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INA Section 242(g): Immigration Agents, Immunity, and Damages Suits

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COMMENT

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Six days after 9/11, Immigration and Naturalization Service (INS) agents ransacked, threatened, interrogated, and arrested Ahmed Farid Khorrami, an Iranian-born British citizen, at his office in Chicago, despite the fact that he was legally authorized to be in the United States.[1] Dr. Khorrami was detained for three months before an immigration judge granted his request for permanent resident status based on his marriage to a U.S. citizen.[2] After his release, Dr. Khorrami filed a *Bivens* action in federal district court, claiming monetary damages to redress his injuries based on the constitutional violations committed by the INS agents during his wrongful arrest and detention.[3] If the unlawful actions had been committed by FBI agents investigating a federal crime, the government would have conceded that a federal court has jurisdiction to hear the damages claims. However, because the acts were committed by immigration officials attempting to deport a foreign national, the government argued that section 242(g) of the Immigration and Nationality Act (INA) completely bars judicial review of such claims. Section 242(g) states:

> Except as provided in this section and notwithstanding any other provision of law . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

1. Khorrami v. Rolince, 493 F. Supp. 2d 1061, 1065 (N.D. Ill. 2007).
2. *Id.* at 1066.
3. A *Bivens* action is named after the Supreme Court case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* held that private parties can recover money damages for injuries resulting from constitutional violations committed by federal employees. *Id.* at 397.

execute removal orders against any alien under this chapter [dealing with removal orders].[4]

The district court agreed with the government's broad interpretation of the jurisdiction-stripping provision, and barred Dr. Khorrami's Fourth Amendment *Bivens* claim challenging his false arrest and detention.[5]

Dr. Khorrami's case is just one of many immigration-related lawsuits where the government has used section 242(g) in an attempt to bar judicial review of monetary damages claims, brought under *Bivens* and the Federal Tort Claims Act[6] (FTCA), for injuries stemming from the unlawful actions of immigration agents. While these lawsuits were rare in the past, the Bush Administration's abuse of immigration law after 9/11[7] and recent events like inhumane immigration raids[8] have energized civil rights lawyers to pursue damages claims. In return, in almost every lawsuit alleging wrongful conduct by immigration agents, the government has argued that section 242(g) bars review.

Ever since the jurisdiction-stripping provision was enacted in 1996, federal courts have struggled over whether section 242(g) prohibits damages claims. On the one hand, the Third, Fifth, and Ninth Circuits have precluded damages claims under section 242(g), holding that the conduct alleged arose from actions to commence proceedings, adjudicate cases, or execute removal orders.[9]

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4. Immigration and Nationality Act (INA) § 242(g), 8 U.S.C. § 1252(g) (2006).

5. *Khorrami*, 493 F. Supp. 2d at 1070.

6. 28 U.S.C. §§ 2671-2680. Unlike *Bivens*, which seeks redress for constitutional violations committed by individual federal officers, the Federal Tort Claims Act permits private parties to sue the United States for most torts committed by individuals acting on behalf of the federal government.

7. *See, e.g.*, Turkmen v. Ashcroft, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006) (describing how hundreds of Muslim noncitizens were mentally and physically abused while being detained in New York-area detention centers after 9/11).

8. *See, e.g.*, Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at B1 (describing a raid in New York State in which federal immigration agents "wearing cowboy hats and brandishing shotguns and automatic weapons" mistakenly drew their guns on local police, U.S. citizens, and other legal residents); Jennifer Medina, *Arrests of 31 in U.S. Sweep Bring Fear in New Haven*, N.Y. TIMES, June 7, 2007, at B1 (describing dragnet-style raid in which "immigration officials knocked on their doors and demanded to speak with every adult in the house, then asked for identification" as well as giving preferential treatment to the mothers – but not the fathers – of children).

