



# Guide on the FTCA and Law Enforcement Misconduct: Using the Law Enforcement Proviso to Seek Accountability

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## **Overview**

This guide is a resource for practitioners seeking to use the Federal Tort Claims Act (FTCA) to hold the United States accountable for injuries caused by federal law enforcement misconduct, including misconduct during protest responses, immigration enforcement actions, and detention-related incidents.

The focus of this guide is one of the FTCA’s most important pathways for law enforcement misconduct: the law enforcement proviso in 28 U.S.C. § 2680(h), which permits certain intentional tort claims when the tortfeasor is an “investigative or law enforcement officer” as defined by the statute. This guide explains what the proviso covers, why it matters, how courts apply it, and how to approach common identification and “employee versus contractor” questions that frequently arise in protest, enforcement, and detention contexts.

## **1. What Is the FTCA and How Does It Apply to Law Enforcement Officers**

The FTCA is the primary statute by which the United States waives sovereign immunity for certain tort claims and permits suits for money damages based on the wrongful acts or omissions of federal personnel. The waiver is limited. The statute contains multiple exceptions that withdraw the waiver for specific categories of claims, including a well-known exception for many intentional torts. *See* 28 U.S.C. § 2680.

In practice, FTCA litigation often turns on identifying which exception applies and whether another provision restores the waiver for a particular subset of cases. The law enforcement proviso in § 2680(h) restores the waiver for a subset of intentional torts for misconduct by federal law enforcement personnel.

## **2. The Intentional Tort Bar and the Law Enforcement Proviso**

### **2.1 The general intentional tort bar**

Section 2680(h) provides that the FTCA does not apply to “Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process,” and several other intentional tort and quasi-intentional categories, including libel, slander, misrepresentation, deceit, and interference with contract rights. 28 U.S.C. § 2680(h).

A common early misstep is to assume that because a client’s harm looks like classic police misconduct (assault, battery, false arrest), the FTCA is categorically unavailable. For federal law enforcement misconduct, § 2680(h) frequently does the opposite because it contains an explicit proviso that restores liability for a defined subset of intentional torts.

### **2.2 What the proviso covers**

The law enforcement proviso restores the FTCA waiver for six intentional torts when they are committed by an “investigative or law enforcement officer” of the United States. The six covered torts are: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. 28 U.S.C. § 2680(h).

The proviso does not convert the FTCA into a general federal police-misconduct statute. It is limited to these six torts. Claims based on categories expressly listed as excluded in § 2680(h) (for example, defamation and misrepresentation-type theories) remain barred even if the actor is law enforcement. 28 U.S.C. § 2680(h).

### **2.3 Who qualifies as an investigative or law enforcement officer**

For purposes of the proviso, § 2680(h) defines an “investigative or law enforcement officer” as “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” 28 U.S.C. § 2680(h).

This definition is functional. Titles and job descriptions can be helpful, but the core question is whether the person is an officer of the United States and is legally empowered to execute searches, seize evidence, or make arrests for federal-law violations.

## **3. Scope of the Proviso: It Is Not Limited to Searches and Arrests (*Millbrook*)**

Defendants have sometimes argued that the proviso applies only when an officer was engaged in the specific law enforcement activities listed in the definition (executing searches, seizing evidence, or making arrests). The Supreme Court rejected that narrow approach in *Millbrook v. United States*, 569 U.S. 50 (2013).

*Millbrook* held that the proviso applies to acts or omissions of covered law enforcement officers that occur within the scope of employment, even if the officer was not conducting a search, seizing evidence, or making an arrest at the time of the alleged misconduct. *Id.* at 54-57.

Practical implication: For many protest, enforcement, and detention cases, the key litigation questions are (1) whether the actor qualifies as an investigative or law enforcement officer under § 2680(h), and (2) whether the conduct was within the scope of employment under the relevant state’s respondeat superior principles, as applied in FTCA cases. *Millbrook*, 569 U.S. at 57.

