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## Accountability for ICE Officials: An Analysis of Existing and Proposed Civil Causes of Action Under Federal Law

**ABSTRACT.** As the size and scope of immigration enforcement operations grow across the country, so does the risk of official misconduct. This article examines the legal remedies an individual can pursue to obtain relief for damages caused by officials of the United States Immigration and Customs Enforcement (ICE) agency. While there were once viable pathways for pursuing claims, recent Supreme Court decisions have made it considerably more difficult. This is demonstrated by the narrowing of Bivens actions, specifically regarding the conduct of immigration enforcement officers. Alternative remedies, such as the Federal Tort Claims Act (FTCA), are similarly restrictive in their scope of coverage and the relief they can secure. The current system leaves individuals who experienced serious harm at the hands of ICE officials without recourse. Members of Congress have proposed legislative solutions creating new causes of action against federal officials by expanding Section 1983 of Title 42. However, these proposals are unlikely to succeed due to concerns over their national security implications and failure to address the deficiencies of Section 1983 itself. This article proposes a narrow and targeted solution ensuring accountability for ICE officers while protecting national security. The proposal creates a new cause of action against ICE officials for violating rights protected by the Constitution and federal law. The proposal also amends the FTCA, making it safer to sue under by reforming the “judgment as bar” provision and allowing for the award of punitive damages to plaintiffs.

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## INTRODUCTION

Throughout 2025, the size and scope of interior operations conducted by the United States Immigration and Customs Enforcement Agency (ICE) increased dramatically. An analysis by the Migration Policy Institute found that the number of daily deportations conducted by ICE doubled from 600 to 1200 in six months, and the number of individuals held in ICE detention centers increased from 40,000 to 60,000 in nine months.<sup>1</sup>

Interior immigration enforcement operations are distinct in their purpose and effect from removals conducted at or near the border. The Migration Policy Institute explains that those targeted in interior enforcement operations have strong ties to their communities due to their extended residency in the United States (U.S.).<sup>2</sup> Apprehending these individuals often requires deploying officers into population centers far from the border. This approach differs from operations conducted near or at the border itself, which primarily target individuals who recently crossed into the country and are not yet embedded in communities. These realities make interior enforcement operations more resource-intensive and impose broader social and economic burdens.<sup>3</sup>

Expansive interior immigration enforcement operations have increased the frequency and intensity of interactions between individuals and ICE. A recent independent report by ProPublica found that immigration agents arrested more than 170 U.S. citizens in the first nine months of 2025.<sup>4</sup> In comparison, the Government Accountability Office (GAO) estimated that between fiscal years 2015 and 2020, ICE arrested 674 “potential U.S. citizens.”<sup>5</sup> This reflects a rate of roughly 19 citizens arrested per month in 2025 compared to 11 per month in the years prior. Additionally, this comparison assumes all 674 “potential U.S. citizens” identified by the GAO

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<sup>1</sup> Ariel G. Ruiz, *A New Era of Immigration Enforcement Unfolds in the U.S. Interior and at the Border Under Trump 2.0*, Migration Pol’y Inst. (Oct. 30, 2025), [www.migrationpolicy.org/news/new-era-enforcement-trump-2](http://www.migrationpolicy.org/news/new-era-enforcement-trump-2).

<sup>2</sup> *Id.* (discussing daily deportation totals).

<sup>3</sup> *Id.*

<sup>4</sup> Nicole Foy & Sarabeth Maney, *More than 170 U.S. Citizens Have Been Held by Immigration Agents. They’ve Been Kicked, Dragged and Detained for Days*, ProPublica (Oct. 16, 2025), [www.propublica.org/article/immigration-dhs-american-citizens-arrested-detained-against-will](http://www.propublica.org/article/immigration-dhs-american-citizens-arrested-detained-against-will).

<sup>5</sup> U.S. Gov’t Accountability Off., *Immigration Enforcement: Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations* 28 (2021), [www.gao.gov/products/gao-21-487](http://www.gao.gov/products/gao-21-487).

between 2015 and 2020 were actually citizens. Therefore, the discrepancy between the data from those years and 2025 may be even greater.

The increase in altercations with ICE officers raises questions about which legal pathways can be used to hold government agents accountable for misconduct. For example, can a U.S. citizen detained by ICE, despite showing proof of lawful residency, sue the arresting officers for damages? This is the case of Leo Venegas, a construction worker from Alabama who alleges that ICE officers violated his rights by arresting him without a warrant or probable cause.<sup>6</sup>

Bivens actions have been used by individuals seeking compensation for violations of their constitutional rights by federal officials.<sup>7</sup> This pathway was established in the Supreme Court case *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), in which a resident of New York sued federal agents for their actions during a search of his home.<sup>8</sup> While Bivens actions were once a reliable avenue for individuals seeking compensation for government misconduct, their usefulness has severely diminished. A separate avenue for relief is the Federal Tort Claims Act (FTCA), which allows individuals to sue the government for officer misconduct if the alleged misconduct would qualify as a tort when committed by a private citizen. However, claims under the FTCA can be convoluted and burdensome for plaintiffs.

This article examines avenues of relief for individuals who allege damages resulting from the conduct of ICE officers. First, it discusses the legal and doctrinal history of Bivens actions and the FTCA. Second, it analyzes complaints filed against ICE officers to determine whether current remedies are effective in securing relief for individuals. Third, it evaluates the structure, power, and recent changes to ICE to demonstrate the importance of holding its officers accountable. Finally, the article analyzes recently proposed solutions and outlines recommendations for creating a new cause of action against ICE officers.

