PRACTICE ADVISORY[1]
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WHOM TO SUE AND WHOM TO SERVE IN IMMIGRATION-RELATED DISTRICT COURT LITIGATION

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INTRODUCTION

This Practice Advisory addresses who is, or who may be, the proper respondent-defendant and recipient for service of process in immigration-related litigation in district court.[3]

Part I of this advisory contains a general overview of potential officials and entities that might be proper respondents-defendants in district court. Part I also addresses whom to sue in specific types of immigration-related actions, including mandamus actions, Federal Tort Claims Act actions (and administrative claims), *Bivens*, and habeas actions. Part II discusses the Federal Rules of Civil Procedure that govern service of process in most immigration-related district court actions. Part III covers adding and substituting respondents-defendants after the initial complaint is filed.

A list of addresses for service is attached as Appendix A and sample certificate of service is attached as Appendix B.

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[3] The terms petitioner-plaintiff and respondents-defendants are used throughout this advisory to refer to the person filing the action and the person/entity being sued, respectively. For example, in federal question or mandamus actions, the person who files the action is the plaintiff and each person/entity sued is a defendant. In habeas actions, the person who files the action is the petitioner and each person/entity being sued is a respondent.

PART I: WHOM TO SUE

A. General Overview of Potential Respondents-Defendants

District court actions are generally brought against the officer/s or entity/entities responsible for the alleged wrongdoing and capable of providing the relief sought unless otherwise specified by statute or case law as discussed below. It is important to identify all the officials, entities or even executive departments (often there is more than one) that may be able to grant the requested relief when filing an action in district court.

In general, most immigration-related actions in district court are brought against the United States and/or one or more officers or entities within the Department of Homeland Security or the Department of Justice.

The Department of Homeland Security (DHS) is headed by the Secretary of Homeland Security. Within DHS, Immigration and Customs Enforcement (ICE) is responsible for the detention and removal of non-citizens. U.S. Citizenship and Immigration Services (USCIS) is responsible for adjudications of applications for immigration and citizenship benefits. Customs and Border Protection (CBP) is responsible for immigration and customs inspections and border patrol.

The ICE Health Service Corps (IHSC) facilitates health care services for immigration detainees. Medical professionals employed by IHSC well as the U.S. Public Health Service (within the Department of Health and Human Services) provide medical care at ICE-owned Service Processing Centers, Contract Detention Facilities, and state or county facilities that exclusively detain individuals for ICE. The IHSC oversees the health care at other state and local facilities that house ICE detainees, but direct care is generally provided by county or state health department employees or other contract medical providers.

The Department of Justice is headed by the Attorney General. Within DOJ, the Executive Office for Immigration Review (EOIR) is responsible for adjudicating immigration cases and it includes the Board of Immigration Appeals (BIA) and the immigration courts. The Federal Bureau of Investigations (FBI) and Federal Bureau of Prisons (FBP) also are within DOJ. The FBI or FBP and/or officers within these agencies also might be named, for example, in cases involving delayed background checks or detention conditions, respectively.

The Department of State (DOS) is headed by the Secretary of State and is responsible for foreign affairs, including visa issuance. The consular non-reviewability doctrine limits most law suits challenging visa denials. In unusual cases, for example, a person may seek a writ of mandamus to compel adjudication of a visa application and/or seek to challenge a visa denial based on constitutional grounds, DOS and/or its officers might need to be named.

Where the identity of the government officer is not known at the time a suit is filed, the names "John Doe" and "Jane Doe" can be used to denote fictitious defendants until the person's real identity becomes known through the discovery process.

Suing more than one official or entity is often necessary and also is advisable when the petitioner-plaintiff is unsure whom to sue. If a court determines that it lacks either personal or subject-matter jurisdiction over a respondent-defendant, the court will dismiss the action against that respondent-defendant. However, as long as the court has subject-matter jurisdiction and personal jurisdiction over *at least one* respondent-defendant, the court may proceed to the merits of the case. *See Employers Reinsurance Corp.* v. *Bryant,* 299 U.S. 374, 382 (1937) (without personal jurisdiction a district court is "powerless to proceed to an adjudication").

B. Whom to Sue in Specific Types of District Court Actions

1. Mandamus Actions

The Mandamus Act, 28 U.S.C. § 1361, authorizes actions in district court "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." In the immigration context, mandamus actions generally seek to force DHS to adjudicate an application for an immigration benefit, for example, a visa petition, adjustment of status application, or naturalization application.