9. *See* Sissoko v. Rocha, 509 F.3d 947 (9th Cir. 2007); Adegbuji v. Fifteen Immigration & Customs Enforcement Agents, 169 F. App'x 733 (3d Cir. 2006); Foster v. Townsley, 243 F.3d 210 (5th Cir. 2001); Humphries v. Various Fed. U.S. INS Employees, 164 F.3d 936, 945 (5th Cir. 1999).

On the other hand, the Tenth Circuit, and district courts in the Second, Sixth, and Fourth Circuits have rejected the applicability of section 242(g), construing the provision narrowly and permitting the claims in order to avoid "grave constitutional issues."[10]

This Comment argues that the government's reading of section 242(g) not only contravenes congressional intent, but also contradicts the Supreme Court's ruling in *Reno v. American-Arab Anti-Discrimination Committee*[11] (*AADC*) to interpret the provision narrowly. Because section 242(g) bars neither legal challenges to nondiscretionary government action nor challenges that do not directly contest the removal process, courts should have jurisdiction to hear monetary damages claims brought by foreign nationals against immigration agents.

I. CONGRESSIONAL INTENT UNDERLYING SECTION 242(g)

While the federal government has urged courts to read section 242(g) broadly to eliminate judicial review of almost all removal-related damages actions, it is doubtful that Congress intended the provision to be interpreted in such a way when enacting the section as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[12] (IIRIRA).

A. Legislative History of Section 242(g)

On its face, section 242(g) appears broad, as to abolish judicial review of practically every claim of a noncitizen challenging aspects of his detention or removal not specifically authorized under the INA. However, IIRIRA's legislative history demonstrates that Congress never intended for section 242(g) to strip federal court jurisdiction over damages actions brought by noncitizens against immigration officials. In fact, the little legislative history on this issue confirms that Congress never considered barring these lawsuits. Instead, the intent of the provision was to reinforce one of the major purposes

10. Medina v. United States, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000), *vacated on other grounds*, 259 F.3d 220 (4th Cir. 2001); *see, e.g.*, Dalis v. United States, No. 99-1248, 2000 WL 339173 (10th Cir. Mar. 31, 2000); Turnbull v. United States, No. 1:06cv858, 2007 U.S. Dist. LEXIS 53054, at *14-15 (N.D. Ohio July 23, 2007); Turkmen v. Ashcroft, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 39170, at *83 (E.D.N.Y. June 14, 2006); Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd on other grounds*, No. 06-4216-cv, 2009 WL 3522887 (2d Cir. Nov. 2, 2009).

11. 525 U.S. 471 (1999).

12. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

of section 242 and the statute as a whole: "to streamline removal proceedings and enhance enforcement of immigration laws that had gone largely unchanged since 1952."[13]

In the months leading up to IIRIRA's enactment, the legislative history confirms that the Act's jurisdiction-stripping provisions were created to make it easier to remove deportable noncitizens. For example, in congressional testimony in March 1995, the INS general counsel stated that "[t]he Administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens."[14] Similarly, in April 1996, the Senate Report of the Act stated that the judicial review provisions were intended to "expedit[e] the removal of excludable and deportable aliens."[15] In fact, the Act's section on judicial review was originally entitled: "Streamlining Judicial Review of Orders of Exclusion or Deportation."[16] Finally, in September 1996, the Act's joint conference report reinforced the streamlining purpose of section 242, stating that the INA was amended "to improve deterrence of illegal immigration to the United States . . . by reforming exclusion and deportation law and procedures."[17]

Notwithstanding the Act's seemingly good intentions of streamlining the review process, a few members of Congress had warned about the dangers of restricting judicial review of removal orders. For example, Congressman Nadler stated: "The bill eliminates judicial review for most INS actions. Just think, a Federal bureaucracy with no judicial accountability. . . . No

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13. Patricia Flynn & Judith Patterson, *Five Years Later: Fifth Circuit Case Law Developments Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 53 BAYLOR L. REV. 557, 561 (2001).

14. *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, Gen. Counsel, Immigration and Naturalization Serv.).