I argue that diminishing the power of Bivens actions has severely restricted the ability of individuals to sue ICE officers for damages. Furthermore, the FTCA is an inadequate alternative due to its limited coverage of potential misconduct and its inability to secure significant financial relief for plaintiffs. Therefore, Congress must

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<sup>6</sup> Inst. for Just., *Alabama Construction Site Raids* (Oct. 28, 2025), [www.ij.org/case/alabama-construction-site-raids/](http://www.ij.org/case/alabama-construction-site-raids/).

<sup>7</sup> Legal Info. Inst., *Bivens Action*, [https://www.law.cornell.edu/wex/bivens\\_action](https://www.law.cornell.edu/wex/bivens_action) (last updated July 2025).

<sup>8</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389-90 (1971).

create a new cause of action to ensure ICE officers are held accountable as agency operations expand.

Section 1983 of Title 42 allows individuals to sue state and local government officials for civil rights violations. The Bivens Act of 2025 would amend Section 1983 to cover federal officials as well.<sup>9</sup> This would ensure they are held to the same standards as their counterparts. The National Oversight and Enforcement of Misconduct Act (NOEM Act) in 2025 would similarly amend Section 1983 of Title 42 to include federal officials, but only those who engage in the enforcement of federal immigration law.<sup>10</sup> Both proposed solutions are broad and likely to face political opposition. Additionally, these acts fail to address the shortcomings of the FTCA and Section 1983. This article proposes an alternative solution that focuses entirely on accountability for ICE. The proposal creates a new cause of action against ICE officials for rights violations and amends the FTCA, reforming the “judgment as bar” provision and allowing for punitive damages to be awarded.

## I. LEGAL BACKGROUND

Victims of misconduct by federal officials have traditionally relied upon Bivens actions and the FTCA for relief. This section discusses the historical context and legal rules unique to each avenue.

### A. *The Creation of the Bivens Action*

In the case *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), Webster Bivens alleged that his apartment in New York was illegally invaded by several federal officers.<sup>11</sup> He claimed that the officers arrested him and investigated his home without proper justification.<sup>12</sup> Seeking compensation, Bivens sued the officers involved for damages resulting from their unlawful conduct.<sup>13</sup> The officers involved argued that no federal cause of action existed for Bivens to seek relief under.<sup>14</sup> The Supreme Court ruled in favor of Bivens, finding that a federal officer who violated the Fourth Amendment rights of an individual could be sued under the Constitution

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<sup>9</sup> Bivens Act of 2025, H.R. 6091, 119th Cong. (2025).

<sup>10</sup> National Oversight and Enforcement of Misconduct Act, H.R. 6493, 119th Cong. (2025).

<sup>11</sup> *Bivens*, 403 U.S. 388.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 389-90.

<sup>14</sup> *Id.* at 390.

itself.<sup>15</sup> This decision was the first in which the Court recognized that a suit alleging a rights violation could be brought absent an express cause of action created by Congress.

The scope of Bivens actions expanded in *Davis v. Passman* (1979) when the Court allowed a lawsuit to be brought against federal officials for violations of the Fifth Amendment. Shirley Davis was a woman who sued Congressman Otto Passman for back pay after she was fired from his office because of her gender.<sup>16</sup> The Due Process clause of the Fifth Amendment prohibits gender-based discrimination that does not serve an important government interest.<sup>17</sup> In Davis' termination notice, Passman admitted Davis was being fired despite performing the duties required of her role.<sup>18</sup> Passman simply believed that it would be more appropriate for a man to hold the position.<sup>19</sup> The Court held that an implied cause of action existed under the Due Process Clause of the Fifth Amendment (just as one did under the Fourth Amendment in *Bivens*), allowing Davis' suit to move forward.<sup>20</sup>

In *Carlson v. Green* (1980), the Court further extended Bivens actions to include claims arising under the Eighth Amendment. The case was brought by the estate of Joseph Jones Jr., an inmate who died in federal prison as a result of an alleged failure by prison officials to give him proper medical care.<sup>21</sup> Jones' estate argued that the officials violated his Eighth Amendment rights and that the estate was entitled to compensation as a result.<sup>22</sup> In its decision, the Court used a two-part test to determine whether an implied cause of action arose under the Constitution. The first step was to establish whether any "special factors" existed that would caution against creating a cause of action, as the creation of remedies is typically a legislative duty.<sup>23</sup> The second step was to determine whether Congress established an alternative cause of action that could be used as a substitute for an implied remedy.<sup>24</sup> Applying step one of the test, the Court reasoned that liability for federal officials did not impose a significant burden on their ability to carry out their duties, and therefore was not a special factor counselling

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<sup>15</sup> *Bivens*, 403 U.S. at 388.

<sup>16</sup> *Davis v. Passman*, 442 U.S. 228, 228 (1979).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 230.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 228.

<sup>21</sup> *Carlson v. Green*, 446 U.S. 14, 16 (1980).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 18.

<sup>24</sup> *Id.*

hesitation against recognizing a claim.<sup>25</sup> Moving to step two, the Court found that the FTCA did not qualify as an alternative remedy that could be a substitute for a Bivens action because it could not award punitive damages.<sup>26</sup>

*Bivens*, *Passman*, and *Green* serve as the foundation for Bivens actions, recognizing claims for Constitutional violations arising under the Fourth, Fifth, and Eighth Amendments, respectively.

### B. *The Weakening of Bivens Actions*

While Bivens actions were initially viewed as a favorable remedy by the Supreme Court, they have since come under increasing suspicion.<sup>27</sup> The modern Court takes a more cautious approach to recognizing claims arising under the Constitution than the courts that decided *Bivens*, *Passman*, and *Green*. This is especially true concerning claims against officials engaged in the enforcement of immigration law.