In a mandamus action, the defendant is the person or entity who has the duty to the plaintiff. Thus, the named defendant will depend on the type of action the mandamus suit seeks to compel. For example, a mandamus action to compel adjudication of an application for a benefit pending at a USCIS district office, should name the DHS Secretary, the USCIS Director, and the USCIS District Director as defendants. A mandamus action to compel adjudication of an application for a benefit pending at a USCIS service center, should name the DHS Secretary, USCIS Director, and the Service Center Director as defendants.[4]

2. Actions under the Federal Tort Claims Act

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 authorizes monetary recovery for damages, loss of property, personal injury or death in suits where damages occurred as a result of the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1326(b).

Section 2680(h) of the FTCA permits suits for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights committed by "investigative or law enforcement officers of the United States Government." An investigative or law enforcement officer is defined as an individual "empowered by law to execute searches, seize evidence, or make arrests for violation of Federal law." *Id.* This definition includes most DHS officers. 8 U.S.C. § 1357(a)(2) (authorizing

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[4] The procedure for how to file a mandamus action and summary of relevant case law are discussed in greater detail in two Council practice advisories entitled, *Mandamus Actions: Avoiding Dismissal and Proving the Case* and *Agency Delay Litigation: Opposing a Motion to Dismiss*.

warrantless arrests by DHS officers); 8 C.F.R. § 103.1(b) (defining immigration officers); 8 C.F.R. § 287.5(c)&(d) (addressing power and authority of immigration officers to arrest and conduct searches).

The FTCA liability also extends to medical negligence committed by employees of the U.S. Public Health Service during immigration detention. *Hui v. Castaneda,* 559 U.S. 799 (2010).

Before an FTCA action may be filed in district court based on the actions or omissions of DHS employees, the claimant must present a written claim to DHS within two years after the claim accrues. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.1 *et seq*. Although there are currently no specific regulations or written guidance for public distribution regarding where immigration-related FTCA *administrative* claims should be sent, such claims arguably fall under the regulations governing service of summonses and complaints in litigation against DHS and its subdivision agencies. *See* 6 C.F.R. §§ 5.41 and 5.42. Litigation is defined to include administrative actions, 6 C.F.R. § 5.41(d), which presumably includes an administrative FTCA claim. These regulations provide for service on the Office of General Counsel.

Because compliance with the statute of limitations is jurisdictional, however, it is advisable to serve the administrative complaint on all appropriate offices. Therefore, we suggest also sending a copy of the administrative claim to the DHS agency employing the officer at the time of the act or omission that forms the basis of the claim and to the agency's regional/local counsel. And, if the claim is related to medical care provided by a U.S. Public Health employee, we suggest also sending a copy of the claim to the Department of Health and Human Services. If a local medical provider (rather than the ICE Health Service Corps) provided the relevant care, we suggest also sending a copy to that provider.

Mailing the claim via certified or registered mail provides independent evidence of proof of compliance with the two-year statute of limitations for administrative claims.

If DHS denies the written claim, the claimant must file suit in district court within six months after DHS mails the notice of denial. 28 U.S.C. § 2675(a). DHS' failure to respond to the claim within six months may be deemed a constructive denial of the claim under 28 U.S.C. § 2675(a).

A district court complaint under the FTCA must name the United States as the defendant, not the federal agency or individual officers. 28 U.S.C. § 1326(b).[5]

3. *Bivens* Actions

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court held that petitioners are entitled to recover damages for injuries resulting from Fourth Amendment violations by federal officials. Actions based on the tort theory set forth in *Bivens* and its progeny are filed in district court under 28 U.S.C. § 1331 (federal question jurisdiction).

[5] For further information on FTCA claims, see the National Immigration Project's *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys.*

A *Bivens* action can only be brought against a government officer in his/her individual capacity, and not against the United States, a government agency, or an officer acting in their official capacity. Superior or supervisory officers may also be named in the complaint where liability for the alleged injury can be linked to the actions or inactions of the senior officer.

Although a *Bivens* remedy is not available for medical negligence committed by employees of the U.S. Public Health Service during immigration detention, *Hui v. Castaneda,* 559 U.S. 799 (2010), it may be available if the negligence was committed by another medical care provider.[6]

4. Habeas Corpus Actions Challenging Detention

In general, a petition for a writ of habeas corpus under 28 U.S.C. § 2241 is filed in district court when a petitioner is challenging the length and/or conditions of detention.[7] In addition, habeas review may be available in the rare circumstance where there is a compelling reason that court of appeals review is inadequate. *See*, *e.g.*, *Singh v. Gonzales,* 499 F.3d 969 (9th Cir. 2007).

