LEGAL CLAIMS INITIATED BY FEDERAL PRISONERS,

FISCAL YEARS 1992-2001

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TABLE OF CONTENTS

I. INTRODUCTION 3

II. THE LEGAL FRAMEWORK GOVERNING CLAIMS INITIATED BY FEDERAL PRISONERS 8

A. The Federal Bureau of Prisons' Administrative Remedies Program 8

1) The History and Purpose of the Administrative Remedies Program 9

2) The Administrative Remedies Program Today 10

B. The Federal Tort Claims Act and the Bureau of Prisons 14

1) Statutory and Regulatory Requirements Governing FTCA Claims Involving the Bureau of Prisons 14

2) Case Law on Issues of Particular Concern for Federal Prisoners 20

C. *Bivens* Claims Against Bureau of Prisons Officials 22

1) Federal Civil Rights Actions Under the Bivens Case 22

2) The Relationship Between FTCA and Bivens Claims 25

3) Restrictions on Bivens Claims of Particular Concern for Federal Prisoners 26

D. Collateral Attacks and Habeas Corpus Petitions by Federal Prisoners 27

E. Overlaps Among Prisoner Claims and Responses by the Courts 31

1) The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act 33

2) The Relationship Between Bivens and Habeas Corpus Claims 36

3) Special Treatment of Pro Se Litigants and the Practice of Construing Filings 40

III. AN INTRODUCTION TO THE DATA SOURCES 43

A. A General Introduction to the Datasets 43

B. Distinguishing Between the Two Datasets 44

C. Limitations in the Two Datasets 46

1) Limitations in the Bureau of Prisons Data 46

2) Limitations in the Administrative Office Data 46

(a) Limits in the Classification of Filings 47

(b) Limits in the Recording of Judgments 49

(c) Limits in the Recording of Monetary Awards 50

IV. DATA RESULTS & ANALYSIS - LEGAL CLAIMS INITIATED BY FEDERAL PRISONERS 53

A. Administrative Claims and Litigation Actions Filed by Federal Prisoners 53

1) The Bureau of Prisons' Administrative Remedies Program 53

(a) Filing Rates and Total Filings for Administrative Remedies 54

(b) Administrative Remedies Filings by Subject Matter 57

(c) Grants and Denials of Administrative Remedies 58

(d) Appeals of Adverse Decisions Under the Administrative Remedies Program 60
2) Federal Tort Claims Act Administrative Claims and Litigation Actions 61
(a) Filing Rates and Total Filings for FTCA Administrative Claims 61
(b) Filing Rates and Total Filings for FTCA Litigation Actions 64
(c) Settlements and Denials of FTCA Administrative Claims 66
(d) The Relationship Between the FTCA Administrative System and Subsequent Litigation Actions 67
3) Litigation Actions by Federal Prisoners 67
(a) Filing Rates and Total Filings for Civil Rights Actions 68
(b) Litigation Actions by Type of Action 71
(c) Pro Se Status of Litigants in Civil Rights Actions 74
(d) Dispositions, Trials, and Judgments in Civil Rights Actions 75
(e) Awards and Settlements in Civil Rights Actions 78
B. Comparisons of Civil Rights Actions in Federal Court by State and Federal Prisoners 78
1) Total Filings and Filing Rates for Civil Rights Actions 79
2) Pro Se Status of Litigants in Civil Rights Actions 80
3) Dispositions, Trials, and Judgments in Civil Rights Actions 81
4) Awards in Civil Rights Actions 82
5) Conclusions 82
C. Analysis and Conclusions 83
1) Conclusions About Legal Remedies Available to Federal Prisoners 83
(a) The Administrative Remedies Program 83
(b) The Federal Tort Claims Act 84
(c) Civil Rights Actions Pursuant to Bivens 86
2) Comparisons Among the Administrative Remedies Program, the FTCA, and Bivens 86
3) The Effects of the PLRA on Legal Activity by Federal Prisoners 87
V. CONCLUSION 89

I. INTRODUCTION

The Federal Bureau of Prisons provides a valuable case study for examining the nature and impact of legal claims initiated by prisoners in custody. With approximately 161,681 prisoners currently under the jurisdiction of federal authorities, the Bureau of Prisons has become the single largest correctional system in the nation.[1] For authors interested in empirical analysis, the federal correctional system is unique because of the wealth of data that is available on legal claims initiated by prisoners in federal custody.[2] Authors have relied on data collected by the Administrative Office of the United States Courts to examine civil rights and habeas corpus actions filed by prisoners in the federal courts, but most of these studies have aggregated claims filed by state and federal prisoners.[3] Few authors have attempted

[1] *See* PAIGE M. HARRISON & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2002 3 (2003).

