



## AMERICAN IMMIGRATION LAW FOUNDATION

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### PRACTICE ADVISORY<sup>1</sup>

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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.<sup>3</sup>

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, *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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<sup>3</sup> 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.

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## **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 (currently Janet Napolitano). Within DHS, Immigration and Customs Enforcement (ICE) is responsible for the detention and removal of non-citizens (currently headed by an Assistant Secretary). U.S. Citizenship and Immigration Services (USCIS) is responsible for adjudications of applications for immigration and citizenship benefits (currently headed by an Acting Deputy Director). Customs and Border Protection (CBP) is responsible for immigration and customs inspections and border patrol (currently headed by an Acting Commissioner).

The Department of Justice is headed by the Attorney General (currently Eric H. Holder Jr.). 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 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.<sup>4</sup>

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. *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937) (without personal jurisdiction a district court is “powerless to proceed to an adjudication”).

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<sup>4</sup> The Department of State (DOS) is responsible for foreign affairs, including visa issuance. However, most law suits challenging visa denials are precluded by the consular non-reviewability doctrine. In unusual cases, for example, a mandamus to compel adjudication of a visa application and/or a challenge to a visa denial based on constitutional grounds, DOS and/or its officers might need to be named.

## **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.

The procedure for how to file a mandamus action and summary of relevant case law are discussed in greater detail in AILF’s Practice Advisory entitled, *Mandamus Actions: Avoiding Dismissal and Proving the Case* ([http://www.ailf.org/lac/lac\\_pa\\_chrono.shtml](http://www.ailf.org/lac/lac_pa_chrono.shtml)).

### **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. INA § 287(a)(2) (authorizing 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).

Before an FTCA action may be filed in district court based on the actions or omissions of DHS officers, 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. Addresses are provided in Appendix A.

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 DHS or any of its component entities. 28 U.S.C. § 1326(b).

For further information on FTCA claims, see *Obtaining Remedies for INS Misconduct*, by Lee J. Teran, Immigration Briefings (May 1996).

### **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. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court extended such right to recover damages to violations of the Due Process Clause of the Fifth Amendment. 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).

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.

For further information on FTCA claims, see *Obtaining Remedies for INS Misconduct*, by Lee J. Teran, Immigration Briefings (May 1996).

### **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.<sup>5</sup> In addition, habeas

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<sup>5</sup> 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).

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 summons and complaint have been filed with the district court, the clerk should issue a case number. The clerk usually stamps the case number on the summons and returns the summons to counsel. The file-stamped summons is then copied for service.

Federal Rule of Civil Procedure 4(i) sets forth the requirements and manner of service of the summons and complaint in suits against the US and its agencies and officers sued in their official capacity. The rule also allows for reasonable time to cure deficiencies in service 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 US Attorneys Office either by in person delivery to the US Attorney, an Assistant US Attorney or clerical employee designated to accept service *or* by registered or certified mail to the civil process clerk; and
- \* US 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 US agency or officer by registered or certified mail. *See* Part II, section A.2 below for information on how to serve US agencies and officers.

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

To serve a US 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
- \* US 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.<sup>6</sup>

## 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:

“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).<sup>7</sup> As *Bivens* actions are

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<sup>6</sup> 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.”

<sup>7</sup> 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

“legal proceedings arising out of the performance of official duties,” service on the Office of General Counsel is also advisable.

## **B. Return of Service and Serving Future Pleadings**

After the summons and complaint has been served, generally, counsel will complete the section on the back of the summons entitled “return of service” by filling in the names, positions and addresses of the parties served and the method of service. Generally, the original summons (with the return of service section on the back completed) is then filed with the district court and constitutes proof of service.

Attorneys from the local US Attorneys 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. 5(b).<sup>8</sup> All future pleadings after the filing of the complaint must be filed with a certificate of service. Fed. R. Civ. Proc. 5(d). 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.

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summons 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.

<sup>8</sup> 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 on the agency's website or AILA InfoNet.

### **Attorney General:**

Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

### **Office of the General Counsel:**

Office of the General Counsel  
U.S. Department of Homeland Security  
Washington, DC 20528<sup>9</sup>

### **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

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<sup>9</sup> 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](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:*<sup>10</sup>

**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

**If USCIS employed the officer,** send the claim to:

U.S. Citizenship and Immigration Services  
United States Department of Homeland Security  
Office of the Chief Counsel  
20 Massachusetts Ave. N.W., Room 4210  
Washington, DC 20529-2120

**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

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<sup>10</sup> 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\***

CERTIFICATE OF SERVICE

On **[Date]**, I, **[Name]**, the undersigned, served the within:

**[Title of Document/s]**

on each person/entity listed below addressed as follows:

**[Manner of Service]**

For example: (by regular mail/ by overnight mail/ by hand delivery)

**[Name]**

**[Name of Entity]**

**[Address]**

I declare under penalty of perjury that the foregoing is true and correct. Executed on **[Date]** at **[City]**, **[State]**.

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**[Name]**

**[Title]**

**\*Note:**

In district court, a certificate of service may be attached to a pleading or it may be filed as a separate document. In addition, many district courts require pleading format. Counsel should check local district court rules regarding the format and contents of a certificate of service.