In detention-related habeas cases, the government has argued that the only proper respondent to the petition is the warden of the facility in which the person is detained. The Supreme Court adopted this position in an enemy combatant case. *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004). At least one circuit court has adopted this position in an immigration case. *Kholyavskiy v. Achim*, 443 F.3d 946, 952-53 (7th Cir. 2006). Although there are arguments that naming the warden is not required, if the court concludes otherwise, the habeas petition could be dismissed. Thus, attorneys may wish to name the warden to avoid litigating this issue.

Additional potential respondents to a habeas petition challenging detention might include the following: DHS; DHS Secretary; Director, Office of Detention and Removal Operations, ICE; Field Office Director, ICE; ICE Officer-in-Charge, ICE; the detention facility; and the Attorney General.

PART II: WHOM TO SERVE

A. Service of the Summons and Complaint

Once the complaint has been filed with the district court, the clerk should issue a case number. In some courts, the attorney must file a partially completed summons with the complaint, which the clerk will complete and issue. In other courts, the clerk will create and issue the summons. Counsel are advised to review the district court's local rules.

Federal Rule of Civil Procedure 4(i) sets forth the requirements and manner of service of the summons and complaint in suits against the United States and its agencies and officers sued in their official capacity. The rule also allows for reasonable time to cure deficiencies in service

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[6] The case law governing *Bivens* claims is discussed in greater detail in the Council's practice advisory *Bivens Basics: An Introductory Guide for Immigration Attorneys*.

[7] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005); HR Conf. Rep. No. 2813, 2873, 109th Cong., 1st Sess., (May 3, 2004).

provided that the United States Attorney *or* the Attorney General has been served. Fed. Rule. Civ. Proc. 4(i)(3).

1. Service on the United States

In suits against the United States, Federal Rule of Civil Procedure 4(i)(1)(A)-(C) provides that counsel must serve the summons and complaint on the:

* local U.S. Attorneys Office either by in person delivery to the U.S. Attorney, an Assistant U.S. Attorney or clerical employee designated to accept service *or* by registered or certified mail to the civil process clerk; and

* U.S. Attorney General by registered or certified mail (to the address in Appendix A); and

* if the action is attacking the validity of an order of an officer or agency *not named as a party to the action*, the U.S. agency or officer by registered or certified mail. S*ee* Part II, section A.2 below for information on how to serve U.S. agencies and officers.

2. Service on an Agency or Officer of the United States

To serve a U.S. agency or officer, Federal Rule Civil Procedure 4(i)(2) provides that counsel must serve the summons and complaint on the:

* the United States as explained above in Part II, section A.1 above; and

* U.S. Agency or Officer by registered or certified mail. To serve DHS, USCIS, ICE, or any DHS employee in their official capacity, including the DHS Secretary, the regulations state that the summons and complaint should be sent to the Office of the General Counsel at the address in Appendix A.[8] To serve DOS or any DOS employee in their official capacity, the regulations state that the summons and complaint must be sent to the Executive Office of the Office of the Legal Adviser at the address in Appendix A.[9]

3. Service on Individuals Within a Judicial District of the United States

To serve an individual within a judicial district of the United States, Federal Rule of Civil Procedure 4(e) provides:

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[8] 6 C.F.R. § 5.42(a) provides that "[o]nly the Office of the General Counsel is authorized to receive and accept on behalf of the Department summonses or complaints sought to be served upon the Department, the Secretary, or Department employees."

[9] 22 C.F.R. § 172.2(a) states that "[o]nly the Executive Office of the Office of the Legal Adviser (L/H–EX) is authorized to receive and accept summonses or complaints sought to be served upon the Department or Department employees."

“Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, . . ., may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.”

Unlike other litigation against the government, because *Bivens* actions are filed against individuals and not against a government agency, counsel is required to serve each individual defendant to a *Bivens* action. If the individual defendant is within the judicial district of the court where the action is filed, Federal Rule of Civil Procedure 4(e) applies.

The regulations say that “summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may . . . be served upon the Office of the General Counsel.” 6 C.F.R. § 5.42(c).[10] As *Bivens* actions are “legal proceedings arising out of the performance of official duties,” service on the Office of General Counsel is also advisable.

B. Return/Affidavit of Service and Serving Future Pleadings

After service of the summons and complaint, counsel must file proof of having effectuated service with the district court. In general, counsel either may file an affidavit of service attesting to the date and manner of service and including proof of delivery or complete the section on the back of the summons entitled “return of service.” Counsel should review the district court’s local rules regarding the preparation and filing of proof of service.

Attorneys from the local U.S. Attorney’s Office or the Office of Immigration Litigation (a division within the Civil Division of the Department of Justice) generally represent the government. Where counsel represents a party, including the government, future pleadings must be served on counsel “unless service upon the party is ordered by the court.” Fed. R. Civ. Proc.