#### **4. Applying the Proviso to Common Fact Patterns**

##### **4.1 Immigration enforcement actions (ICE and CBP)**

In immigration enforcement contexts, many frontline federal actors are likely to satisfy § 2680(h)’s functional definition because their roles commonly include arrest authority and related enforcement powers under federal law. The litigation challenge is often not conceptual (whether such roles can qualify), but factual and evidentiary: identifying which individuals committed which acts, demonstrating federal status, and developing scope-of-employment facts.

When federal and non-federal actors operate together, it becomes especially important to separate identity questions (who was federal, who was state or local, who was private) from liability questions (which tort fits the facts; was the conduct within scope). See § 6 below for more information about claims involving conduct by state or local officials working with DHS or pursuant to an agreement with DHS, and § 8 for more information about claims involving government contractors.

##### **4.2 Protest response and crowd-control incidents**

In protest response cases, the same six-tort menu frequently maps onto common allegation patterns: assault and battery (physical force), false arrest and false imprisonment (detention without lawful basis), and, in some cases, malicious prosecution or abuse of process (improper initiation or misuse of legal process).

Protest operations also frequently involve mixed personnel, rapid movement, masks or helmets, and uniform ambiguity. Early evidence preservation and development of the agents’ identities are therefore central to making the law enforcement proviso usable in practice.

##### **4.3 Detention-related abuse and transport incidents**

Detention and transport settings can present a misleading intuition that misconduct is “not law enforcement.” *Millbrook* is particularly useful here because it makes clear that the proviso’s applicability does not depend on whether an arrest or search was underway; the

central limiter is scope of employment. *Millbrook*, 569 U.S. at 54-57. All immigration officers have the authority to conduct searches, seize evidence, and make arrests, *see* 8 U.S.C. § 1357, including the immigration officers who oversee ICE detention as part of ICE’s Enforcement and Removal Operations.

#### **4.4 National Guard involvement: why status and chain of command matter**

National Guard involvement in enforcement or crowd-control scenarios requires a threshold status assessment. The National Guard is unusual because it can operate in different legal statuses that affect whether the Guard member is treated as a federal employee for FTCA purposes and, relatedly, whether the United States is the proper defendant under the FTCA for torts committed by Guard personnel.

At a high level, two frameworks are most commonly encountered:

- Title 10 status: Guard members are federalized into active duty as part of the U.S. Army or U.S. Air Force and fall under federal command and control.
- Title 32 status: Guard members remain under state command (typically the Governor and state chain of command) but perform duty that is federally funded and authorized under Title 32 of the U.S. Code.

The FTCA’s definition of “employee of the government” expressly addresses National Guard members in a limited set of Title 32 circumstances. Specifically, 28 U.S.C. § 2671 includes as employees “members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32.” 28 U.S.C. § 2671.

In other words, when a Guard member is performing certain Title 32 duties (including common operational duty under 32 U.S.C. § 502), Congress has treated those Guard members as federal employees for FTCA purposes. When Guard personnel are instead acting purely in a state capacity outside those enumerated Title 32 duty categories, different rules may govern their conduct and liability for misconduct may be governed by statutes other than the FTCA.

Why chain of command matters: FTCA liability is tied to whether the alleged tortfeasor is an “employee of the government” acting within the scope of employment. 28 U.S.C. §§ 1346(b)(1), 2671. Guard duty status and command structure are often the most concrete indicators of whether the person’s actions are attributable to the federal government for FTCA purposes. The operational reality can be mixed: federal funding, federal equipment, federal coordination, and state command can coexist, and courts may focus on the statutory status and orders in place.

Practical intake and discovery priorities in Guard-involved incidents often include: obtaining or describing the Guard member’s orders (Title 10 or Title 32), identifying who had operational command on the day in question, identifying the mission authority cited



(for example, 32 U.S.C. § 502), and preserving any public announcements or written directives that describe the activation. These facts can determine whether the FTCA is an available path, whether another pathway is required, or whether both federal and state actors should be analyzed separately.

### **5. Quick screening checklist for a law enforcement proviso case**

A useful initial screen is to answer five questions as early as possible. This helps identify whether the law enforcement proviso is likely to be a viable pathway and where the hard work will be (identity, status, scope, or tort fit).