[2] The Administrative Office of the United States Courts dataset provides a wealth of information about all case filings and terminations in the federal courts. *See infra* Data Appendix, Part I.B. By contrast, reliable and consistent data on legal claims filed in state courts is fairly limited. *See generally* National Center for State Courts, Court Statistics Project, *at* http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

[3] Researchers working with the federal Bureau of Justice Statistics have performed some of the most comprehensive studies of prisoner litigation in the federal courts. *See generally* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (2002) (examining trends in habeas corpus and civil rights action filed by state and federal prisoners); JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-1996 (1997) (same); ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS (1995) (studying habeas corpus actions filed by state prisoners in 18 federal judicial districts in nine states); ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION (1994) (same for civil rights actions filed by federal and state prisoners). For a recent comprehensive study of civil rights actions filed by state and federal prisoners in federal, *see* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). Other studies have focused on samples of cases from shorter time periods or from particular judicial districts. *See generally, e.g.*, Kim Mueller, *Comment: Inmate Civil Rights Cases and the Federal Courts: Insights Derived From a Field Research Project in the Eastern District of California,* 28 CREIGHTON L. REV. 1255 (1995) (studying prisoner civil rights actions in the Eastern District of California); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989) (comparing case outcomes in civil rights and prisoner cases terminated between 1978 and 1985); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) (examining constitutional tort actions filed in the Eastern District of Pennsylvania and the Northern District of Georgia in 1980 and 1981); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (same for constitutional tort actions filed in the Central District of California in 1980 and 1981); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984) (describing trends in overall prisoner filings between 1944 and 1983); Theodore Eisenberg, *Section 1983: Doctrinal Foundations And An Empirical Study*, 67 CORNELL L. REV. 482 (1982) (analyzing § 1983 actions filed in the Central District of California in 1975 and 1976); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV L. REV. 610 (1979) (studying prisoner cases terminated in five districts in 1975, 1976 and 1977); David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321

to analyze claims filed by federal prisoners as a separate category.[4] More important, no previous study has included data on legal claims initiated by federal prisoners that never reach the federal courts (and thus are not captured by the Administrative Office data)—namely those grievances handled through internal administrative processes.

The focus of this paper is on individual administrative and litigation claims initiated by prisoners in federal custody, seeking damages or various forms of corrective action related to the conditions of their confinement.[5] Federal prisoners seeking to challenge the conditions of their confinement may choose from three distinct legal remedies—administrative grievances under the Bureau of Prisons' Administrative Remedies Program, administrative claims and litigation actions authorized under the Federal Tort Claims Act (FTCA), and civil rights actions against individual federal officials pursuant to the Supreme Court decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[6] This study analyzes litigation activity by federal prisoners in these three categories during the past ten years, based on two data sources—the traditional dataset provided by the

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(1973) (examining habeas corpus filings in the District of Massachusetts between 1970 and 1972). Authors such as Richard Posner and Marc Galanter also have analyzed the AO data on prisoner litigation, in the course of exploring more general claims that a litigation explosion is inundating the federal courts. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 54-58, 62-64, 102-04, 297-303 (1996) (relying on the AO data to identify the sources of docket pressures in the federal courts and to support specific proposals for reform, including restrictions on habeas corpus and civil rights cases); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-65, 81-83, 186-89 (1985) (same); Marc Galanter, *The Life and Times of the Big Six, or the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 (1988) (relying on the AO data to examine filing trends for, *intera alia*, civil rights cases and prisoner petitions filed in the federal courts from 1960 to 1986); Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (relying on the AO dataset to examine changes in the federal caseload between 1975 and 1984).

[4] In the course of discussing trends over time in overall prisoner filings in the federal courts, Judith Resnik reports on the different filing rates for state and federal prisoners. *See* Resnik, *supra* note 3, at 943-46 & n. 489-99.

