attorneys' fees, but also authorizes payment to the prevailing party of expenses and costs.[371] Costs are measured by the general federal cost statute.[372] Expenses that have been allowed include reasonable travel, postage, telephone, computer-assisted research, and law clerk and paralegal assistance.[373]

ADMINISTRATIVE COMPLAINTS

Because of the enormous costs associated with litigation and the limited availability of counsel willing and able to pursue a federal lawsuit, many persons injured by the illegal or unconstitutional actions of the INS are unable to pursue civil litigation against the U.S. or the offending officer. Other persons are victims of abuse, such as verbal attacks and threats, which may not be actionable. In many instances, therefore, the filing of an administrative complaint, with a request that the abusive agent be disciplined or the offending policy be changed, may be the only remedy.

There is no question that an effective administrative complaint process can provide certain benefits. The complainant may be successful in having an abusive officer disciplined or an offending policy changed without the costs and inconveniences of litigation. The INS also benefits from a system that avoids the expense of defending lawsuits.

Despite these advantages, however, the pursuit of administrative complaints is presently considered a remedy of last resort. It is widely believed that most persons who have been subjected to INS abuse do not pursue administrative complaints — either out of a sense of futility or because of threats made to them by INS agents. Indeed, the agency has received extensive criticism regarding the mismanagement of its complaint system. Human Rights Watch/Americas charges that the INS's procedures for complaint review "are wholly inadequate" because the government resists public outreach, maintains a complex review system, fails to notify complainants of the disposition of complaints, and ultimately fails to prosecute or discipline abusive officers effectively.[374] In September 1994, the Commission on Immigration Reform issued a report stating:

> INS management must demonstrate clearly and decisively, both in policy and in administrative response to misconduct, that abuse of human and civil rights will not be tolerated . . . The most effective way to monitor the success or failure of policies designed to eliminate human rights abuse is a credible, effective complaint procedure . . . .[375]

While critics charge that the "pace of change [of the INS complaint system] is glacial,"[376] it remains to be seen whether monitoring by human rights organizations, legislative advocacy, litigation, and pressures from within the agency itself will ultimately lead to a more effective system.

The INS Operations Instructions (OIs) indicate that it is the Service's policy "that each employee shall be made aware of and strictly adhere to Departmental and Service Standards of Conduct as enumerated in the Officer's Handbook, the Administrative Manual, the Federal Personnel Manual, and the Code of Federal Regulations."[377] The OIs categorize employee misconduct into two parts: Category I and II, and charge all INS employees with the responsibility of reporting misconduct immediately.[378]

Category I misconduct encompasses any violations of federal and state statutes, and federal civil rights statutes.[379] Category II misconduct relates to non-criminal violations of standards of conduct, violations of INS policies and rules, and "on or off-duty behavior which adversely affects the efficiency and reputation of the Government service."[380]

Complaints of INS misconduct are to be directed to

the Office of Professional Responsibility (OPR) or to the Office of Inspector General (OIG). The OIG was established in 1988, and conducts investigations for fraud and abuse. The OPR, an arm of the INS, also investigates misconduct of INS officers. In 1993, the INS created the Office of Internal Audit to ensure that complaints are investigated and to identify patterns of INS employee conduct problems. The Criminal Section of the Department of Justice's Civil Rights Division (CRD), which is charged with responsibility for the prosecution of federal officers who commit criminal offenses, also deals with complaints against the INS.

New regulations provide for an expedited internal review process for complaints of violations of the INS's standards for enforcement.[381] Section 503 of the 1990 Act expanded the authority of INS officers, and in regulations published on August 17, 1994, the INS set out standards governing interrogation, arrest, detention, deadly force,[382] criminal search warrants, and the use of firearms.[383] The regulation for an expedited internal review of the standards for enforcement[384] provides that complaints should be addressed to the Department of Justice by mail at: P.O. Box 27606, Washington, DC 20038–7606, or by telephone at: (800) 869–4499.[385] Complaints "shall be investigated expeditiously consistent with the policies and procedures of the Office of Professional Responsibility and the Office of Inspector General of the Department of Justice."[386] The Office of Internal Audits is responsible for "coordinating the reporting and disposition of allegations."[387]

Critics have characterized the new procedures as inadequate, and continue to argue that the system is flawed. For the most part, individuals who have been subjected to abusive conduct or policy are unaware of the relevant INS regulations and OIs, and the agency does little to increase public awareness. Moreover, the regulations fail to guarantee to a complainant any notice of the disposition of complaints. Because the division of authority among the various offices charged with receiving, investigating, and disposing of complaints is unclear, there is often considerable confusion regarding the outcome of any given complaint.[388] For instance, a complaint lodged against an INS officer may be referred to the CRD, which then passes the charge to the FBI for investigation, and if the CRD declines to prosecute, the complaint is referred back to the OIG. The OIG does not have the independence and staff to investigate complaints promptly and thoroughly, and, ultimately, is unable to institute effective discipline and change. Regarding recent changes made by the agency, including the creation of the Office of Internal Audit, Human Rights Watch/Americas noted, "[w]hile these are laudable goals, the creation of yet another inaccessible department within the INS or Justice Department to deal with abuse problems is not the solution to the problems we and others have identified."[389]

Many, including members of Congress, have called for an independent civilian review board authorized to review complaints against the agency.[390] The INS has resisted establishment of an independent board, but instead has backed the Citizens Advisory Panel (CAP) established in 1994, and empaneled in April 1995. The CAP has 13 voting members appointed by the attorney general; four are U.S. government officials and nine come from the private sector, and include immigration and civil rights advocates.[391] During three days of hearings in San Diego, California in July 1995, the CAP heard from federal officials reporting of new initiatives to improve the complaint process and advocates presenting incidents of abuse.[392] While advocates continue to call for a national review commission that is independent of the INS, the CAP has begun to serve, at least in some respects, as a forum in which to air complaints and as a conduit for proposals to reform the system.[393]

Litigators also have focused on settlement negotiations in INS abuse cases to reform the INS's complaint procedures. The settlements reached in *Murillo v. Musegades*,[394] *Velasquez v. Ackerman*,[395] and *Pearl Meadows Mushroom Farm, Inc. v. Nelson*[396] include initiatives aimed at increasing public awareness and improving the INS's responsiveness. *Murillo* focuses on expanded public outreach efforts and includes provisions for the production and distribution of posters, pamphlets, and bumper stickers that notify the public of complaint procedures. In addition, the INS must make quarterly reports to the court on the nature and disposition of all complaints it reviews. The settlements in *Velasquez* and *Pearl Meadows* include provisions calling for allegations of misconduct to be submitted directly to the Office of Internal Audits, which must then acknowledge receipt and inform the complainant of the final disposition.

PRACTICE POINTS

1. An individual may bring a *Bivens* action against an individual federal officer for the violation of constitutional rights. A *Bivens* claim is a judicially created damage remedy based on the U.S. Constitution.