In *Ziglar v. Abbasi* (2017), the Court reviewed a Bivens action filed by a group of undocumented immigrants held in detention for several months following the September 11th attacks. The detainees alleged that their Fourth and Fifth Amendment rights were violated by their pretrial detention based on race and the strip searches they underwent while in custody.<sup>28</sup> The Court applied a new two-part test to determine whether a cause of action existed, which was significantly more restrictive than the test used in *Green*. Under the new test, the Court first had to determine whether meaningful differences could distinguish the case being reviewed from previous cases recognizing Bivens actions (specifically *Bivens*, *Passman*, and *Green*).<sup>29</sup> Meaningful differences include “the rank of officers involved; the Constitutional right at issue; the generality or specificity of the official action; the statutory or other legal mandate under which the officer was operating; [cont.]”<sup>30</sup> There are a significant number of potential differences that can cause Bivens actions to be treated as new rather than falling under a previously recognized cause. Once a claim is determined to be new, the Court looks to see if there are special considerations that would discourage the

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<sup>25</sup> *Carlson*, 446 U.S. at 14-15.

<sup>26</sup> *Id.* at 15.

<sup>27</sup> Ronald M. Levin & Jeffery S. Lubbers, *Administrative Law and Process in a Nutshell* 415 (West Academic Publishing 7th ed. 2025).

<sup>28</sup> *Ziglar v. Abbasi*, 582 U.S. 120, 120 (2017).

<sup>29</sup> *Id.* at 122.

<sup>30</sup> *Id.*

recognition of a new cause of action arising under the Constitution.<sup>31</sup> This inquiry centers on whether any special factors “cause a court to hesitate” before they create a remedy, seeking to avoid intruding into the role of Congress.<sup>32</sup> Applying this test in *Ziglar*, the Court found that although *Green* involved the treatment of detainees, the cause of action in the case arose under the Eighth Amendment.<sup>33</sup> This was distinct from the Fourth and Fifth Amendment claims made by the detainees in *Ziglar*, and represented a meaningful difference, causing the claims in the case to be considered new. Looking to step two of the test, the Court reasoned that because the plaintiff’s claims challenged the government’s counter-terrorism regime, the recognition of a new cause of action raised significant national security implications and therefore should not be done.<sup>34</sup> The two-part test in *Ziglar* significantly curtailed the availability of Bivens remedies, making it incredibly difficult for courts to recognize claims against federal officers arising under the Constitution.

Bivens actions were further eroded by *Hernandez v. Mesa* (2020), which involved a suit against a Customs and Border Protection (CBP) officer who fatally shot Sergio Hernandez-Guereca, a Mexican national, at the U.S.-Mexico border. The family of Hernandez alleged that the agent’s actions violated his rights under the Fourth and Fifth Amendments.<sup>35</sup> The Court applied the two-part test from *Ziglar* and found that no cause of action for damages existed to sue under.<sup>36</sup> The Court first ruled that because this case involved a shooting, it was distinct from previously recognized causes of action under Bivens.<sup>37</sup> *Bivens*, *Carlson*, and *Green* involved a warrantless search, a wrongful firing, and a failure to provide adequate medical care, none of which were sufficiently similar to the context of immigration enforcement presented in *Hernandez*. The Court ruled on step two of the test, finding that the case implicated multiple special considerations related to national security and foreign policy that prevented them from creating a new remedy.<sup>38</sup> The Court emphasized that the judiciary should be especially cautious in recognizing new causes of action when they may impact relations between the U.S. and other countries.<sup>39</sup> Additionally, the Court

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<sup>31</sup> *Ziglar*, 582 U.S. at 136.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 148.

<sup>34</sup> *Id.* at 122-23.

<sup>35</sup> *Hernandez v. Mesa*, 589 U.S. 93, 93 (2020).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 96.

<sup>38</sup> *Id.* at 94.

<sup>39</sup> *Id.* at 103-04.

underscored that immigration enforcement plays a sensitive role in national security, necessitating heightened judicial restraint.<sup>40</sup> This case demonstrates the Court's reluctance to permit Bivens actions in disputes concerning immigration enforcement agencies due to their strong connections to national security.

*Egbert v. Boule* (2022) was the most recent decision by the Supreme Court restricting Bivens actions. The case was brought by Robert Boule, who cooperated with federal law enforcement to identify individuals illegally present in the U.S.<sup>41</sup> Erik Egbert, a border patrol agent, initiated a confrontation with Boule while searching for a suspect, throwing Boule to the ground.<sup>42</sup> Boule initially filed a complaint under the FTCA following the encounter, allegedly leading Egbert to retaliate by reporting Boule's license plate to Washington officials and causing him substantial duress.<sup>43</sup> Boule argued that Egbert's violent actions and subsequent retaliation violated his First and Fourth Amendment rights.<sup>44</sup> Using the *Ziglar* test, the Court agreed that both of Boule's claims presented meaningful differences from *Bivens*, *Passman*, and *Green*.<sup>45</sup> The Court further reasoned that creating a new remedy would have significant implications on national security by impacting the critical duties of immigration enforcement officers.<sup>46</sup> While the Fourth Amendment claim shared some similarities with *Bivens*, it was not sufficient to recognize a new cause of action. The First Amendment claim was also defeated, as no previous court had ever recognized a cause of action arising under it.<sup>47</sup>

While Bivens actions initially showed promise as an avenue to secure compensation for rights violations committed by federal officials, the Supreme Court has significantly diminished its power. Claims against officers face significant barriers, such as the two-step test in *Ziglar*. Therefore, ensuring relief for victims requires Congress to create a new cause of action.