15. S. REP. NO. 104-249, at 2 (1996); *see also id.* (describing purposes of IIRIRA as including "[s]treamlining exclusion and deportation procedures," "increasing the disincentives for repeated illegal entry or visa overstay," and "[e]stablishing special procedures to expedite the removal of criminal aliens").

16. S. 1664, 104th Cong. § 142 (1996).

17. H.R. REP. NO. 104-828, at 199 (1996) (Conf. Rep.). Similarly, in 2005, when Congress amended section 242(g) as part of the REAL ID Act, its purpose was to further streamline the removal process by explicitly barring habeas corpus review and other review that could delay a deportable noncitizen's departure from the United States, such as mandamus actions and actions under the All Writs Act. *See* H.R. REP. NO. 109-72, at 173-75 (2005).

government agency should be allowed to act, much less lock people up or send them back to dictatorships, without being subject to court review."[18]

B. Understanding Section 242(g) Through Canons of Statutory Silence

Although the legislative history and text are silent on whether the INA bars damages claims, one may argue, as the government has done, that Congress's silence on the issue, coupled with section 242(g)'s broad wording, substantiates Congressman Nadler's fears: that Congress intended to bar judicial review of most actions by immigration officials, including *Bivens* and FTCA claims. However, this reading of section 242(g) belies both the statutory development and structure of section 242, the INA's section on judicial review.

First, prior to IIRIRA, courts had upheld immigration-related *Bivens* and FTCA claims for years,[19] even though the INA had previously contained a similar judicial review provision.[20] Therefore, in the absence of any text or legislative history indicating Congress's intention to diverge from past practice and preclude damages actions, Supreme Court precedent is clear that courts should not infer a break from the prior statute.[21] Second, section 242 expressly eliminated or limited judicial review and relief in many areas of immigration law, including crime-related deportation grounds,[22] types of discretionary decisions,[23] and provisions regarding entry and inadmissibility.[24] Therefore, under the principle of *expressio unius*, the inclusion in section 242 of express and multiple bars to both review and relief implies that Congress did not mean to preclude damages claims.[25] Third, because *Bivens* actions challenge the

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18. 142 CONG. REC. H11071, H11085 (daily ed. Sept. 25, 1996) (statement of Rep. Nadler).

19. For *Bivens* claims, see, for example, *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987). For FTCA claims, see, for example, *Sanchez v. Rowe*, 651 F. Supp 571, 574 (N.D. Tex. 1986).

20. *See* 8 U.S.C. § 1105a (1994).

21. *See* Chisom v. Roemer, 501 U.S. 380, 396 & n.23 (1991) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration that a watchdog did not bark in the night." (quoting Harrison v. PPG Indus., Inc., 426 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521-22 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

22. *See* 8 U.S.C. § 1252(a)(2)(C) (2006).

23. *See id.* § 1252(a)(2)(B).

24. *See id.* § 1252(f)(1).

25. *See* Guo v. U.S. Dep't of Justice, 422 F.3d 61, 64 (2d Cir. 2005) (applying the *expressio unius* principle to the INA); BLACK'S LAW DICTIONARY 1635 (7th ed. 1999) (defining *expressio unius est exclusio alterius* as "[t]he expression of one thing is the exclusion of another").

constitutionality of government action, to read Congress's silence as barring these claims would violate the long-standing principle that jurisdictional statutes should not be construed to preclude review of constitutional claims absent the most explicit directive from Congress.[26] Finally, to read Congress's silence as barring FTCA claims would mean that in enacting IIRIRA, Congress had implicitly repealed the FTCA as it applied in the immigration context. This reading would violate the cardinal rule of statutory interpretation that repeals by implication are strongly disfavored.[27]