2. *Bivens* actions may be maintained only against a federal officer in her or his individual capacity. Officers in their official capacity and federal agencies are

protected from suit by sovereign immunity. The principle of qualified immunity shields from liability federal officers performing discretionary functions. A federal officer who knew or reasonably should have known that the action he or she took would violate the clearly established constitutional rights of an individual is not, however, immune from liability.

3. There is no requirement that the plaintiff give advance notice to the agency in a constitutional claim; the FTCA requires the prior filing of an administrative claim. A plaintiff in a *Bivens* action may request a jury trial and may be awarded actual, compensatory, and punitive damages. Attorneys' fees under the EAJA are not available in a *Bivens* action, and there are no other provisions for fee shifting. Attorneys may charge a contingency fee based on the damage award.

4. A party injured by the negligent or wrongful act or omission of a federal officer may bring an FTCA damage claim against the U.S. State law determines the basis of a cause of action under the FTCA. The U.S. may invoke state privileges and defenses, but may not rely on the official immunity that states may provide to their own law enforcement officers.

5. There are 13 exemptions from FTCA liability. The most common of these relates to claims arising: (i) from the exercise of discretionary functions; (ii) from the detention or confiscation of goods; and (iii) in foreign countries. Claims based on the intentional torts of federal law enforcement officers are no longer exempt under the FTCA.

6. FTCA actions are governed by a strict administrative exhaustion requirement. An FTCA action may not be brought unless the injured party has filed, within two years of the cause of action, a claim with the responsible federal agency, and the agency has had six months to review and dispose of the claim. A claimant has six months from an administrative denial of the claim in which to bring suit.

7. An FTCA suit may be brought for actual and compensatory damages. There is no right to a jury trial. Attorneys' fees are limited to 20% of the award following settlement and 25% of the award after a suit is filed.

8. *Bivens* and FTCA claims may be combined and pursued simultaneously. Practitioners should note, however, that the court will decline to enter judgment on both claims. The FTCA specifies that a judgment in an FTCA action bars subsequent claims arising out of the same subject matter.

9. Suits against the government for declaratory and injunctive relief may challenge federal policies and practices, and may be brought for the redress of individual and class-based grievances. Plaintiffs also may join claims for damages under *Bivens* and the FTCA.

10. A party may obtain injunctive relief upon a showing of: (i) probable success on the merits or that serious questions are raised; (ii) irreparable injury; (iii) harm that outweighs harm to the defendant; and (iv) service of the public interest.

11. Individuals seeking injunctive relief must generally overcome challenges based on standing. Ordinarily, a plaintiff in such cases can obtain relief if he or she is able to demonstrate the likelihood of the recurrence of an injury, or that the federal agency sanctioned the illegal conduct.

12. The party challenging broad policies and procedures set by the INS, as opposed to eligibility in individual applications, may obtain injunctive relief over objections based on the failure to exhaust administrative remedies. A program, pattern, or scheme to violate constitutional rights is distinct from review of an individual administration application.

13. The INS often responds to suits for declaratory and injunctive relief by instituting changes addressing some of the plaintiff's grievances. The INS carries a heavy burden to establish that the changes it has made moot the controversy. Absent substantial evidence that the challenged conduct will not recur, injunctive relief should be granted.

14. Awards of attorneys' fees serve as an effective deterrent to unjustified INS action. The EAJA provides for the awarding of attorneys' fees to the prevailing party based on the common law theory of bad faith and in cases where the government's position was not substantially justified. EAJA fees are limited by statute to $75 per hour, but a higher award may be made, based on increases in the cost of living or the limited availability of qualified attorneys.

15. Persons subject to abuse by the INS who are unable to pursue litigation should file an administrative complaint. Under regulations providing for expedited review, illegal conduct and violations of the INS's policy

should be brought to the attention of the Department of Justice. Complaints also should be directed to the Civilian Advisory Panel established to review complaints and the INS's complaint procedures.

CONCLUSION

The vindication of statutory and constitutional rights for immigrants and other aliens depends, in large part, on the availability of advocates ready to pursue remedies before administrative agencies and in federal court. While this is not a task exclusively for the immigration bar, immigration lawyers often represent persons who have been subjected to violence and other forms of abuse, and, accordingly, are experts in the law and procedures relevant to challenging INS misconduct. There are relatively few immigration practitioners, however, and in many areas of the country, there are no attorneys practicing immigration law. Indeed, immigrants' rights litigation is handled by a small band of immigration practitioners and a few immigrants' rights organizations scattered around the U.S. Reductions in funding from government and foundations seriously threaten the continued advocacy efforts of rights organizations already operating on severely limited budgets.[397]

An equally important component of the effort to end the cycle of violence and other forms of abuse against immigrants and other aliens is an informed populace. One should not assume that the INS or the Department of Justice will take effective steps to inform immigrants and other aliens of their rights and the procedures for remedying abuse. Instead, greater support should be given to campaigns sponsored by the immigration bar and immigrants' rights organizations, which have been far more effective than the government in informing and supporting immigrant and minority communities.[398] Such efforts also assist in monitoring abuse and the effectiveness of the INS's complaint procedures.

References

1 Suzanne Espinoza, *Farm Workers Sue Border Patrol: Raids on Homes Called Illegal*, S.F. Chron., Nov. 5, 1993, at 1 (reporting that 50 residents in the rural community of Farmersville, California brought suit for damages charging the INS with violations of their civil rights).

2 Patrick McDonnell, *INS to Review Agents' Use of Lethal Force at the Border: Recent Shootings Spur Immigration Commissioner to Call for Review of Policy*, L.A. Times, Dec. 7, 1990, at B1 ("In the wake of a series of controversial shootings by Border Patrol officers, federal Immigration and Naturalization Commissioner Gene McNary has called for an unprecedented review of lethal force procedures. . . .").

3 In 1992 in Temecula, California, six persons died as a result of an INS high-speed chase. In 1979 in South Texas, two persons died and ten persons were seriously injured during a high-speed chase, when a Border Patrol agent shot the tires of a pick-up truck. *See Rodriguez v. Handy*, 873 F.2d 814 (5th Cir. 1989) (involving claim brought by nonresident aliens against U.S. for deaths and injuries arising out of high-speed chase).

4 Human Rights Watch/Americas, Crossing the Line: Human Rights Abuses Along the U.S. Border With Mexico Persist Amid Climate of Impunity 1 (1995) [hereinafter Human Rights Watch/Americas, Crossing the Line].

5 The American Friends Service Committee (AFSC) organized the Immigration Law Enforcement Monitoring Project (ILEMP) to increase public awareness and to foster change in public policy regarding human rights violations along the border. The organization gathers complaints of abuse by the INS and monitors the INS's response.

6 American Friends Serv. Comm., Sealing Our Borders: The Human Toll 19 (1992).

7 Human Rights Watch/Americas, Crossing the Line, *supra* note 4; Human Rights Watch/Americas, Frontier Injustice (1993); Human Rights Watch/Americas, Brutality Unchecked (1992).