### C. *The Federal Tort Claims Act*

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<sup>40</sup> *Hernandez*, 589 U.S. at 104.

<sup>41</sup> *Egbert v. Boule*, 596 U.S. 482, 482 (2022).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 483.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 498-99.

The doctrine of sovereign immunity generally prevents individuals from filing suits against their government to secure compensation for alleged damages.<sup>48</sup> The government can waive its sovereign immunity in specific circumstances through legislation that creates causes of action for individuals seeking judicial relief.<sup>49</sup> The FTCA is one example of this, allowing individuals to sue the government for the tortious actions of its officers (with exceptions).<sup>50</sup> An FTCA claim is distinct from a Bivens action, as it is not based on alleged violations of constitutional rights by the government, but rather on simple tort suits. Individuals who believe they were the victim of a tortious action by a government official can file a claim under the FTCA with the agency that oversees the official in question. If this claim is denied or ignored by the agency, the individual may file a suit in court against the U.S. to secure compensation.<sup>51</sup>

If an individual chooses to sue federal officers in their own capacity, a different process occurs. Once a suit is filed, the U.S. Attorney General examines the facts of the case and determines whether the federal official involved was acting “within the scope of his office or employment” when the incident occurred.<sup>52</sup> If the Attorney General finds that the officer was acting within his scope, all claims related to the incident are moved to the Federal Court, and the U.S. is substituted as the defendant. If the officer is found to have been acting outside his scope, the officer remains the sole defendant, and the case proceeds.<sup>53</sup> This mechanism shields federal officials from personal liability under state and local tort suits, which are generally easier to pursue and more generous in their compensation than claims made under the FTCA. While this function protects officials acting in good faith from financial risk, it also harms efforts to discourage malicious and negligent behavior. When individuals lack personal financial liability for their actions, they may be more likely to act recklessly and without regard for others.

Several other features of the FTCA limit its effectiveness in securing adequate compensation for individuals. As stated in the statute, the U.S. “shall not be liable for interest prior to judgment or for punitive damages.”<sup>54</sup> This significantly reduces the

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<sup>48</sup> Levin & Lubbers, *supra* note 27.

<sup>49</sup> *Id.*

<sup>50</sup> 28 U.S.C. § 2674.

<sup>51</sup> 28 U.S.C. § 2675(a).

<sup>52</sup> 28 U.S.C § (d) (1)-(4).

<sup>53</sup> *Id.*

<sup>54</sup> 28 U.S.C. § 2674.

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plaintiff's ability to secure relief. The language also precludes the government itself from suffering serious financial harm when its officers act inappropriately.

Another roadblock built into the FTCA is the “judgment as bar” provision. The provision states that an official judgment by a court in an FTCA case bars any other claim against the defendant made “by reason of the same subject matter.”<sup>55</sup> The Sixth Circuit Court of Appeals found in *Serra v. Pichardo* (1986) that this provision bars any claims “arising out of the same actions, transactions, or occurrences” as a previous claim.<sup>56</sup> This interpretation was agreed to by the 10th Circuit in *Estate of Trentadue ex rel. Aguilar v. United States* (2005).<sup>57</sup> As a result, the “judgment as bar” provision makes pursuing claims under the FTCA riskier for individuals. For example, if an individual receives a judgment in an FTCA claim alleging assault, they are likely barred from bringing a claim alleging a different tort, such as false imprisonment. The provision can also preclude claims relating to civil rights violations separate from the FTCA. In *Gasho v. United States* (1994), the Ninth Circuit held that “any FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in the prior judgment.”<sup>58</sup> In *Simmons v. Himmelreich* (2016), the Supreme Court reasoned that, as a general rule, when a Plaintiff receives a judgment in an FTCA suit, he cannot then sue the employees involved in their individual capacity.<sup>59</sup> The judgment bar, therefore, can confuse plaintiffs who believe both a tortious action was committed against them under the FTCA as well as a civil rights violation, as they are effectively forced to choose between pursuing a claim against one or the other.

The FTCA also shields the government from accountability for certain actions taken by its agents that violate the Constitution. The statute provides that if an agent accused of misconduct was “exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid,” when their tortious action occurred, then a claim cannot be brought.<sup>60</sup> Finally, the Act prevents tort claims against officers for certain tortious actions they could be held liable for while acting in

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<sup>55</sup> 28 U.S.C. § 2676.

<sup>56</sup> See *Serra v. Pichardo*, 786 F.2d 237, 239-240 (6th Cir. 1986).

<sup>57</sup> See *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858-59 (10th Cir. 2005).

<sup>58</sup> *Gasho v. United States*, 39 F.3d 1420, 1437-38 (9th Cir. 1994).

<sup>59</sup> *Simmons v. Himmelreich*, 578 U.S. 621, 625 (2016)

<sup>60</sup> 28 U.S.C. § 2680(a).

their private capacity.<sup>61</sup> These prohibited torts are “libel, slander, misrepresentation, deceit, or interference with contract rights.”<sup>62</sup>

Finally, courts have consistently interpreted the FTCA to shield officers from liability when questions of scope are presented. For example, in *Postal Service v. Konan* (2026), the Supreme Court interpreted an FTCA exception so broadly that it held it prevented claims from being filed against postal workers who intentionally refused to deliver mail to an individual.<sup>63</sup> The plain text of the statute reads that claims “arising out of the loss, miscarriage, or negligent transmission” of mail were barred.<sup>64</sup> The Court rejected the interpretation of the Fifth Circuit, which had held that “the intentional act of not delivering the mail at all” was not covered by the exception.<sup>65</sup>

The FTCA was created to provide relief for damages inflicted by federal officials, but it falls short of this goal in practice. Claims made under it secure minimal compensation, and several procedural hurdles make it burdensome for plaintiffs to pursue. The weakness of the FTCA as a remedy further strengthens the need for Congress to create a new cause of action in addition to reforming the act itself.

