

Suing the Government

Comparing 42 USC 1983 and Tort Claims Acts

	42 USC 1983	State and Federal Tort Claims Acts
Original Purpose	Prevent de facto discrimination and intimidation of ex-slaves by persons acting under state law	To compensate persons injured by ordinary negligence who would otherwise be barred from suing by sovereign immunity
Basic jurisdictional requirement	<p>A violation of a constitutional right</p> <p>By someone acting under state law (thus only against state and local government folks, not the feds)</p> <p>Most violations look like torts, i.e., beatings, cruel and unusual punishment</p>	<p>A negligent injury by a government employee acting within course and scope of employment</p> <p>Must file a claim for compensation with the government and wait for a stated period before filing a lawsuit.</p> <p>The statute of limitations for the claim is often short.</p>
Who do you sue?	<p>Individual in his personal capacity</p> <p>Individual in his official capacity - the employer also has to pay</p> <p>No vicarious liability - You have to show the action was part of official policy or known behavior to make a 1983 claim against the governmental employer.</p>	<p>The individual and the governmental employer is substituted</p> <p>Can also sue the agency</p>
What can you get?	<p>Money damages from local government entities and from individuals.</p> <p>Injunctions to stop unconstitutional behavior by</p>	<p>Money damages, subject to damage caps in the states. Often \$500,000.</p>

	<p>the state - no money damages because of the 11th amendment. Can be contempt of court fines for not correcting the enjoined conditions.</p>	
Limitations	<p>Not for minor injuries.</p> <p>Not for ordinary torts - must have a constitutional component.</p> <p>Ordinary negligence will be covered by the state tort claims act.</p>	<p>Excludes intentional torts unless committed by law enforcement.</p> <p>Excludes strict/products liability.</p> <p>Excludes constitutional violations unless they are also covered torts. (See Bivens)</p> <p>Other exclusions</p>
11th amendment	<p>Only applies to the state and its agencies - includes universities.</p> <p>Does not apply to cities and other non-state governmental entities</p> <p>Can sue state officials in their personal capacity, but cannot sue them in their official capacity. Thus, in theory the state is not responsible for judgments against state employees under 1983, but all states indemnify them if it is in their official capacity.</p> <p>States may waive 11th amendment immunity in several ways, including by buying insurance.</p>	<p>Waived by the tort claims statute, as well waiving sovereign immunity.</p>
Defenses: Personal Capacity Claims	<p>Absolute immunity - legislators, judges, prosecutors (only for their direct prosecutorial duties).</p> <p>Qualified immunity - everyone else: should they have known it was unconstitutional?</p>	<p>The federal or state government is substituted for the individual plaintiff - there is no personal liability under the FTCA.</p>

<p>Defenses: Official Capacity Claims</p>	<p>The act leading to the injury was not done pursuant to a state policy. This leaves the individual liable.</p> <p>The governmental employer may, but is not always required to indemnify the employee.</p>	<p>Discretionary authority: if the action was done pursuant to an agency policy or represents a policy choice.</p> <p>Official policy is a defense to a tort claims act case, unless it violates some other law. The policy cannot violate the constitution, a statute binding on the agency, or a regulation binding on the agency.</p>
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