8 Human Rights Watch/Americas, Crossing the Line, *supra* note 4, at 2.

9 *Id.*

10 H.R. 2119, 103d Cong., 1st Sess. (1993).

11 A Citizens Advisory Panel (CAP) was established in 1994. The panel has 13 voting members from both the public and private sectors. *See* 72 Interpreter Releases 1277, 1291 (Sept. 18, 1995); 71 Interpreter Releases 325 (Mar. 7, 1994).

12 *See, e.g.*, Michael J. Nunez, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 Hastings L.J. 1573 (1992) (discussing abuse by Border Patrol and violence perpetrated by bandits and white

vigilantes who prey on unsuspecting migrants); Steven A. Rosenbaum, *Keeping an Eye on the INS: A Case for Civilian Review of Uncivil Conduct*, 7 La Raza L.J. 1 (1994) (documenting Border Patrol misconduct and urging adoption of external civilian review of the INS's internal complaint system). *See generally* Patrick McDonnell, *When Agents Cross Over the Borderline of Law Enforcement: Charges of Wrongdoing in Border Patrol Have Forced Even Loyalists to Call for Reforms*, L.A. Times Apr. 22, 1993, at A1 (reporting pressure to hire new agents for Border Patrol exacerbates an already inadequate screening and training process) [hereinafter McDonnell, *When Agents Cross Over the Borderline*].

13 Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (1986) (partially codified in scattered sections of the INA).

14 Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100–690. *See* 65 Interpreter Releases 1119, 1133 (Oct. 31, 1988) (reporting on and reproducing immigration-related provisions of the ADAA).

15 Immigration Act of 1990 (1990 Act or IA 90), Pub. L. No. 101–649, 104 Stat. 4978 (1990) (amending scattered sections of 8 USC).

16 *See* 73 Interpreter Releases 603 (May 6, 1996); 358 (Mar. 25, 1996).

17 Human Rights Watch/Americas, Crossing the Line, *supra* note 4, at 4–5.

18 Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214. *See* 73 Interpreter Releases 681, 700 (May 20, 1996); 650 (May 13, 1996); 601 (May 6, 1996); 568, 548 (Apr. 29, 1996); 521 (Apr. 22, 1996).

19 AEDPA § 423.

20 28 USC § 2412.

21 *See generally* 73 Interpreter Releases 385 (Apr. 1, 1996); 313 (Mar. 18, 1996).

22 In a study of immigration litigation, it was found that in over 40% of affirmative challenges to actions by the INS and the EOIR, plaintiffs obtained some relief. Peter H. Schuck & Theodore H. Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*, 45 Stan. L. Rev. 115 (1992).

23 "Bowie High School provides an oasis of safety and freedom for the students and staff who reside within the School District. The continued harassment of Bowie High School students and staff by the El Paso Border Patrol is both an invasion of their civil rights and the oasis." *Murillo v. Musegades*, 809 F. Supp. 487, 495 (W.D. Tex. 1992).

24 *Id.*

25 *Id.*

26 *Mendoza v. INS*, 559 F. Supp. 842 (W.D. Tex. 1982). In *Mendoza*, owners and patrons of El Paso bars brought an action to challenge illegal searches and seizures by the INS. Judge Bunton found the INS had violated the plaintiffs' Fourth Amendment rights and entered an injunction. *Id.* at 851.

27 Federal Tort Claims Act (FTCA), 28 USC §§ 2671–2680.

28 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

29 A settlement of plaintiffs' claims for declaratory and injunctive relief and attorneys' fees was reached February 17, 1994, and the *Bivens*/FTCA claims were severed. Thereafter, the government agreed to an award of FTCA damages for the named plaintiffs and the *Bivens* claims were dismissed. *Murillo v. Musegades*, C.A. No. EP–92–CA–319–B (W.D. Tex. Feb. 17, 1994) (final order); *Murillo v. U.S.*, C.A. No. EP–93–CA–466 (F) (W.D. Tex. Nov. 10, 1994) (order of dismissal).

30 For instance, Border Patrol agents assigned to the Texas Panhandle have been the principles in five known lawsuits. In *Cervantez v. Whitfill*, C.A. No. 2–79–206 (N.D. Tex. Dec. 12, 1979), residents of North Texas charged the Border Patrol and the state highway patrol with cooperating in their illegal arrest and detention based on the North Texas residents' Latino appearance and their inability to speak English. The case was settled. In *Ortega v. Rowe*, 796 F.2d 765 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987), INS detainees sued complaining of inhuman conditions of confinement. In another case, an inmate in one jail maintained by the Border Patrol and county officials in Staton, Texas was denied adequate medical care after a fall and was paralyzed. *Zavala v. Rowe*, C.A. No. 5–84–056 (N.D. Tex. 1984). In *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986), *aff'd in part, rev'd in part*, 870 F.2d 291 (5th Cir. 1989), an undocumented alien, who refused to agree to voluntary departure, was beaten by his arresting officer. He sued for damages under *Bivens* and the FTCA. In *Hernandez v. Reynolds*, C.A. No. 2–94–CV–344 (N.D. Tex. 1994), a family residing in North Texas charged they were illegally arrested, detained, and assaulted by the Border Patrol. In 1995, the family and the INS reached a settlement for damages with an agreement that the agents be retrained. *Hernandez v. Reynolds*, C.A. No. 2–94–CV–344 (N.D. Tex. Dec. 18, 1995).

31 *See generally* Rebecca Chiao, *Fourth Amendment Limits on*

Immigration Law Enforcement, 93-2 Immigration Briefings (Feb. 1992); Dan Kesselbrenner, *Contesting Deportability*, 92-5 Immigration Briefings (May 1992); Brian K. Bates & Bruce A. Hake, *A Tale of Two Cites: Due Process and the Plenary Power Doctrine*, 92-4 Immigration Briefings (Apr. 1992).

32 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

33 *Carlson v. Green*, 446 U.S. 14 (1980).

34 *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985).

35 *See Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987) (U.S. citizen falsely arrested); *Gallegos v. Haggerty*, 689 F. Supp. 93 (N.D. N.Y. 1988) (illegal stops and detention at migrant labor camp); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (Border Patrol assault on undocumented alien).

36 *Medina v. O'Neill*, 589 F. Supp. 1028 (S.D. Tex. 1984).

37 *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

38 *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (concluding that Fourth Amendment's protections extend to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community") (Rehnquist, C.J.).

39 *Cuban American Bar Ass'n., Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995); *Medina v. O'Neill*, 838 F.2d 800 (5th Cir. 1988).

40 8 USC § 1357(a)(1).

41 *See* Chiao, *supra* note 31.

42 *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

43 *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 877 (1969); *Benitez-Mendez v. INS*, 760 F.2d 907 (9th Cir. 1983); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985). It is permissible, however, for INS officers to approach and question an individual without reasonable suspicion of illegal presence. *INS v. Delgado*, 466 U.S. 210 (1984).

44 *Murillo v. Musegades*, 809 F. Supp. 487, 498 (W.D. Tex. 1992) (quoting *Brignoni-Ponce*, 422 U.S. 873, 878 (1975)) (citations omitted).

45 *INS v. Delgado*, 466 U.S. 210 (1984).

46 *Brown v. Texas*, 443 U.S. 47 (1979).