## II. INADEQUACY OF EXISTING CAUSES OF ACTION AGAINST ICE OFFICIALS

This section will demonstrate how current laws prevent individuals from securing compensation for damages caused by ICE officials. Precedents will be applied to modern cases to analyze their efficacy in securing relief for victims and holding ICE officers accountable for alleged misconduct.

### A. Asserting a Cause of Action under *Bivens*

This section analyzes *Venegas v. Homan* (2025),<sup>66</sup> in which Leo Venegas was allegedly detained in Alabama despite offering proof of his legal residency to agents in the form of his REAL ID.<sup>67</sup> Venegas was detained on two separate occasions, leading

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<sup>61</sup> See 28 U.S.C. § 2680.

<sup>62</sup> 28 U.S.C. § 2680(h).

<sup>63</sup> *Postal Service v. Konan*, 607 U.S. \_\_\_, 190 (2026).

<sup>64</sup> 28 U.S.C. § 2680(b).

<sup>65</sup> *Postal Service*, 607 U.S. at 189.

<sup>66</sup> *Leo Venegas v. Homan*, No. 1:25-cv-00397 (S.D. Ala. Sep 30, 2025).

<sup>67</sup> See Inst. for Just., *supra* note 6.

him to sue the officers involved under a Bivens action for violations of his Fourth Amendment rights.<sup>68</sup>

As demonstrated in *Hernandez* and *Boule*, courts have been unwilling to recognize causes of action brought under the Constitution against immigration officials. The Court has since criticized the Bivens actions as overstepping the judiciary's authority in *Ziglar*, *Hernandez*, and *Boule*.

Applying the formalized two-step test in *Ziglar* to this case, there are considerable roadblocks to a successful Bivens action. Venegas's claim arises under the Fourth Amendment, which would make *Bivens* the corresponding case for comparison. *Bivens* involved agents of the now nonexistent Federal Bureau of Narcotics raiding the home of an individual. In contrast, this case involves federal immigration officers and a detention resulting from an immigration enforcement operation. These differences in context should lead the courts to find that the asserted cause of action is new. This reasoning aligns with the Court's decision in *Ziglar*, where the Supreme Court relied on a difference in the context of alleged misconduct (drug enforcement versus counterterrorism) to determine that a new cause of action was being presented.<sup>69</sup>

Once a Bivens action is found to arise from a new context, the court determines whether any special factors exist that suggest they should not recognize the new cause of action. In this case, courts will conclude that recognizing a cause of action would have significant national security implications. This follows from the *Hernandez* ruling, where the Supreme Court determined that the regulation of conduct by immigration officials at the border threatened core national security functions.<sup>70</sup> While it could be argued that Venegas's case does not implicate national security to the same extent as *Hernandez* because the alleged misconduct occurred in Alabama rather than at the border, it is unlikely to be dispositive in court. This conclusion is supported by the Court's decision in *Boule*, which denied a Bivens action arising under the Fourth Amendment after determining that "immigration investigations in this country are perhaps more likely to impact the national security of the United States" than investigations across the border.<sup>71</sup> It is extremely unlikely that courts would ignore this precedent and instead choose to recognize a new Bivens action in this case.

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<sup>68</sup> See Inst. for Just., *supra* note 6.

<sup>69</sup> See *Ziglar*, 582 U.S. at 140.

<sup>70</sup> See *Hernandez*, 589 U.S. at 94.

<sup>71</sup> *Egbert*, 596 U.S. at 496-97.

*B. Asserting a Cause of Action under the FTCA*

This section looks at the case of *Retes v. United States* (2026) in California.<sup>72</sup> George Retes is a veteran and a U.S. citizen who was allegedly stopped in his car on his way to work by immigration officers who were blocking the road.<sup>73</sup> Retes claims that he was approached by the agents, who broke his window and dragged him out of the car before arresting him.<sup>74</sup> Retes was then held for more than 72 hours without being able to contact his family.<sup>75</sup> Retes subsequently pursued a claim against the government in accordance with the FTCA to receive compensation for the harm he suffered.<sup>76</sup>

Receiving compensation through the FTCA is limited by multiple factors. For example, under the act, plaintiffs are prohibited from being awarded punitive damages.<sup>77</sup> This differs from other civil suits, where courts have long held that a plaintiff “might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions.”<sup>78</sup> However, so long as the defendant was a federal official acting within the scope of their office according to the FTCA, such punitive damages are unable to be awarded to Retes.

The judgment bar provision of the FTCA could also complicate Retes’s case. Regardless of whether Retes succeeds in his FTCA claims, any judgment rendered in his case would prohibit him from pursuing future claims arising from the same actions, transactions, or occurrences.<sup>79</sup> This includes claims related to civil rights violations.<sup>80</sup>

Retes’ case demonstrates how the FTCA cannot provide sufficient relief for Plaintiffs and is also extremely difficult to navigate. While he could alternatively pursue a Bivens action for his alleged mistreatment, the same factors that hinder Venegas’s claim would similarly work against him.

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<sup>72</sup> *George Retes v. United States*, No. 2:26-cv-01761 (C.D. Cal. Feb 18, 2026).

<sup>73</sup> *George Retes Federal Officer Accountability*, Institute for Justice (Nov. 20, 2025), [ij.org/case/george-retes-federal-officer-accountability/](https://www.ij.org/case/george-retes-federal-officer-accountability/).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See* 28 U.S.C. § 2674.