- Which of the six covered torts fits best? (assault, battery, false imprisonment, false arrest, abuse of process, malicious prosecution).
- Are there any additional torts (not covered by the § 2680(h)'s exclusions) that may apply to the conduct at issue, such as negligent or intentional infliction of emotional distress?
- Who did the hands-on conduct? Identify each actor as precisely as possible, and separate federal, state or local, and private personnel.
- Does the actor qualify as an “investigative or law enforcement officer” as defined by § 2680(h)?
- Was the conduct within the scope of employment? *Millbrook v. United States*, 569 U.S. 50 (2013).
- Is there a contractor issue that may prevent FTCA coverage for the hands-on actor? See Section 8 below.

### **6. State and Local Collaboration: 287(g) Agreements and Mixed Operations**

Some operations involve close collaboration between federal officers and state or local law enforcement. One structured form of collaboration is a 287(g) agreement under the Immigration and Nationality Act (INA), which allows DHS to delegate certain immigration enforcement functions to trained state or local officers under written agreement and federal supervision. 8 U.S.C. § 1357(g).

In practice, 287(g) involvement can complicate threshold questions about who is acting under what authority and who is the proper defendant. For initial evaluation and investigation, treat 287(g) as a signal to gather more detail about command structure, supervision, and the role of federal personnel.

### **7. Identification and Evidence: Building the Record Early**

Protest responses and enforcement actions often involve multiple agencies, rapidly moving teams, protective gear, and deliberate efforts to reduce identifiability. Clients also frequently have only partial recollections, especially where the incident involved fear, confusion, physical pain, or separation from family.

Having only partial information should not be a barrier to pursuing a claim. Rather, it is important to collect small, concrete details that can later be matched to video, photographs, dispatch logs, rosters, and agency records. Clients do not need to know acronyms or job titles for their recollections to be valuable.

### **7.1 What to ask clients to memorialize (even if they are unsure)**

Encourage clients to write down what they remember as soon as they can safely do so. Even small fragments can become decisive when cross-referenced with other evidence.

- Clothing and gear colors: approximate uniform color (dark blue, green, tan, camouflage), color of vests, helmets, gloves, and any high-visibility markings.
- Words and letter groupings: any partial text on clothing or vests (for example, three-letter blocks, partial agency names, or the word “POLICE”).
- Patches and symbols: any recollection of shapes or logos (shields, eagles, flags, circular seals), placement (shoulder, chest), and colors.
- Badges and credentials: metal badge versus neck credential versus wallet-style badge; any visible numbers; whether the person displayed an identification card when asked.
- Vehicle cues: marked versus unmarked vehicles, colors, light bars, unit numbers, plates (state), and any visible agency markings.
- Equipment details: the weapons, devices, restraints, or technology that agents use may help identify what agency they were with and whether they were obeying agency policies.
- Officer description: height and build range, voice, notable facial hair, tattoos, eyewear, hairstyle, and any distinguishing features.
- Timeline anchors: where the officer approached from, what they said, who gave commands, and what happened immediately before and after the force or detention.
- Medical and physical details: points of impact, restraints used, and immediate symptoms (pain locations, dizziness, breathing difficulty), which can later correlate with medical records.

If a client cannot recall details, that is not failure. The goal is to gather enough to connect the incident to external sources such as videos, photographs, and rosters.

For a more detailed, practical guide to recognizing and documenting different types of officers, uniforms, insignia, and operational patterns (including ICE, CBP, and related personnel), see the Officer Identification and Documentation Guide in this FTCA toolkit.

### **7.2 Preserve Third-Party Evidence Quickly**

Early preservation often determines whether identity and scope can be proven. Practitioners should ask about and seek to preserve:

- Neighborhood and business camera footage (including doorbell systems).
- Livestreams and social media posts (including original files where possible).

- Event organizer and legal observer footage.
- Local media raw footage and photographers' archives.

Maintain original files when possible because metadata and timestamps can matter. Create a simple evidence log: source, date obtained, what it shows, and how it was stored.

## **8. Contractors and the employee-versus-contractor determination**

Contractor issues are a frequent stumbling block, especially in detention, transport, and security contexts. The FTCA generally makes the United States liable for torts committed by an “employee of the government” acting within the scope of employment, not by independent contractors. *See* 28 U.S.C. §§ 1346(b)(1), 2671.