47 *Delgado*, 466 U.S. at 216–17.

48 *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

49 *Brignoni-Ponce*, 422 U.S. at 884. *See also U.S. v. Pacheco*, 617 F.2d 84 (5th Cir. 1980); *U.S. v. Orona-Sanchez*, 648 F.2d 1039 (5th Cir. 1981).

50 *Brignoni-Ponce*, 422 U.S. at 882 n.7.

51 8 USC § 1357(a)(2).

52 *Chambers v. Maroney*, 399 U.S. 42 (1970).

53 *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

54 *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989). *Johnson* also required that the injury suffered by the plaintiff be "significant," but the Supreme Court overturned this requirement in an Eighth Amendment case, *Hudson v. McMillian*, 503 U.S. 1 (1992). *See also Knight v. Caldwell*, 970 F.2d 1430, 1432 (5th Cir. 1992) (holding arrestee required to show "injury" resulting from alleged use of excessive force).

55 468 U.S. 1032 (1984).

56 *Matter of Garcia-Flores*, 17 I&N Dec. 325 (1980) (respondents in deportation proceedings, where evidence is based on egregious violations of Fourth and Fifth Amendments, may rely on exclusionary rule).

57 *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

58 *Id.*

59 *Id.* at 271.

60 Victor C. Romero, *Rights After* INS v. Lopez-Mendoza *and* United States v. Verdugo-Urquidez, 65 S. Cal. L. Rev. 999 (1991).

61 In a recent damage action brought by an undocumented alien and her family for illegal arrest, detention, and assault by Border Patrol agents, the government, in its motion to dismiss the *Bivens* claim, cited *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) to argue that it "remains unclear to what extent, *if at all*, persons in this country illegally may claim the Fourth Amendment protections." Individual Defendants' Motion to Dismiss, *Hernandez v. Reynolds*, C.A. No. 2–94–CV–344 (N.D. Tex. Apr. 17, 1995) (emphasis added).

62 *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953); *Fiallo v. Bell*, 430 U.S. 787 (1977).

63 *Mathews v. Diaz*, 426 U.S. 67 (1976).

64 *Id.* at 77.

65 *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896).

66 *Plyler v. Doe*, 457 U.S. 202 (1982).

67 *Landon v. Plasencia*, 459 U.S. 21 (1982).

68 *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

69 494 U.S. 259 (1990).

70 *Id.* at 275.

71 509 U.S. 155 (1993).

72 43 F.3d 1412 (11th Cir. 1995), *reported on in* 72 Interpreter Releases 387 (Mar. 20, 1995).

73 *Id.* at 1426–27.

74 *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) *aff'd*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot on other grounds sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993).

75 Actions also have been brought based on the tort of intentional infliction of emotional distress. *Garza v. U.S.*, 881 F. Supp. 1103, 1107 (S.D. Tex. 1995).

76 *See Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 933, 1012–13 (S.D. Tex. 1981).

77 *See Benright v. Western Auto Supply Co.*, 670 S.W.2d 373, 377 (Tex. Ct. App. 1984).

78 *Whirl v. Kern*, 407 F.2d 781, 793 (5th Cir. 1969).

79 Law Dictionary (Steven H. Gifis ed., 2d ed. 1984) ("Where the restraint is imposed by virtue of purported legal authority and an arrest occurs, it will be a false arrest resulting in a false imprisonment. . . .").

80 *Douthit v. Jones*, 619 F.2d 527, 532 (5th Cir. 1980).

81 *Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (quoting *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)).

82 *See U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 264–75 (1990), *reported on in* 67 Interpreter Releases 325 (Mar. 19, 1990).

83 *Bivens*, 403 U.S. at 392.

84 *Id.* at 394–96.

85 Protections from the unconstitutional actions of state and local officers can be found in the Civil Rights Act. 42 USC § 1983. Section 1983 applies to federal officers who join state or local officers in the violations of rights. *Peck v. U.S.*, 470 F. Supp. 1003 (S.D.N.Y. 1979).

86 *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

87 *Bivens*, 403 U.S. at 396.

88 442 U.S. 228 (1979).

89 *Id.* at 245–49.

90 446 U.S. 14 (1980).

91 *Bivens*, 403 U.S. at 396.

92 *Id.* at 397.

93 *Davis*, 442 U.S. at 228.

94 *Carlson*, 446 U.S. 14.

95 *Davis*, 442 U.S. at 246–47.

96 *Carlson*, 446 U.S. at 19.

97 *Id.* at 19–20.

98 *Id.*

99 *Chappell v. Wallace*, 462 U.S. 296 (1983).

100 *Bush v. Lucas*, 462 U.S. 367 (1983).

101 *Chappell*, at 304–05.

102 *Bush*, 462 U.S. at 388.

103 *U.S. v. Stanley*, 483 U.S. 669 (1987). The military officer's FTCA claim also was denied, as an intrusion into military affairs. *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981), *reversed in part, vacated in part sub nom. U.S. v. Stanley*, 483 U.S. 669 (1987).

104 *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

105 *Carlson v. Green*, 446 U.S. 14 (1980).

106 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971).

107 The only damage remedy against a federal officer in her or his official capacity is against the U.S. under the FTCA. *Norton v. U.S.*, 581 F.2d 390 (4th Cir. 1978), *cert. denied*, 439 U.S. 1003 (1978).

108 *Mack v. U.S.*, 814 F.2d 120 (2d Cir. 1987); *Clemente v. U.S.*, 766 F.2d 1358 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

109 *Butz v. Economou*, 438 U.S. 478 (1978).

110 *Id.*

111 *Williams v. Luna*, 909 F.2d 121, 123 (5th Cir. 1980).

112 *Rizzo v. Goode*, 423 U.S. 362 (1976).

113 *See Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990) (warden aware that prisoners did not have protective clothing); *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980) (policy set by sheriff).

114 436 U.S. 658 (1978).

115 *Monell*, 436 U.S. at 694 n.58 (citing *Rizzo v. Goode*, 423 U.S. 362, 370–71 (1976)).

116 *Howard v. Fortenberry*, 723 F.2d 1206 (5th Cir. 1984).

117 *Howell v. Evans*, 922 F.2d 712, 723 (11th Cir. 1991), *vacated on other grounds*, 931 F.2d 711 (11th Cir. 1991).

118 *Hufford v. Rodgers*, 912 F.2d 1338 (11th Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).

119 416 U.S. 232 (1974).

120 *Id.* at 248–50.

121 438 U.S. 478 (1978).

122 *Id.* at 506.

123 *Scheuer*, 416 U.S. at 240.

124 *Siegert v. Gilley*, 500 U.S. 226 (1991).

125 Certain officials enjoy absolute immunity. Judges performing judicial acts are absolutely immune. *Pierson v. Ray*, 386 U.S. 547 (1967). Prosecutors also enjoy protection from liability. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

126 *Cf. Wood v. Strickland*, 420 U.S. 308, 322 (1975) (plurality opinion). *Wood* was limited to the situation of a school board member in a § 1983 case. Subsequently, *Wood* has been cited as a general statement of the qualified immunity standard. *See Procunier v. Navarette*, 434 U.S. 555, 562–63 (1978), *quoted in Baker v. McCollan*, 443 U.S. 137, 139 (1979).