<sup>78</sup> *Barry v. Edmunds*, 116 U.S. 550, 562 (1886).

<sup>79</sup> 28 U.S.C. § 2676.

<sup>80</sup> *Gasho v. United States*, 39 F.3d 1420, 1437-38 (9th Cir. 1994).

### III. NECESSITY FOR A CAUSE OF ACTION AGAINST ICE OFFICIALS

This section argues that the ever-growing presence of ICE officials in population centers creates a dangerous environment where rights violations are prevalent. It will also discuss how alternative accountability measures, such as criminal sanctions and traditional oversight, are unable to deter misconduct by ICE officials.

#### A. Civil Liberty Threats From ICE

With the passage of the One Big Beautiful Bill Act of 2025 (OBBBA), the size and structure of ICE changed dramatically. The Act granted the agency \$75 billion over four years, in addition to \$10 billion originally appropriated for 2025.<sup>81</sup> As a result, the overall budget for 2025 was nearly triple what it was the year prior (\$28.7 billion versus 10 billion).<sup>82</sup> These funding increases signaled the expansion of ICE in immigration enforcement operations. For example, the OBBBA specifically allocated funding for the detention of migrants, deportation operations, and hiring nearly 10,000 additional agents.<sup>83</sup>

This expansion of ICE through the OBBBA had a major impact on the realities of immigration enforcement. Following the act's passage, the Trump Administration has prioritized sophisticated, resource-intensive interior immigration enforcement operations carried out in population centers.<sup>84</sup> In addition, federal records obtained by Wired allege that ICE planned to establish over 150 facilities surrounding metropolitan areas.<sup>85</sup>

Interior ICE operations also impose an immense burden on cities. For example, enforcement operations in Minneapolis are estimated to have cost the city a minimum of \$203 million in economic damages.<sup>86</sup> The consequences of these operations can lead

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<sup>81</sup> Margy O'Herron, *Big Budget Act Creates a "Deportation-Industrial Complex"*, Brennan Center for Justice (Feb. 14, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/big-budget-act-creates-deportation-industrial-complex>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Ruiz, *supra* note 1.

<sup>85</sup> Leah Feiger, *ICE is Expanding Across the US at Breakneck Speed. Here's Where its Going Next*, WIRED Magazine, Feb. 10, 2026, <https://www.wired.com/story/ice-expansion-across-us-at-heres-where-its-going-next/>.

<sup>86</sup> City of Minneapolis, *Operation Metro Surge Results in 203 Million Dollar Impact on Minneapolis* (Feb. 13, 2026), <https://www.minneapolismn.gov/news/2026/february/oms-impact/>.

to negative sentiment between the public and ICE, increasing tension and complicating future interactions.<sup>87</sup> This is especially true as public perception of the agency has become increasingly negative.<sup>88</sup>

Concerns among politicians, lawyers, and the general public have also arisen regarding the training of ICE agents, particularly those hired following the passage of the OBBBA. In recent testimony before the Senate, former ICE attorney Ryan Schwank stated that the agency's training program was "deficient, defective, and broken."<sup>89</sup> Schwank warned that ICE recruits may enter the field without sufficient knowledge of their constitutional duty or the limits of their authority. Without proper training, officers risk engaging in gross misconduct that violates civil rights. Reporting from Politico has shown a dramatic increase in instances where force has been used by ICE officials in the first few months of 2025 compared to previous years.<sup>90</sup> If the training of officers is insufficient, this further justifies a new cause of action to discourage misconduct.

*B. Alternative Accountability Measures to Civil Litigation*

ICE agents also require expanded civil liability because officials have not been held accountable for misconduct through other methods, such as criminal prosecution. Section 242 of Title 18 (Deprivation of rights under color of law) makes it a crime for federal officials to violate the rights of an individual guaranteed by the Constitution or federal statute.<sup>91</sup> The punishment may be as minimal as a fine, but could be enhanced by the amount of harm caused to the victim by the official.<sup>92</sup> The statute is intended to discourage officials from engaging in misconduct that may violate an individual's

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<sup>87</sup> Domenico Montanaro, *Poll: Two: Thirds of Americans Say ICE Has "Gone Too Far" in Immigration Enforcement*, NPR, Feb. 5, 2026,

[www.npr.org/2026/02/05/nx-s1-5699413/poll-trump-ice-immigration-economy-approval](https://www.npr.org/2026/02/05/nx-s1-5699413/poll-trump-ice-immigration-economy-approval).

<sup>88</sup> See Hollie Silverman, *Percentage of Americans Calling ICE Tactics "Too Tough" Rises: Poll*, Newsweek Jan. 18, 2026,

<https://www.newsweek.com/percentage-of-americans-calling-ice-tactics-too-tough-rises-poll-11378720>.

<sup>89</sup> See Ryan Schwank, *Selected Excerpts from the Prepared Testimony of Ryan Schwank* (Feb. 22, 2026), [https://www.blumenthal.senate.gov/imo/media/doc/excerpted\\_testimony\\_ryan\\_schwank.pdf](https://www.blumenthal.senate.gov/imo/media/doc/excerpted_testimony_ryan_schwank.pdf).

<sup>90</sup> See Eric Bazail-Eimil, *ICE Officials Knew Use of Force Was Rising Well Before Minneapolis Shootings*, POLITICO, Feb. 17, 2026,

<https://www.politico.com/news/2026/02/17/ice-officials-use-of-force-00782501>.

<sup>91</sup> 18 U.S.C. § 242.

<sup>92</sup> *Id.*

rights. This can be a useful alternative to civil causes of action, which require Plaintiffs to undergo a lengthy litigation process with no guarantee of success.