[5] The federal courts frequently use the term "conditions of confinement" broadly to refer to any prisoner suit that is not a collateral attack on the prisoner's sentence or conviction, and I use the phrase in this broad sense as well. The Prison Litigation Reform Act uses a similar phrase, "with respect to prison conditions," *see, e.g.*, 18 U.S.C.A. § 3626, 42 U.S.C.A. § 1997e(a), (c)(1), and (f)(1), which the Supreme Court has described as encompassing "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

[6] In addition, federal prisoners may file collateral attacks under 28 U.S.C. § 2255 or similar actions to challenge the fact or duration of their confinement, litigation actions that are fundamentally criminal rather than civil in nature. *Cf.* Schlanger, *supra* note 3, at 1558 n.4 (noting that habeas corpus petitions and other collateral attacks by prisoners "are properly conceptualized as part of the criminal, rather than civil, justice system"). While collateral attacks and habeas corpus petitions are discussed in brief, the primary focus of this paper is on individual, non-criminal claims initiated by federal prisoners.

Administrative Office of the U.S. Courts, as well as a unique set of internal data provided by the Federal Bureau of Prisons. Combining these two data sources produces a more complete picture of the overall grievance system available to federal prisoners seeking to challenge the conditions of their confinement, including crucial components of that system that have been overlooked by previous studies.

This paper has three main goals. The first objective is to provide a descriptive narrative of the overall grievance system available to federal prisoners for challenging the conditions of their confinement. A general introduction to the legal framework governing claims initiated by federal prisoners describes the forms of relief that are available to federal prisoners seeking to challenge the conditions of their confinement, and highlights the procedural and substantive barriers to recovery under each legal regime. The data results and analysis answer basic questions about how these legal regimes operate on a daily basis, including the rate at which federal prisoners file administrative claims and litigation actions, the total number of filings on an annual basis, the kinds of subject matters that are raised, how persistent prisoners are in pursing their claims to the highest levels of the legal system, and how successful prisoners are in wining some form of relief.

Related to this goal is the second objective, to understand the comparative roles played by each of the various legal remedies that are available for prisoners seeking to challenge the conditions of their confinement. While previous studies have focused on prisoner litigation in the federal courts, one of the goals of this paper is to demonstrate the critical role played by the administrative grievance systems that are available to federal prisoners. The data results presented in this paper will show that federal prisoners file many more administrative claims than litigation actions, and that they are far more successful in winning some relief under the administrative systems.

Finally, in focusing on administrative remedies and litigation actions challenging a prisoner's conditions of confinement, this paper will touch on the effects of the Prison Litigation Reform Act (PLRA) of 1996 on legal activity by federal prisoners. The discussion will focus on two of the PLRA's key goals—to decrease litigation by prisoners in the federal courts, and thereby to improve the overall

quality of the litigation actions that survive.[7] Although a full analysis of the PLRA is beyond the scope of this paper, even a cursory examination of the data on recent administrative and litigation actions by federal prisoners suggests several areas in which the PLRA has made an impact (and additional areas where little or no impact can be detected).

Part II provides the legal framework for understanding the three major types of claims initiated by federal prisoners seeking to challenge the conditions of their confinement—grievances under the Administrative Remedies Program, administrative claims and litigation actions under the FTCA, and civil rights actions under *Bivens*. Part II also includes a brief discussion of the legal framework governing collateral attacks on federal convictions and sentences and other forms of habeas corpus relief, an overlapping but distinct area of litigation activity by federal prisoners. A general introduction to the basic doctrines governing each of these types of prisoner actions is critical, not only for understanding the mechanics of how prisoners' legal claims are handled, but also in order to appreciate the remedial options facing a federal prisoner who seeks to challenge the conditions of his confinement. This legal framework provides the context for understanding the statistics and analysis that are presented in Part III.

Part III. provides a brief introduction to the data provided by the Administrative Office and by the Bureau of Prisons, and notes the potential limitations with each of these two data sources.[8]

Part IV. presents results and analysis from these two data sources for the three major types of legal claims noted above. The discussion in each section generally tracks the three main objectives outlined above—providing a description of the numbers and types of claims that are filed under each legal regime and the outcomes for prisoners, discussing the relative significance of each type of claim compared to other available forms of relief, and noting any recent changes in filing patterns that might be attributable to the PLRA.

There are a number of related research questions that are beyond the scope of this paper. This paper is focused on the *quantitative* information that can be gleaned from the Bureau of Prisons' internal

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[7] *See* Schlanger, *supra* note 3, at 1565-70.

[8] For a full description of the two datasets, as well as raw data and results from each, *see infra* Data Appendix.

records. These records also provide a wealth of *qualitative* information on the types of complaints raised by federal prisoners, the Bureau's general approach to prisoner complaints, and so forth. In addition, the quantitative data in the Bureau's records could be refined further to provide more detailed analysis on a variety specific research questions. Finally, an in-depth analysis of recent trends in collateral attacks and other habeas corpus petitions by federal prisoners and the effects of the Anti-Terrorism and Effective Death Penalty Act of 1996 is beyond the scope of this paper.