127 *Wood*, 420 U.S. at 322.

128 457 U.S. 800, 816 (1982).

129 *Id.* at 815–16.

130 *Id.* at 818.

131 *Id.*

132 *Seigest v. Gilley*, 500 U.S. 226 (1991).

133 *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (strip search of 13-year-old female); *Ayala-Serrano v. Lebron Gonzalez*, 909 F.2d 8 (1st Cir. 1990) (officer stood by as person was beaten).

134 *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 455 (5th Cir. 1994).

135 *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

136 *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir. 1994), *cert. denied*, 114 S. Ct. 2680 (1994).

137 *See Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) (concluding overcoming qualified immunity defense mandated heightened pleading requirement); *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 621 (5th Cir. 1992) (holding plaintiff's poorly alleged pro se complaint failed to plead specific facts to establish violation). *But see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (heightened pleading standard not applicable to civil rights cases alleging municipal liability).

138 *Mitchell*, 472 U.S. at 530.

139 *Id.*

140 *Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987). *See also Wicks v. Mississippi State Employment Serv.*, 41 F.3d 991, 997 n.27 (5th Cir. 1995) (holding that where pleadings fail to state facts sufficient to overcome qualified immunity defense, limited discovery is improper and discharge of claim on motion to dismiss is appropriate).

141 *Anderson*, 483 U.S. at 646; *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987).

142 *DiMartini v. Ferrin*, 889 F.2d 927 (9th Cir. 1989).

143 811 F.2d 487 (9th Cir. 1987).

144 *Arevalo*, 811 F.2d at 488.

145 783 F.2d 1371 (9th Cir. 1986).

146 *Guerra*, 783 F.2d at 1375.

147 *Id.* In a similar case in Georgetown, Texas, several families residing in a predominantly Latino neighborhood joined to bring a *Bivens*/FTCA case charging the INS had unlawfully entered and searched their homes. *Sanchez v. Garza*, C.A. No. SA–93–CA–1030 (W.D. Tex. Dec. 6, 1993). The case was recently settled for FTCA damages. *Sanchez v. Garza*, C.A. No. SA–93–CA–1030 (W.D. Tex. June 20, 1995) (judgment).

148 651 F. Supp. 571 (N.D. Tex. 1986).

149 *Sanchez*, 651 F. Supp. at 574.

150 *Id.* 574–75. In *Hernandez v. Reynolds*, C.A. No. 2–94–CV–344 (N.D. Tex. 1994), the plaintiffs charged they had been subjected to physical and verbal abuse because they refused to accept a voluntary departure. The plaintiffs dismissed their *Bivens* claim in exchange for an award of damages under the FTCA.

151 719 F. Supp. 610 (W.D. Mich. 1989).

152 *Id.* at 617.

153 The GAO reported that INS detainees are confined an average of 64 days. U.S. Gen. Accounting Office, Pub. No. GAO100D–92–85, Immigration Control: Immigration Policies Affect INS Detention Efforts 26 (1992).

154 810 F.2d 1363 (5th Cir. 1987).

155 *Id.* at 1367–68.

156 838 F.2d 800 (5th Cir. 1988).

157 *Id.* at 803.

158 917 F.2d 1552 (11th Cir. 1990).

159 *Id.* at 1559–60. Recent cases call into question the applicability of the malicious infliction of cruel treatment and gross physical abuse standards in *Medina* and *Adras*. In an Eighth Amendment excessive force case, *Hudson v. McMillian*, 112 S. Ct. 995 (1992), the Court rejected the requirement that the victim demonstrate a significant injury. *See Valencia v. Wiggins*, 981 F.2d 1440, 1447 (5th Cir. 1993) (abandoning requirement that detention officer's challenged conduct be so excessive that it shocks the conscience or that the injury be severe), *cert. denied*, 113 S. Ct. 2998 (1993). *See also* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Const. Law J. 1087 (1995) (arguing that standards imposed on alien conditions of detention cases are departure from standards generally imposed in jail cases and inappropriate infusion of plenary power doctrine).

160 28 USC § 1331; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392–95 (1971).

161 *Burns v. Lawther*, 53 F.3d 1237 (11th Cir. 1995).

162 *Wilson v. Garcia*, 471 U.S. 261 (1985).

163 *Lopez v. Aran*, 600 F. Supp. 323 (D.P.R. 1984).

164 *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

165 *Smith v. Wade*, 461 U.S. 30 (1983); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986).

166 *Carlson v. Green*, 446 U.S. 14, 22 (1980).

167 28 USC § 2412.

168 *Kreines v. U.S.*, 33 F.3d 1105 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995). If, however, the case involved a claim that the INS acted in concert with state or local officers, fees could be claimed under the Civil Rights Act, 42 USC § 1988. *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 735 F.2d 895 (5th Cir. 1984).

169 *Kreines*, 33 F.3d at 1109.

170 *Commissioners of the State Ins. Fund v. U.S.*, 72 F. Supp. 549, 552 (S.D.N.Y. 1947).

171 28 USC §§ 2671–2680.

172 *See* 28 USC §§ 2671–2680; 28 USC § 1346(b).

173 *U.S. v. Muniz*, 374 U.S. 150, 165 (1963).

174 28 USC § 2680(h).

175 *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986).

176 A *Bivens* claim cannot be used to redress the negligence of federal agents. *Daniels v. Williams*, 474 U.S. 327 (1986). For example, the Fifth Circuit has held that "technical batteries . . . or passing thumps do not rise to constitutional abuses." *U.S. v. Bigham*, 812 F.2d 943, 949 (5th Cir. 1987); *cf. Knight v. Caldwell*, 970 F.2d at 1432 (5th Cir. 1992) (holding that there must be proof of some injury to implicate the Constitution, but such injury need not be "significant").

177 *Birnbaum v. U.S.*, 588 F.2d 319 (2d Cir. 1978); *Brown v. U.S.*,

653 F.2d 196 (5th Cir. 1981). *But see Caban v. U.S.*, 728 F.2d 68 (2d Cir. 1984) (relying on federal immigration law and New York law in case involving INS detention).

178 *Federal Deposit Ins. Corp. v. Meyer*, 114 S. Ct. 996 (1994).

179 *Birnbaum v. U.S.*, 588 F.2d 319.

180 *Id.* at 327.

181 *Crider v. U.S.*, 885 F.2d 294 (5th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990).

182 *Louie v. U.S.*, 776 F.2d 819, 825 (9th Cir. 1985).

183 728 F.2d 68 (2d Cir. 1984).

184 *Id.* at 74–75.

185 55 F.3d 428 (9th Cir. 1995).

186 *Id.* at 431.

187 653 F.2d 196 (5th Cir. 1981), *cert. denied*, 456 U.S. 925 (1982).

188 *Brown*, 653 F.2d at 199.

189 811 F.2d 487 (9th Cir. 1987).