C. The Text of Section 242(g)

A textual analysis of section 242(g) also demonstrates that the provision was meant only to bar review of removal orders in order to expedite the removal of deportable noncitizens. First, Congress titled INA section 242—from which section 242(g) is drawn—"Judicial review of orders of removal."[28] To the extent any ambiguity exists, section 242, in its entirety, should be construed only to limit review of removal orders, not independent damages actions.[29] Second, section 242(g) bars claims "arising from" actions by immigration officials.[30] Because Congress did not choose the phrase "related to" or some other broader language, Hiroshi Motomura has argued that the narrower "arising from" language demonstrates that Congress did not intend to bar damages claims or others collateral to the removal process.[31]

Finally, section 242(g) eliminates judicial review specifically for three types of actions: "to commence proceedings, adjudicate cases, or execute removal orders."[32] While IIRIRA's legislative history offers little clarification as to why

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26. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 517 (2003) ("'[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.'" (quoting Webster v. Doe, 486 U.S. 592, 603 (1988))).

27. *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 660-61 (1996); *see also* United States v. Sforza, 326 F.3d 107, 111 (2d Cir. 2003) ("[W]ell-established law strongly disfavors preclusion of one federal statute by another absent express manifestations of preclusive intent.").

28. INA § 242, 8 U.S.C. § 1252.

29. *See* INS v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

30. *See* INA § 242(g), 8 U.S.C. § 1252(g).

31. Hiroshi Motomura, *Judicial Review in Immigration Cases After* AADC*: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 431 (2000); *see also* Humphries v. Various Fed. USINS Employees, 164 F.3d 936, 943 (5th Cir. 1999) ("'[A]rising from' does seem to describe a nexus somewhat more tight than the also frequently used phrase 'related to.'" (quoting INA § 242, 8 U.S.C. § 1252)).

32. INA § 242(g), 8 U.S.C. § 1252(g).

these three actions were delineated, the Supreme Court's reasoning in *AADC*,[33] the touchstone case interpreting section 242(g), is compelling. The Court stated that the three

> discrete acts . . . represent the initiation or prosecution of various stages in the deportation process. At each stage the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice . . . of exercising that discretion for humanitarian reasons or simply for its own convenience.[34]

However, by exercising prosecutorial discretion, the INS had opened the door to litigation over these decisions. Therefore, section 242(g) was created to restrict judicial review only of discretionary decisions made by immigration agents stemming from these three discrete acts of the removal process.[35]

II. APPLYING SECTION 242(g) TO MONETARY DAMAGES ACTIONS

Based on this more nuanced understanding of how Congress intended INA Section 242(g) to apply, it is clear that, but for the following two caveats, the provision does not bar *Bivens* and FTCA claims. First, the damages claims need to challenge nondiscretionary actions committed by immigration officials. Second, the claims must not directly challenge the removal process. If these two conditions are met, then section 242(g) does not deprive federal courts of jurisdiction to hear damages claims regarding unlawful action committed by immigration enforcement agents against noncitizens.

A. Section 242(g) Applies Only to Discretionary Decisions

In *AADC*, the Supreme Court stated that section 242(g) only bars removal-related claims that challenge immigration officials' exercise of *discretionary* authority, that is, only those decisions that Congress has committed to the discretion of the Attorney General.[36] The Supreme Court's holding was predicated on its finding that the claim in that case was encompassed within the scope of section 242(g) because it challenged the Attorney General's exercise of prosecutorial discretion. The plaintiffs in *AADC* argued that the

33. 525 U.S. 471 (1999).

34. *Id.* at 483-84.

35. *Id.* at 484-85.

36. *Id.* at 482.

Court should enjoin the Attorney General from commencing removal proceedings against them, notwithstanding the fact that, as plaintiffs conceded, the Attorney General had lawful authority to deport them on the basis of technical visa violations.[37] The Court emphasized that section 242(g) applied because the decision to commence proceedings in that case was purely discretionary.