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[10] 6 C.F.R. § 5.42(c) reads as follows:

> Except as otherwise provided §§ 5.42(d) and 5.43(c), the Department is not an authorized agent for service of process with respect to civil litigation against Department employees purely in their personal, non-official capacity. Copies of summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may, however, be served upon the Office of the General Counsel.

5(b).[11] All future pleadings after the filing of the complaint must be filed with a certificate of service. Fed. R. Civ. Proc. 5(d). Counsel should review the district court's local rules regarding the form and filing of certificates of service. A sample certificate of service is attached as Appendix B.

PART III: PROCEDURAL ISSUES

A. Adding or Removing Respondents-Defendants After The Initial Filing

Federal Rule of Civil Procedure 21 governs adding or removing a respondent-defendant after a complaint is filed. Federal Rule of Civil Procedure 21 states that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Thus, to add or remove a respondent-defendant, counsel should make a motion for leave to amend the petition-complaint to add the appropriate party.

B. Substituting Respondents-Defendants After The Initial Filing

Under Federal Rule of Civil Procedure 25(d), when a public officer is sued in their official capacity and subsequently dies, resigns, or otherwise ceases to hold office, the officer's successor is automatically substituted as a party. Future pleadings should name the officer's successor, however, any misnomer will be disregarded unless it affects substantial rights.

Although Federal Rule of Civil Procedure 25(d) provides for substitution as a matter of law, counsel may wish to notify the court of the change by inserting a footnote after the change in the case caption and briefly explaining the change.

[11] Fed. R. Civ. Proc. 5(b) further provides that service of future pleadings on opposing counsel may be completed by delivery, as defined under the rule, or mail. Service by mail is complete upon mailing.

APPENDIX A:
LIST OF SERVICE ADDRESSES

Please note that government addresses may change. Attorneys are advised to verify the addresses in this appendix.

Attorney General: Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001	**Board of Immigration Appeals:** United States Department of Justice Executive Office for Immigration Review Office of the Chief Clerk Board of Immigration Appeals 5201 Leesburg Pike, Suite 2000 Falls Church, VA 22041
Office of the General Counsel: Office of the General Counsel U.S. Department of Homeland Security Washington, DC 20528 [12]	**Department of State:** Executive Office of the Office of the Legal Adviser U.S. Department of State 600 19th Street NW, Suite 5.600 Washington DC 20522

[12] The zip code for the Office of the General Counsel is erroneously listed in the regulations as 20258. *See* 6 C.F.R. §5.42(a). The correct zip code is 20528. *See* http://www.dhs.gov/xutil/contactus.shtm (DHS website); and http://zip4.usps.com/zip4/zcl_2_results.jsp (U.S. Postal Service website). This footnote was added on February 14, 2006.

Administrative Claims under the Federal Tort Claims Act: In addition to sending the administrative claim to the Office of General Counsel at the above address, send a copy of the administrative claim to the appropriate agency employing the officer at the time of the act or omission at the following addresses: [13]

<table>
<tr>
<td>If ICE employed the officer, send the claim to:

Office of the Principal Legal Advisor
Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street SW
Washington, DC 20024</td>
<td>If CBP employed the officer, send the claim to:

U.S. Customs and Border Protection
Office of the Chief Counsel
1300 Pennsylvania Avenue, N.W.
Washington, DC 20229</td>
</tr>
<tr>
<td>If the claim is related to medical care facilitated by the Division of Immigrant Health Services while in detention, send the claim to:

Office of the Principal Legal Advisor
Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street SW
Washington, DC 20024

and

U.S. Department of Health and Human Services
Office of the General Counsel
200 Independence Ave. S.W.
Washington, D.C. 20201

and, if the person was <u>not</u> detained in a Service Processing Center or Contract Detention Facility, we suggest also sending a copy of the claim to the local medical provider.</td>
<td>If USCIS employed the officer, send the claim to:

U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
Office of the Chief Counsel
20 Massachusetts Ave. N.W., Room 4210
Washington, DC 20529-2120</td>
</tr>
</table>

[13] Because of the ambiguity surrounding the issue of where to file an administrative claim under the Federal Tort Claims Act, it may be worthwhile to also send copies of the administrative claim to the agency's regional/local counsel.

APPENDIX B:
SAMPLE CERTIFICATE OF SERVICE
(FOR DOCUMENTS FILED AFTER SERVICE OF THE COMPLAINT)*

CERTIFICATE OF SERVICE

I hereby certify that on [Date], I electronically filed the foregoing [Document/s], with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties shall be served in accordance with the Federal Rules of Civil Procedure.

____
[Name]
[Title]

*Note: Counsel should check local district court rules regarding the format and contents of a certificate of service.