II. THE LEGAL FRAMEWORK GOVERNING CLAIMS INITIATED BY FEDERAL PRISONERS

Federal prisoners seeking to challenge the conditions of their confinement face an intricate web of statutory provisions, regulations, and legal doctrines that govern prisoners' grievances. Recovery is blocked by both procedural and substantive rules that serve to discourage frivolous claims and to protect government agencies and officials from liability. The purpose of this part of the paper is to describe the legal framework governing the main types of legal claims initiated by federal prisoners, with particular emphasis on the forms of relief that are available, the procedures for processing claims, and the governing rules that may block recovery. The first four sections provide general introductions to the four major forms of legal claims initiated by federal prisoners—administrative remedies, claims under the Federal Tort Claims Act, *Bivens* actions, and collateral attacks on prisoners' convictions. The final section discusses the potential overlaps among several of these types of legal claims, and responses by the courts to these challenges. The basic legal framework governing prisoners' grievances provides the context for understanding the statistics and analysis presented in Part IV.

A. The Federal Bureau of Prisons' Administrative Remedies Program

Ever since its inception, the Federal Bureau of Prisons has provided some form of an internal, quasi-legal grievance system for responding to prisoners' complaints regarding the conditions of their confinement. The history and animating purposes of the Bureau's Administrative Remedies Program underscore the significance of the Program for day-to-day prison management. With this background in mind, the Bureau of Prisons has established rules and regulations governing the Administrative Remedies Program that prescribe the general types of complaints that may be filed, and the processes for filing complaints, investigating and responding to claims, and appealing adverse decisions. Claims filed under the Program often are ends in themselves, or they may become the first steps toward subsequent litigation actions by federal prisoners.

1) The History and Purpose of the Administrative Remedies Program

The modern Administrative Remedies Program evolved from earlier grievance provided less-formal mechanisms for responding to prisoner complaints. During the ea federal prison system, the wardens handled internal prisoner grievances in an informal manner that probably discouraged prisoners from making complaints.[9] The creation of the federal Bureau of Prisons in 1930 resulted in the adoption of more formal procedures for prisoners to submit grievances directly to the Bureau, known as the Prisoners' Mail Box.[10] The Bureau's modern grievance system initially grew out of complaints by federal judges during the 1970's that prisoners' lawsuits—including many frivolous and trivial complaints—were overwhelming the federal courts' dockets.[11] The Bureau responded to these concerns in 1978 with the Administrative Remedies Program, a more structured grievance system that would allow the Bureau and its individual institutions to resolve many prisoner complaints before they reached the courts' dockets.[12] The Bureau's Administrative Remedies Program became a model for the adoption of similar grievance systems by correctional agencies throughout the United States.[13]

One of the central goals of the Prisoners' Mail Box and the subsequent Administrative Remedies Program has been to provide a safe and effective mechanism for prisoners to express their dissatisfaction

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[9] Federal prisoners could submit grievances to their local wardens but they had to pass these complaints through the guards first (who might be the subject of many such complaints), and complaints to persons outside of the institution were discouraged because the wardens were authorized to read all prisoner mail. *See* Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights, in* ESCAPING PRISON MYTHS: SELECTED TOPICS IN THE HISTORY OF FEDERAL CORRECTIONS 111, 114-15, 117 (John W. Roberts ed., 1994).

[10] *See id.* at 119-21. One of the first regulations adopted by the new Bureau of Prisons authorized prisoners to communicate directly with the Attorney General and the Director of the Bureau of Prisons through "mailboxes" provided in each institution for that purpose. *See id.* at 121. However, any matter that could be handled by the warden or other institution officials was to be directed to their attention first. *See id.* During the early years of this system, the Bureau struggled with breaches of promised confidentiality, infrequent collections from the mailboxes, and delayed responses to the grievances. *See id.* at 121-25.

[11] *See* John W. Roberts, *View From the Top: The Bureau of Prisons' Five Directors Discuss Problems and Ethics in Corrections*, FEDERAL PRISON JOURNAL, Summer 1990, at 27, 40. In the early 1970's Norman Carlson, then-Director of the Bureau of Prisons, met with a group of judges from the Eighth Circuit Court of Appeals and heard their complaints about federal prisoner litigation. *See id.* at 40. It is worth noting that the "flood" of prisoner suits at the time amounted to only 15,000 prisoners suits annually for the entire federal court system, compared to current totals of over 50,000 such suits annually. *See infra* Data Appendix, Part II., Table 14.