Under the reasoning in *AADC*, if damages actions against immigration officials challenged nondiscretionary decisions, they would not be barred under section 242(g). Courts have made it clear that government officials do not have discretion to violate the law or the Constitution.[38] Noncitizen plaintiffs in *Bivens* and FTCA claims do not contest how discretionary authority was exercised, but instead argue that immigration officials were acting beyond their discretion, in a manner *ultra vires*, by violating the Constitution and tort law, respectively. As mentioned above, to read section 242(g) otherwise would preclude review of constitutional claims without explicit direction from Congress.[39]

The federal government, and some courts, have responded to this argument by suggesting that foreign nationals could bring the same constitutional claims in a habeas petition (before the enactment of the REAL ID Act[40]) or a petition for review to the courts of appeals.[41] However, this reasoning is misplaced. The petition for review process refers to judicial review of a final agency action. The only relief available under a petition for review is to reverse or undo an underlying removal order, or obtain relief from that order in the form of vacatur or a new removal proceeding. The only relief available in habeas corpus actions is release from detention. FTCA and *Bivens* plaintiffs do not seek this relief. Instead, they seek damages for harm stemming from their arrest, detention, and conditions of confinement—unconstitutional treatment that could not have been redressed on a petition for review or in

37. *Id.* at 473.

38. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 517 (2003) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."); Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.").

39. *See supra* note 26 and accompanying text.

40. *See supra* note 17.

41. *See, e.g.*, Arias v. ICE, No. 07-1959, 2008 U.S. Dist. LEXIS 34072, at *17-19 (D. Minn. Apr. 23, 2008) (denying *Bivens* claims because noncitizens should have brought claims in a petition for review to the court of appeals); Khorrami v. Rolince, 493 F. Supp. 2d 1061, 1069 (N.D. Ill. 2007) (noting that plaintiff "could have raised his challenges in a petition for habeas corpus").

habeas corpus proceedings. Moreover, unlike habeas proceedings or petitions for review, damages actions are unique in that they provide an important deterrent against similar illegal government action in the future.

B. Section 242(g) Does Not Apply to Challenges Collateral to Removal Proceedings

The second circumstance in which section 242(g) does not apply to damages claims is when the claims arise outside the context of removal proceedings. As the Supreme Court held in *AADC*, section 242(g) applies narrowly to "three discrete events along the road to deportation."[42] This reading of section 242(g) is consistent with both the text and legislative history of the statute, which confirm that the purpose of section 242 is to streamline the deportation process to ensure the prompt removal of deportable noncitizens.[43] Section 242(g) furthers this goal by barring jurisdiction over a cause or claim arising from the Attorney General's commencement or prosecution of removal proceedings and execution of a removal order until the order has become final. Therefore, in a variety of contexts, courts have held that section 242(g) does not apply outside of removal proceedings.[44]

The same reasoning applies to *Bivens* and FTCA claims. These claims constitute collateral challenges to removal proceedings in two ways. First, damages claims do not challenge a noncitizen's removal, but instead the lawfulness and constitutionality of the immigration officials' arrest, detention, and treatment of the plaintiff while in custody. Therefore, they do not challenge one of the three discrete actions mentioned in section 242(g). Second, when plaintiffs seek damages they are not challenging the removal process, but rather requesting monetary redress for the government's unlawful conduct. They do not seek any relief from their underlying removal orders. In almost all damages cases, the final order of removal has already either been carried out or vacated. Therefore, damages claims could not prolong a noncitizen's removal

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42. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999).

43. *See* discussion *supra* Part I.

44. *See, e.g.*, Barahona-Gomez v. Reno, 236 F.3d 1115, 1118 (9th Cir. 2001) (finding that section 242(g) does not preclude review of collateral claims that do *not* seek merits review of the outcome of removal proceedings, but instead go to collateral issues that do not "contribut[e] to the deconstruction, fragmentation, and hence prolongation of removal proceedings—the evils meant to be remedied by the statute" (citations omitted)); Sabhari v. Reno, 197 F.3d 938, 940 (8th Cir. 1999) (holding section 242(g) inapplicable in adjustment of status proceeding); Walters v. Reno, 145 F.3d 1032, 1052 (9th Cir. 1998) (explaining that section 242(g) does not apply to "collateral challenges to unconstitutional practices and policies used by the agency" (citations omitted) (internal quotation marks omitted)).