Despite the value the statute provides, the Department of Justice (DOJ) has yet to use Section 242 to hold officials accountable for misconduct.<sup>93</sup> This, combined with the private and public support the current administration has given to its officers accused of violating civil rights,<sup>94</sup> shows a concerning dynamic at play. If government officials are confident they will not face criminal prosecution for misconduct, they will have less of an incentive to act with due care for the rights of individuals. Even if a future administration were to try to prosecute officials for misconduct, they could be granted preemptive pardons by the current administration before they leave office.<sup>95</sup> So long as Section 242 remains unenforced against ICE agents, it further necessitates the existence of a viable civil cause of action.

#### IV. A NEW CAUSE OF ACTION AGAINST ICE OFFICIALS

This section explains how claims are brought under Section 1983 of Title 42 and analyzes proposed legislation to expand the scope of the statute to include federal officials. Congress must take a direct approach to ensure ICE officials are held accountable. First, a new cause of action against ICE officials for civil rights violations must be created. Additionally, the FTCA should be amended as applied to ICE officials to make it a reliable pathway for securing relief.

##### A. *An Overview of Section 1983*

Section 1983 of Title 42 is a cause of action used to hold state and local officials accountable for violating the rights of citizens.<sup>96</sup> The pathway was created by the Civil Rights Act of 1871 and was part of Reconstruction efforts to promote civil rights in

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<sup>93</sup> Samantha Trepel, *DOJ's Dangerous Silence in the Face of Federal Immigration Agents' Violent Tactics*, Just Security (2026), <https://www.justsecurity.org/128353/doj-silence-federal-immigration-agents-violence/>.

<sup>94</sup> *See Id.*

<sup>95</sup> *See* Richard E. Lempert, *Presidential Pardons: Settled Law, Unsettled Issues, and a Downside for Trump*, Brookings Institution (Jan. 17, 2021), <https://www.brookings.edu/articles/presidential-pardons-settled-law-unsettled-issues-and-a-downside-for-trump/>.

<sup>96</sup> Michael G. Collins, *Section 1983 Litigation in A Nutshell* 1 (West Academic 2024).

the former Confederate states.<sup>97</sup> Suits brought under Section 1983 face fewer roadblocks than suits against federal officials via Bivens actions and the FTCA.

To succeed, a Section 1983 claim must show that an official was acting under the authority of state or local law and not in their own manner as a private citizen.<sup>98</sup> In *Monroe v. Pape* (1961), the Supreme Court made this condition easier to satisfy by ruling that a claim may be pursued against those who act outside the scope of the explicit authority granted to them by law.<sup>99</sup> In *Monroe*, a family alleged that their rights were violated by police officers when they raided the family's home without a warrant.<sup>100</sup> Defendants argued that breaking into the family's apartment violated state and local law, and because Section 1983 did not apply to unauthorized acts, they therefore could not be sued under the statute.<sup>101</sup> The Court rejected this argument, reasoning that the abuse of authority granted to an official by law still qualifies as an action taken under the color of law.<sup>102</sup> To pursue a claim under Section 1983, an individual must only prove that a rights violation occurred when the official was acting as an agent of the state.

Unlike the FTCA, claims arising under Section 1983 can be brought against officials in their individual capacity.<sup>103</sup> Additionally, the Supreme Court has held that plaintiffs who bring claims under Section 1983 may be awarded punitive damages.<sup>104</sup> In *Green*, the Court found that the ability to sue individuals and secure compensation acted as a strong deterrent against misconduct by officials.<sup>105</sup> These features make Section 1983 an especially powerful remedy.

The doctrine of qualified immunity serves as a roadblock to claims arising under Section 1983, shielding officials from liability who are alleged to have engaged in unconstitutional action. The doctrine was established by the Supreme Court in *Scheuer v. Rhodes* (1974), holding that officials enjoyed immunity from suit under Section 1983 "depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was

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<sup>97</sup> Collins, *supra* note 96, at 4-5.

<sup>98</sup> 42 U.S.C. § 1983.

<sup>99</sup> *Monroe v. Pape*, 365 U.S. 167, 167 (1961).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 172.

<sup>102</sup> *Id.* at 167.

<sup>103</sup> *See* 42 U.S.C. § 1983.

<sup>104</sup> *Smith v. Wade*, 461 U.S. 30, 30 (1983).

<sup>105</sup> *Carlson*, 446 U.S. at 15.

taken.”<sup>106</sup> Qualified immunity has attracted fierce criticism, such as claims that it is antithetical to the purpose and plain text of the Civil Rights Act of 1871.<sup>107</sup> The qualified immunity standard set by *Scheuer* was later amended in *Davis v. Scherer* (1984). *Scherer* held that qualified immunity may be overcome when a plaintiff shows that the rights that they allege were violated “were clearly established at the time of the conduct at issue.”<sup>108</sup> Finally, in *Butz v. Economou* (1978), the Court held that while federal officials currently cannot be sued under Section 1983, their immunity in civil suits should be no greater than that of state and local officials.<sup>109</sup> As a result, federal officials enjoy the protections of qualified immunity when sued in a Bivens action. This immunity would also extend to suits under Section 1983 if the statute were amended to include federal officials.

Section 1983 is a more reliable remedy for rights violations than Bivens actions. However, the statute only applies to the actions of state and local officials. Extending the statute to cover federal officials as well would require an act of Congress. Additionally, the doctrine of qualified immunity prevents many claims arising from serious misconduct from succeeding.