[12] *See* Robbins, *supra* note 9, at 133-35; Roberts, *supra* note 11, at 40. The Administrative Remedies Program was first tested in 1973 at the Federal Medical Center in Springfield, Missouri, the source of many of the lawsuits filed in the Eighth Circuit which Director Carlson had heard complaints about. *See* Roberts, *supra* note 11, at 40.

[13] *See id.* at 45.

and frustration. Bureau Director Sanford Bates, who was primarily responsible for the implementation of the Prisoners' Mail Box during the 1930's and 1940's, observed:

> It seems to me important that the inmates in [an] institution should have some reasonable and dignified method of making known any real or fancied grievance that they might have. An institution is a good deal like a steam boiler, and needs a safety valve occasionally.[14]

Ultimately the hope is that prisoners will be less likely to resort to violence if they are provided with an opportunity to communicate constructively with staff about their grievances,[15] a goal that continues to animate the Administrative Remedies Program to this day.[16] It is important to keep these animating purposes in mind in evaluating the relative significance of the Program, which remains the most frequently used component in the overall grievance system available to federal prisoners for challenging the conditions of their confinement.[17]

2) The Administrative Remedies Program Today

The Administrative Remedies Program provides a formal administrative process for prisoners to submit grievances seeking non-monetary relief related to any aspect of their confinement.[18] The program does not cover grievances for which separate administrative processes have been established,[19] including claims under the Federal Tort Claims Act (FTCA)[20] and the Inmate Accident Compensation program.[21]

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[14] Robbins, *supra* note 9, at 119. The Bureau's manual on the Prisoners' Mail Box from 1947 similarly commented: "The Mail Box serves a useful purpose as an outlet for inmates who are unsettled or in an emotional state over some critical event." *Id.* at 127.

[15] *See* Interview with Michael Pybas, Senior Counsel, Office of General Counsel, Federal Bureau of Prisons, in Washington D.C. (Feb. 28, 2002) (hereinafter "Pybas Interview").

[16] *See id.;* FEDERAL BUREAU OF PRISONS, ABOUT THE FEDERAL BUREAU OF PRISONS 3 (2001), *available at* http://www.bop.gov/pubinfo.html.

[17] *See* discussion *infra* Parts IV.A.1(a) and C.2.

[18] *See* 28 C.F.R. § 542.10 (2002). Complaints may not be submitted on behalf of another prisoner, *see id.* § 542.12(a), but the president of a recognized prisoner organization may submit a complaint on behalf of that organization regarding an issue that specifically affects the organization. *See* FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT 1330.13 ADMINISTRATIVE REMEDY PROGRAM 4 (1997) [hereinafter "P.S. 1330.13."].

[19] *See* 28 C.F.R. § 542.12(b). If a prisoner incorrectly submits a complaint that is covered by another administrative process, a staff member will inform the prisoner in writing of the correct administrative process. *See id.*

[20] The separate administrative process for claims under the Federal Tort Claims Act is discussed in further detail in the next section. *See infra* Part II.B.1.

[21] Prisoners who suffer injuries (or the survivors of prisoners who die) while performing duties for any paid work assignments within a federal prison are eligible for compensation under the Lost-Time Wage Program and the

Relief under the Administrative Remedies Program is limited to corrective action—requests for monetary damages generally fall under the FTCA administrative process instead.[22] As discussed in further detail in Section IV.A.1(b), *infra*, complaints filed under the Administrative Remedies Program typically involve disciplinary decisions, medical treatment, staff, or classification issues.

The Administrative Remedies Program is designed to encourage resolution of prisoner complaints informally and at the institutional level first. Most prisoner complaints under the Administrative Remedies Program must be filed at the institutional level first.[23] Exceptions are provided—allowing a prisoner to proceed directly to the next administrative level by filing a claim with one of the Bureau's regional offices—for "sensitive" issues[24] and for appeals of certain disciplinary decisions.[25] Prior to filing a formal administrative complaint, a prisoner must attempt to informally resolve the issue by bringing it to the attention of institutional staff under procedures adopted by the warden at each prison.[26] If informal resolution fails, then the prisoner may file a formal administrative complaint within twenty calendar days of the underlying incident.[27]

Compensation for Work-Related Physical Impairment or Death Program, collectively the Inmate Accident Compensation Program. *See generally* 28 C.F.R. part 301. These programs are a prisoner's exclusive remedy for work-related injuries. *See, e.g.*, United States v. Demko, 385 U.S. 149, 152-54 (1966) (holding that a prisoner may not recover for work-related injuries under the Federal Tort Claims Act, because the prisoner accident compensation programs are the exclusive remedy).