190 *Id.* at 490.

191 651 F. Supp. 571 (N.D. Tex. 1986), *aff'd in part, rev'd in part*, 870 F.2d 291 (5th Cir. 1989).

192 651 F. Supp. at 576.

193 782 F. Supp. 688 (D. Mass. 1992).

194 No. C90–1163WD (W.D. Wash. Apr. 15, 1993), *reported on in* 70 Interpreter Releases 744 (June 7, 1993).

195 881 F. Supp. 1103 (S.D. Tex. 1995).

196 *Id.* at 1106–08 (finding actions of the INS reasonable and privileged in light of allegations that plaintiffs attempted to elude officers suspecting illegal conduct).

197 412 F. Supp. 43 (S.D. Cal. 1976), *aff'd*, 549 F.2d 807 (9th Cir. 1977).

198 *Id.* at 44.

199 739 F.2d 202 (5th Cir. 1984).

200 *Id.* at 204–05.

201 *Dore v. Schultz*, 582 F. Supp. 154 (S.D.N.Y. 1984).

202 *Id.* at 158.

203 826 F.2d 806 (9th Cir. 1987).

204 *Id.* at 809, 814.

205 *Garza v. U.S.*, 881 F. Supp. 1103 (S.D. Tex. 1995).

206 *Id.* at 1107.

207 *Crider v. U.S.*, 885 F.2d 294 (5th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990); *Hetzel v. U.S.*, 43 F.3d 1500 (D.C. Cir. 1995).

208 28 USC § 2671.

209 *Id.*; *Slagle v. U.S.*, 612 F.2d 1157 (9th Cir. 1980).

210 412 U.S. 521 (1973).

211 *Id.* at 532–33.

212 *Panella v. U.S.*, 216 F.2d 622, 624 (2d Cir. 1954); *U.S. v. Shearer*, 473 U.S. 52 (1985).

213 *Sandoval v. U.S.*, 980 F.2d 1057, 1059 (5th Cir. 1993).

214 *Id.*

215 28 USC § 2680.

216 *Santiago-Ramirez v. Department of Defense*, 984 F.2d 16, 20 (1st Cir. 1993).

217 28 USC § 2680(a).

218 28 USC § 2680(c).

219 28 USC § 2680(k).

220 *U.S. v. Varig Airlines*, 467 U.S. 797 (1984).

221 *Id.*

222 *Berkovitz v. U.S.*, 486 U.S. 533, 537 (1988).

223 *Id.*

224 917 F.2d 1552 (11th Cir. 1990).

225 *Adras*, 917 F.2d at 1556.

226 739 F.2d 202 (5th Cir. 1984).

227 *Id.* at 204–05.

228 671 F.2d 1230 (2d Cir. 1982), *aff'd on other grounds*, 728 F.2d 68 (2d Cir. 1984).

229 826 F.2d 806 (9th Cir. 1987).

230 855 F. Supp. 587 (N.D.N.Y. 1994).

231 *Id.* at 592.

232 *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988).

233 412 F. Supp. 43 (S.D. Cal. 1976).

234 *Id.* at 44 n.4.

235 28 USC § 2680(h).

236 *Id.* The question has arisen whether intentional torts not excepted in § 2680(h) may give rise to an FTCA claim. The Supreme Court has said that courts may not "read exemptions into the Act beyond those provided by Congress." *Rayonier, Inc. v. U.S.*, 352 U.S. 315 (1957). Accordingly, courts have allowed claims based on intentional infliction of emotional distress because the tort is not specifically exempted. *Truman v. U.S.*, 26 F.3d 592 (5th Cir. 1994); *Sheehan v. U.S.*, 896 F.2d 1168 (9th Cir. 1990).

237 *See Caban v. U.S.*, 728 F.2d 68 (2d Cir. 1984) (concluding INS officers are law enforcement officers).

238 28 USC § 2675(a).

239 *Sexton v. U.S.*, 832 F.2d 629 (D.C. Cir. 1987); *Employees Welfare Comm. v. Daws*, 599 F.2d 1375 (5th Cir. 1979).

240 28 USC § 2401(b).

241 *U.S. v. Kubrick*, 444 U.S. 111 (1979).

242 *Hoch v. Carter*, 242 F. Supp. 863 (S.D.N.Y. 1965) (finding statute that tolls limitations for those under legal disability applies to civil actions but not to tort claims).

243 28 USC §§ 2401(b), 2675(a); 28 CFR § 14.2(b).

244 28 CFR § 14.2(a); *Williams v. U.S.*, 693 F.2d 555 (5th Cir. 1982).

245 28 CFR § 14.2(a); *Estate of Santos v. U.S.*, 525 F. Supp. 982 (D.P.R. 1981).

246 28 CFR § 14.2(a).

247 28 CFR § 14.4; *Adams v. U.S.*, 615 F.2d 284 (5th Cir. 1980), *reh'g denied*, 622 F.2d 197 (5th Cir. 1980) (holding claim sufficient where notice given is such that agency is able to investigate).

248 614 F.2d 812 (1st Cir. 1980).

249 *Id.* at 814–15.

250 *Adams*, 615 F.2d at 289.

251 *Santiago-Ramirez v. Department of Defense*, 984 F.2d 16 (1st Cir. 1993); *Adams*, 615 F.2d 284.

252 28 USC § 1346(b).

253 28 USC § 2675(a).

254 28 USC § 2401(b); *Page v. U.S.*, 729 F.2d 818, 820 (D.C. Cir. 1984); *Claremont Aircraft, Inc. v. U.S.*, 420 F.2d 896 (9th Cir. 1970).

255 28 USC § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

256 *Menkarell v. Bureau of Narcotics*, 463 F.2d 88 (3d Cir. 1972); *U.S. v. Glenn*, 231 F.2d 884 (9th Cir. 1956), *cert. denied*, 352 U.S. 926 (1956).

257 *Miller v. U.S.*, 741 F.2d 148 (7th Cir. 1984).

258 867 F.2d 916 (6th Cir. 1989).

259 *Id.* at 920. *See also Boyd v. U.S.*, 482 F. Supp. 1126, 1129 (W.D. Pa. 1980) (holding plaintiff not barred from bringing suit under FTCA by six-month limitations period); *Mack v. U.S. Postal Serv.*, 414 F. Supp. 504 (E.D. Mich. 1976) (holding six-month period for filing suit against the government to recover damage to automobile was tolled during three-year period in which automobile owner waited in vain for agency to act on claim, so that action filed thereafter was timely).

260 28 USC § 1402(b).

261 28 USC § 2402. If a *Bivens* claim is joined, however, issues of fact may be determined by a jury.

262 28 USC § 2674.

263 932 F.2d 1064 (4th Cir. 1991).

264 *Id.*

265 *Id.* at 1065–66 (quoting *Birnbaum v. U.S.*, 588 F.2d 319, 335 (2d Cir. 1978)).

266 *Birnbaum v. U.S.*, 588 F.2d 319 (2d Cir. 1978).

267 *Id.* at 335.