The label “contractor” in a written agreement is not always the end of the analysis. Courts focus on the real-world relationship between the federal government and the individual or entity performing the work.

### **8.1 The core test: day-to-day control over detailed physical performance**

The Supreme Court has emphasized that the key inquiry is whether the federal government has authority to control the “detailed physical performance” of the work. When the government sets general standards or retains a right to inspect, but does not supervise day-to-day operations, the actor is typically treated as an independent contractor, and the FTCA does not apply to the contractor’s torts. *Logue v. United States*, 412 U.S. 521, 527-32 (1973); *United States v. Orleans*, 425 U.S. 807, 814-17 (1976).

In practical terms, this often means distinguishing between:

- General oversight (contract terms, compliance audits, performance standards), which usually does not create employee status; and
- Operational control (who gives direct instructions, who controls daily schedules, discipline, and the manner of performing tasks), which is more consistent with employee status.

### **8.2 Factors that can suggest employee status despite a contract**

No single factor is dispositive, and the analysis is fact-specific. Useful questions include:

- Who directly supervised the person’s work on a daily basis, and how? (for example, a federal supervisor giving real-time instructions versus periodic contract oversight).
- Who had authority to hire, fire, discipline, or reassign the person? (and whether that authority was exercised in practice).
- Whether the person was integrated into a federal unit and performed the same functions as federal employees, under the same operational protocols and chain of command.

- Whether the government dictated the specific manner of performing tasks (not just the desired result), including use-of-force protocols, restraint procedures, and operational decisionmaking.
- Whether the person held a federal appointment, credentialing status, or deputation that made them an “officer of the United States” under federal law for relevant purposes.

Even where a person exercises authority that resembles federal enforcement power, courts still ask whether the person is a federal employee for FTCA purposes. A contractor can act “for” the government in a colloquial sense without being an “employee of the government” under the FTCA. *Logue*, 412 U.S. at 527-32; *Orleans*, 425 U.S. at 814-17.

### **8.3 How contractor status interacts with the law enforcement proviso**

The law enforcement proviso in § 2680(h) applies to certain intentional torts committed by an “investigative or law enforcement officer,” defined as an officer of the United States empowered to execute searches, seize evidence, or make arrests for federal-law violations. 28 U.S.C. § 2680(h).

Many private actors in detention or security contexts will not meet this definition because they are not officers of the United States. Even when their uniforms and functions look law-enforcement-like, their legal status may remain private. In those circumstances, the FTCA may be unavailable for their direct misconduct, but private litigation against the contractor may be available under state tort law, subject to defenses.

Separate from direct contractor liability, it may still be appropriate to evaluate potential FTCA claims based on the acts or omissions of federal employees (for example, federal supervisors) where supported by the facts and consistent with other FTCA limits. Contractor issues will be addressed in greater detail in other toolkit resources; this section provides only a practical primer for screening and early investigation.

### **8.4 Early contractor-screening questions**

- What entity employed the individual (agency versus private company), and what documentation supports that (pay stubs, onboarding, ID cards)?
- Who gave instructions during the incident, and how were those instructions communicated (radio channel, supervisor presence, command structure)?
- Did the person present a federal credential, claim federal authority, or use federal forms or equipment? If so, document details.
- Were federal officers on site directing contractor staff in real time, or was federal involvement limited to contractual oversight?
- What uniforms or insignia were worn, and did they identify a private company name or logo?



## **9. Closing note and next steps**

The law enforcement proviso is often the most direct FTCA pathway for cases involving physical force, unlawful detention, and process misuse by federal enforcement personnel. The strongest early investments are in (1) careful tort selection among the six covered categories, (2) identity development, and (3) status and scope-of-employment documentation, especially in mixed federal-state operations and Guard-involved incidents. 28 U.S.C. § 2680(h); *Millbrook*, 569 U.S. 50.

Please also take a look at the [Officer Identification and Documentation Guide](#) tailored to common immigration enforcement and protest-response scenarios.

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