proceedings or otherwise challenge the validity of a removal order.[45] They merely seek compensation for injuries resulting from alleged torts or constitutional violations.[46]

CONCLUSION

The government's interpretation of section 242(g) is simply one byproduct of the Bush Administration's general hostility to claims brought by noncitizens to vindicate their constitutional rights.[47] While it is still too early to tell if President Obama will alter the previous Administration's stance on section 242(g) or other barriers to legal relief for immigrants, initial indications are not promising.[48] As is, the federal government's interpretation of section 242(g)

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45. In some cases, filing damages actions have prolonged noncitizens' removal proceedings. For example, in *Barrera v. Boughton*, ICE agreed to a stay of removal proceedings if the noncitizen plaintiffs agreed to a stay of discovery in the damages lawsuit. *See, e.g.*, Joint Motion To Hold Appeals in Abeyance, *In re* Barrera, A98 300 502 (B.I.A. Aug. 14, 2008) (on file with author). While cases like *Barrera* appear to go against section 242's purpose of ensuring the timely removal of noncitizens, it was the government's strategic decision to agree to the stay of removal proceedings. ICE could have foregone its desire to stay discovery, the removal proceedings could have proceeded as is, and the noncitizens could have continued litigating the damages actions even if they had been removed from the United States. That is, there is nothing inherent in filing a damages action that prolongs a noncitizen's deportation from the United States.

46. *See, e.g.*, Medina v. United States, 92 F. Supp. 2d 545, 552-53 (E.D. Va. 2000), *vacated on other grounds*, 259 F.3d 220 (4th Cir. 2001) (denying government's motion to dismiss FTCA claim by noncitizen because he did not challenge his removal, but rather demanded compensation for the violation of his rights).

47. Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1152 ("In the wake of 9/11, a number of statutory measures and agency schemes were introduced that further restricted the rights of aliens held by the federal government.").

48. For example, in *Barrera v. Boughton*, Obama Administration lawyers followed their predecessors by arguing that section 242(g) barred damages claims by immigrant day laborers arrested in an undercover sting operation. *See* Transcript of Motions Hearing at 23-24, Barrera v. Boughton, No. 3:07CV1436 (D. Conn. Mar. 10, 2009). Similarly, in *Arar v. Ashcroft*, the government maintained that immigration agents are immune from a *Bivens* suit brought by a Canadian citizen sent to Syria to be tortured. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd on other grounds*, No. 06-4216-cv, 2009 WL 3522887 (2d Cir. Nov. 2, 2009); Mark Sherman, *Ex-Bush Officials Face Lawsuits over Their Actions*, ASSOCIATED PRESS, Sept. 29, 2009, *available at* http://www.boston.com/news/nation/washington/articles/2009/09/29/ex_bush_officials_face_lawsuits_over_their_actions. However, high-level Obama Administration officials have argued in the past that section 242(g) should not bar damages actions. *See* David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of* Reno v. AADC, 14 GEO.

creates an unwarranted and unprecedented exception for immigration agents. Out of all federal government officials, only actions committed by immigration agents would be completely immune from suit under the FTCA and *Bivens*. As Judge Dennis concludes in his dissent in *Humphries*:

> Today we should be more aware than ever that:
>
> > Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."
>
> I see no reason why the federal official defendants in the present case have a better claim to a jurisdictional defense to a *Bivens* action for money damages than a president, congressman, cabinet member, or any other federal officer.[49]

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IMMIGR. L.J. 363, 376 (2000). Therefore, it is not certain that the government will maintain its present view of section 242(g) in the coming years.

49. Humphries v. Various Fed. USINS Employees, 164 F.3d 936, 951 (5th Cir. 1999) (Dennis, J., concurring in part and dissenting in part) (citations omitted) (quoting Davis v. Passman, 442 U.S. 228, 246 (1979)).