268 28 USC § 2412(d)(1)(A). *But see Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989) (considering request for fees under 28 USC § 2412(b), based on defendant's bad faith). The court ultimately rejected the request that was based solely on defendant's pre-litigation conduct, but left open the possibility that "bad faith" EAJA fees may be available in FTCA cases.

269 28 USC § 2678.

270 *See, e.g., Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986).

271 *Griffin v. Leonard*, 821 F.2d 1124, 1125 (5th Cir. 1987); *Sanchez*, 651 F. Supp. 571; *Ramirez v. Webb*, 599 F. Supp. 1278 (W.D. Mich. 1984).

272 *Carlson v. Green*, 446 U.S. 14 (1980).

273 *Id.* at 20.

274 *See* Chiao, *supra* note 31, at 42 app. 2.

275 28 USC § 2402. *See Birnbaum v. U.S.*, 588 F.2d 319, 335 (2d Cir. 1978) (upholding 28 USC § 2402 bar against jury trials as constitutional).

276 28 USC § 2676.

277 *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Birnbaum*, 588 F.2d at 333; *Aetna Casualty and Surety Co. v. U.S.*, 570 F.2d 1197, 1201 (4th Cir. 1978), *cert. denied*, 439 U.S. 821 (1978); *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *see also Gasho v. U.S.*, 39 F.3d 1420 (9th Cir. 1994) (concluding that even in cases where FTCA judgment is entered favoring U.S., subsequent *Bivens* suit is barred).

278 873 F.2d 814 (5th Cir. 1989).

279 *Rodriguez*, 873 F.2d at 816.

280 651 F. Supp. 571 (N.D. Tex. 1986).

281 *Id.* at 576. Some courts have refused to interpret the statute to disallow a claimant from obtaining a judgment against the U.S. under the FTCA as well as a judgment against the individual employee. Both judgments may be allowed to stand as long as there is no double recovery. *Moon v. Price*, 213 F.2d 794, 796–97 (5th Cir. 1954); *United States v. First Sec. Bank of Utah*, 208 F.2d 424, 428 (10th Cir. 1953); *Adams v. Jackel*, 220 F. Supp. 764, 766 (E.D.N.Y. 1963); *Munson v. U.S.*, 380 F.2d 976, 980 (6th Cir. 1967).

282 *See* Schuck & Wang, *supra* note 22, at 117 (discussing rise of affirmative challenges to INS policies during 1980's and resulting development of immigration litigation and INS enforcement policy).

283 *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547 (9th Cir. 1986); *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985), *modified*, 796 F.2d 309 (9th Cir. 1986); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977).

284 Attorneys' fees have been awarded under the EAJA in many immigration-related cases. *See, e.g., LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985); *Haitian Refugee Ctr. v. Muse*, 791 F.2d 1489 (11th Cir. 1986); *Nadler v. INS*, 737 F. Supp. 658 (D.D.C. 1989).

285 *Califano v. Sanders*, 430 U.S. 99 (1977); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 366 (C.D.Cal. 1982), *aff'd, Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

286 *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

287 *Diaz v. Stathis*, 576 F.2d 9 (1st Cir. 1978)

288 *Powell v. McCormack*, 395 U.S. 486 (1969).

289 *Beltran v. Myers*, 677 F.2d 1317, 1320 (9th Cir. 1982). *See also Productos Carnie, S.A. v. Central Amer. Beef and Seafood Trading Co.*, 621 F.2d 683 (5th Cir. 1980) (discussing elements of preliminary injunctive relief).

290 *Meltzer v. Board of Public Instruction*, 548 F.2d 559, 568 (5th Cir. 1977), *aff'd on reh'g*, 577 F.2d 311 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

291 461 U.S. 95 (1983).

292 *Id.* at 110.

293 *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990).

294 *Id.* at 237, 240–41.

295 762 F.2d 1318 (9th Cir. 1985).

296 *Id.* at 1324–25.

297 *Id.*

298 676 F.2d 1023 (5th Cir. 1982).

299 *Haitian Refugee Ctr.*, 676 F.2d at 1033.

300 498 U.S. 479 (1991).

301 *Id.* at 494–99.

302 *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

303 *Pacific Maritime Ass'n v. International Longshoremen's and Warehousemen's Union*, 454 F.2d 262, 263 (9th Cir. 1971).

304 *W.T. Grant Co.*, 345 U.S. at 633; *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

305 *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990).

306 *Id.* at 235 (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

307 540 F.2d 1062 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977) (en banc).

308 *Id.* at 1072.

309 599 F. Supp. 1278 (W.D. Mich. 1984), *aff'd*, 787 F.2d 592 (6th Cir. 1986).

310 *Ramirez*, 599 F. Supp. at 1292.

311 762 F.2d 1318 (9th Cir. 1985).

312 *Id.* at 1321.

313 *Id.* at 1330–31.

314 797 F.2d 700 (9th Cir. 1985).

315 797 F.2d at 704.

316 *Id.* at 702.

317 The INS had engaged in the series of "factory surveys" or workplace searches known as "Project Jobs" for the purpose of creating jobs for U.S. citizens and permanent residents. 64 Interpreter Releases 1371 (Dec. 14, 1987).

318 674 F. Supp. 294 (N.D. Cal. 1987).

319 *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) (quoting *INS v. Delgado*, 466 U.S. 210, 218 (1984).

320 809 F. Supp. 487 (W.D. Tex. 1992)

321 723 F. Supp. 432 (N.D.Cal. 1989).

322 *See also Velasquez v. Ackerman*, C–84–20723 WPI (N.D. Cal. 1992) (involving plaintiff settling with provisions for complaint procedure).

323 541 F. Supp. 351 (C.D. Cal. 1982); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

324 *Orantes-Hernandez*, 685 F. Supp. at 1511–13.

325 676 F.2d 1023 (5th Cir. 1982). *See also Perez-Funez v. INS*, 619 F. Supp. 656 (C.D. Cal. 1985) (finding minors must be informed of rights before signing waiver of hearing).

326 676 F.2d at 1039–42.

327 *See Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd as modified*, 472 U.S. 846 (1985) (unadmitted aliens seeking release from detention have no constitutional right for admission or parole); *Cuban-American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) (interdicted Cubans and Haitians detained in safe haven at U.S. military base not entitled to due process protection); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 479 (1995) (concluding excludable Cubans do not have constitutional right to freedom from indefinite detention).

328 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993).

329 *Haitian Ctrs. Council v. McNary*, 969 F.2d at 1341–42.

330 837 F. Supp. 1506 (N.D. Cal. 1993).

331 *Id.* at 1563–64.

332 712 F. Supp. 756 (N.D. Cal. 1989).

333 694 F. Supp. 864 (S.D. Fla. 1988), *aff'd.* 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991).

334 694 F. Supp. at 880–81.

335 913 F.2d 230 (5th Cir. 1990), *reh'g denied*, 925 F.2d 1461 (5th Cir. 1991).

336 520 F. Supp. 389 (S.D. Tex. 1981).

337 28 USC § 2412(d)(1)(A).

338 28 USC § 2412(b).