### *B. Analyzing Proposed Amendments to Section 1983*

Legislators have recognized the value of Section 1983, leading many to propose amendments that would bring federal officials under its jurisdiction. The first of these amendments is the Bivens Act of 2025, proposed by Congressman Hank Johnson, which would extend Section 1983 to include all federal officials.<sup>110</sup> This proposal has been introduced to Congress several times and has never received broad support.<sup>111</sup> This proposal is broad in scope and thus unlikely to pass Congress. Unlike state and local governments, federal government agencies often engage in core national security functions. Examples of these agencies are the Department of Defense (DoD) and the Central Intelligence Agency (CIA). This ensures stiff political opposition to the Bivens Act, as concerns regarding its implications on national security are prevalent.

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<sup>106</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 232-33 (1974).

<sup>107</sup> See Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 Harv. J.L. & Pub. Pol’y 151 (2026).

<sup>108</sup> *Davis v. Scherer*, 468 U.S. 183, 183 (1984).

<sup>109</sup> *Butz v. Economou*, 438 U.S. 478, 478 (1978).

<sup>110</sup> Bivens Act, H.R. 6091, 119th Cong. (2025).

<sup>111</sup> See Danielle C. Jefferis, *RIP Bivens*, 103 Nebraska L. Rev., 17 (2024).

The NOEM Act was proposed to amend Section 1983 to include all federal officials who engage in the enforcement of federal immigration law.<sup>112</sup> While this proposal is narrower than the Bivens Act, it still faces roadblocks. Combining officials acting under ICE and U.S. Customs and Border Protection ignores critical differences between the two agencies. ICE officials conducting interior enforcement operations in population centers are more prone to engage in tense interactions, as going into neighborhoods to remove longtime residents provokes more controversy than apprehensions at the border.<sup>113</sup> Furthermore, ICE has recently seen a major expansion in its size and national profile, leading to increased tension. These factors, in addition to further political opposition on national security grounds, necessitate a different approach to expanded accountability.

*C. Creating a New Cause of Action Against ICE Officials*

To ensure accountability for ICE officials, Congress should create a new cause of action for civil rights violations and amend the FTCA. The proposal would draw on the strengths of Bivens, Section 1983, and the FTCA, while also addressing their weaknesses.

The statute must provide a cause of action against ICE officials who violate an individual's rights under the Constitution and federal law. This cause of action will be modeled after Section 1983, allowing for the award of punitive damages. The proposal will differ from Section 1983 by explicitly forbidding the defense of qualified immunity for ICE officials. This disparate treatment from other law enforcement entities is justified by the fact that ICE misconduct represents a unique threat to civil liberties in the U.S. Together, personal financial risk and the absence of qualified immunity can ensure that officials are held accountable for their actions and that civil rights are protected.

This proposal also includes a set of reforms to the FTCA. The statute must be amended to allow punitive damages to be awarded for claims against ICE officials. This would ensure that individuals receive sufficient compensation when they bring a claim under the FTCA. The judgment bar provision of the FTCA should also be amended for claims involving ICE officials. The bar should no longer apply to subsequent claims alleging violations of rights guaranteed by the Constitution or federal law. For example, a plaintiff who brings a property damage claim under the FTCA and receives a

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<sup>112</sup> National Oversight and Enforcement of Misconduct Act, H.R. 6493, 119th Cong. (2025).

<sup>113</sup> Ruiz, *supra* note 1.

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judgment will still be able to later file a suit for violations of his civil rights. The fact that the subsequent suit simply involves the same incident as the original FTCA claim will no longer act as a barrier to accountability. These changes to the FTCA would make it a more reliable vehicle for relief, working in tandem with the new cause of action proposed.

Just as in the case of the Bivens Act and the NOEM Act, a possible objection to this proposal is that it would hinder the enforcement of immigration law and, therefore, the country's national security. If ICE agents face an increased threat of financial harm for their actions, they will be more likely to hesitate in performing their duties. These concerns could also influence policymaking, as officials' fear of civil litigation may cause leadership to avoid sending officers into risky situations, leaving the country less secure.

Arguments against expanded accountability highlight legitimate national security concerns. However, ICE officials would have legal protections under this proposal, ensuring immigration law can be enforced effectively. While ICE officials would not be able to assert the broad defense of qualified immunity, they could defend themselves in court on the grounds that they acted in good faith to execute the law and did not intend harm. Additionally, they would retain the right to present their defense before a jury of their peers under the Seventh Amendment. Finally, these new measures only target ICE officials, leaving other agencies such as CBP able to freely perform their duties related to national security.

A final benefit of this proposal is that it will provide an opportunity for legislators to analyze the impact of expanded accountability on federal law enforcement operations across the country. The data collected and court cases litigated following the implementation of the proposal would allow Congress to determine whether similar accountability mechanisms should be extended to other federal agencies.

### **CONCLUSION**

This article demonstrates the inability of existing causes of action under federal law to secure compensation for victims of ICE misconduct. While Bivens actions were originally a promising remedy, they have become unreliable for plaintiffs to pursue. Furthermore, the FTCA is an inadequate alternative to Bivens actions, as it cannot provide major relief to plaintiffs and has several procedural roadblocks built into it.

This lack of accountability is demonstrated by the cases of Leo Venegas and George Retes, who are both unlikely to secure compensation for the harm caused to them by

ICE officials. Additionally, recent developments within ICE and the country as a whole further prove the necessity of expanded liability for the agency.

Congress must act to promote accountability in government and ensure the protection of civil liberties. They can do this by creating a new cause of action against ICE officials inspired by Section 1983. This, combined with reforms to the FTCA, will create a robust set of remedies for individuals who are victims of ICE misconduct. This would allow the country to move towards the ultimate goal of a safe society where rights are respected, and a strong bond of trust exists between individuals and government officials.