339 *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975).

340 *Ardestani v. INS*, 502 U.S. 129 (1991).

341 489 U.S. 782 (1989).

342 490 U.S. 877 (1989).

343 *Texas State Teachers Ass'n*, 489 U.S. at 789 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978)).

344 *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988), *aff'd*, *INS v. Jean*, 496 U.S. 154 (1990).

345 *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982); *Achaval-Bianco v. Gustafson*, 736 F. Supp. 214 (C.D. Cal. 1989).

346 *Public Citizen Health Research Group v. Young*, 909 F.2d 546, 550 (D.C. Cir. 1990); *Chen v. Slattery*, 842 F. Supp. 597 (D.D.C. 1994).

347 *S & H Riggers and Erectors, Inc. v. OSHA*, 672 F.2d 426, 430 (5th Cir. 1982).

348 *INS v. Jean*, 496 U.S. 154 (1990).

349 487 U.S. 552 (1988).

350 *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988) (quoting *Pierce v. Underwood*, 487 U.S. at 567–71 (1988)). The Eleventh Circuit adds three additional factors to those found in *Pierce*: (i) the clarity of the governing law; (ii) the foreseeable length and complexity of the litigation; and (iii) the consistency of the government's position. *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988) *aff'd sub nom. INS v. Jean*, 496 U.S. 154 (1990).

351 *INS v. Jean*, 496 U.S. 154.

352 791 F.2d 1489 (11th Cir. 1986).

353 791 F.2d at 1500 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).

354 863 F.2d 759 (11th Cir. 1988).

355 *Id.* at 780.

356 762 F.2d 1318 (9th Cir. 1985).

357 *Id.* at 1330–33.

358 672 F. Supp. 1072 (N.D. Ill. 1987).

359 The INS also has been ordered to pay attorneys' fees in a number of reported mandamus cases. In *Ramon-Sepulveda v. INS*, 863 F.2d 1458 (9th Cir. 1988), the court found the INS's position regarding res judicata inconsistent, and, therefore, unjustified, where the INS sought repeated and unlawful deportation orders. In *Nadler v. INS*, 737 F. Supp. 658 (D.D.C. 1989) and *Dabone v. Thornburgh*, 734 F. Supp. 195 (E.D. Pa. 1990), the INS's delay in processing petitions was found to be unjustified.

360 28 USC § 2412(d)(2)(A).

361 *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993); *Ramon-Sepulveda v. INS*, 863 F.2d 1458 (9th Cir. 1988). *But see Pollgreen v. Morris*, 911 F.2d 527 (11th Cir. 1990) (cost of living determination made by reference to CPI-Personal Expenses).

362 *Perales v. Casillas*, 950 F.2d 1066, 1074–77 (5th Cir. 1992).

363 *Garcia v. Schweiker*, 829 F.2d 396 (3d Cir. 1987).

364 *Pierce v. Underwood*, 487 U.S. at 572 (citing patent lawyers as an example).

365 *Perales*, 950 F.2d 1066; *Baker v. Bowen*, 839 F.2d 1075 (5th Cir. 1988).

366 *Perales*, 950 F.2d at 1078 n.16.

367 *Jean v. Nelson*, 863 F.2d at 774; *Nadler v. INS*, 737 F. Supp. at 662. *But see Ramon-Sepulveda*, 863 F.2d at 1462–63 (holding immigration expertise not needed in case where primary issue was res judicata and where there was no shortage of immigration lawyers).

368 *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989).

369 *Perales*, 950 F.2d at 1072.

370 *Id.* at 1067–72.

371 28 USC § 2412(d)(1)(B).

372 28 USC § 1920.

373 *Jean v. Nelson*, 863 F.2d at 776–78.

374 Human Rights Watch/Americas, Crossing the Line, *supra* note 4, at 2. Human Rights Watch/Americas also charges that none of the recommendations to improve the complaint procedure that the U.S. Civil Rights Commission made in 1980 has been implemented. *Id.* at 4.

375 U.S. Comm'n on Immigration Reform, U.S. Immigration Policy: Restoring Credibility (1994).

376 Estimates of the number of complaints lodged against the INS vary. Claiming to base its numbers on a 1989 study by the Justice Department's Office of Inspector General (OIG), the INS says that it receives one complaint per 17,000 arrests. Human Rights Watch/Americas, however, maintains that the OIG reports of complaints received exceed INS estimates. Human Rights Watch/Americas, Crossing the Line, *supra* note 4, at 24, 29. *See also*

McDonnell, *When Agents Cross Over the Borderline, supra* note 12 (OIG estimate is based only on complaints received by OIG and did not include those determined by the INS to be unfounded or not provable). Human rights organizations find the INS's estimates to be insignificant —given the underreporting of abuses due to ignorance of complaint procedures, agents' efforts to dissuade persons subjected to abuse and fellow agents to report, and the perceived futility of filing a complaint.

377 INS Operations Instruction (OI) 287.10(a).

378 INS OI 287.10(d).

379 INS OI 287.10(d)(1).

380 *Id.*

381 8 CFR § 287.10.

382 8 CFR § 287.8.

383 8 CFR § 287.9(a).

384 8 CFR § 287.9(b).

385 8 CFR § 287.10(b).

386 8 CFR § 287.10(a).

387 8 CFR § 287.10(a).

388 Human Rights Watch/Americas, Crossing the Line, *supra* note 4, at 28. *See also* McDonnell, *When Agents Cross Over the Borderline, supra* note 12, at A3 (reporting that squabble between investigating agencies interferes with the complaint process). The FBI has complained that Border Patrol agents dissuade fellow agents from reporting suspected crimes. *Id.*

389 Human Rights Watch/Americas, Crossing the Line, *supra* note 4, at 30.

390 *See* Rosenbaum, *supra* note 12 ("Both the public and the immigration authorities would be well-served by restructuring the process for receiving, investigating, and resolving allegations of misconduct").

391 *See* 71 Interpreter Releases 325 (Mar. 7, 1994).

392 Sebastian Rotella, *Border Panel Debates How to Police Immigration Agents*, L.A. Times, Jul. 13, 1995, at A3.

393 *See* 73 Interpreter Releases 174 (Feb. 5, 1996) (CAP is reviewing complaint procedures and will make recommendations to the INS and attorney general).

394 809 F. Supp. 487 (W.D. Tex. 1992).

395 *Velasquez v. Ackerman*, Civ. No. C–84–29733 (N.D. Cal. Mar. 6, 1992).

396 723 F. Supp. 432 (N.D. Cal. 1989).

397 *See* Donald M. Kerwin, *Don't Give Me Your Tired, Your Poor or Your Huddled Masses: The Impact of Pending Legislation*, 73 Interpreter Releases 157 (Feb. 5, 1996).

398 For example, in 1994 the Texas Lawyers Committee for Civil Rights, Immigrant and Refugee Rights Project, launched an effort to inform communities in the vast underserved area of West Texas. Staff and volunteers have conducted meetings, small and large, throughout the region and have begun to establish a liaison with non-immigration practitioners in an effort to provide a network of support.