[22] *See* P.S. 1330.13, *supra* note 18, at 5 (noting exceptions for claims involving correction of prisoner pay, commissary errors, or a prisoner's telephone charge account).

[23] *See* 28 C.F.R. § 542.14.

[24] Sensitive filings are defined as those where "the inmate reasonably believes. . .[his] safety or well-being would be placed in danger if the Request became known at the institution." *See id.* § 542.14(d)(1). Sensitive filings must include a written explanation of the reason(s) for not submitting the complaint at the institutional level. *See id.* If the complaint is deemed sensitive by counsel in the regional office, then it will be accepted for investigation and review. *See id.* If the request is not deemed sensitive, then counsel in the regional office will send a written rejection and explanation to the prisoner, and the prisoner may appeal this determination, or may re-submit the request at the institutional level. *See id.* Michael Pybas, Senior Counsel in the Bureau's Office of General Counsel, reports that many prisoners try to file ordinary administrative remedies as "sensitive" in order to avoid dealing with staff at their institution. *See* Pybas Interview, *supra* note 15.

[25] *See* 28 C.F.R. § 542.14(d)(2) to (4). Disciplinary actions at the institutional level are the responsibility of the Unit Discipline Committee (UDC) for offenses involving minor sanctions, or the Disciplinary Hearing Officer (DHO) for more serious offenses. *See id.* §§ 541.2, 541.15. A prisoner may appeal a UDC decision by filing an administrative remedy at the institutional level, while appeals of DHO decisions must be filed directly with the appropriate regional office. *See id.* § 541.19.

[26] *See* 28 C.F.R. § 542.13(a). However, the requirement of informal resolution "may be waived in individual cases at the Warden or institution Administrative Remedy Coordinator's discretion when the inmate demonstrates an acceptable reason. . ." *Id.* § 542.13(b). Acceptable reasons for waiver include "when informal resolution is deemed

Tight deadlines at every level within the Administrative Remedies Program ensure that complaints will be resolved within a short period of time. Grievances generally proceed from an initial complaint at the institutional level, through appeals to the Bureau's six regional offices, and ultimately to the Central Office in Washington, D.C.[28] A warden must respond to an initial complaint within twenty calendar days,[29] and the prisoner then may appeal an adverse decision to a regional director in the appropriate regional office within twenty calendar days.[30] A regional director must respond to an appeal within thirty calendar days,[31] and the prisoner may appeal an adverse decision at this level to general counsel in the Central Office within thirty calendar days.[32] The Central Office must respond to an appeal within forty calendar days.[33] Whenever a complaint or an appeal is denied, the Bureau must provide the prisoner with written notice of the basis for denial, and if the problem is considered correctable then the prisoner must be provided with a reasonable time period for correcting and resubmitting the filing.[34]

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inappropriate due to the issue's sensitivity." *See* P.S. 1330.13, *supra* note 18, at 5. In addition, the informal resolution requirement will be waived if a prisoner is represented by counsel. *See* Pybas Interview, *supra* note 15.

[27] *See* 28 C.F.R. § 542.14(a). A prisoner will be granted an extension if he can demonstrate a valid reason for failing to meet the deadline, such as an extended physical incapacitation or an extended period of attempts at informal resolution. *See id.* § 542.14(b). The prisoner generally must submit written verification from staff members supporting any claimed reason for delay. *See* P.S. 1330.13, *supra* note 18, at 6.

[28] The Bureau of Prisons is organized into six geographic regions, which provide the administrative structure for tracking and responding to legal claims involving the Bureau and its employees, including appeals under the Administrative Remedies Program, administrative claims under the FTCA, and FTCA and *Bivens* litigation actions. For a complete listing of the institutions and states within each region, *see* FEDERAL BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 43-55 (2003), *available at* http://www.bop.gov/pubinfo.html. Prisoners must file administrative remedies appeals with the regional office for the institution where they are confined at the time of filing. *See* P.S. 1330.13, *supra* note 18, at 8. A prisoner may need to appeal a denial all the way to the Central Office in order to fully exhaust his administrative remedies before filing suit in court. *See id.*

[29] *See id.* 28 C.F.R. § 542.18. This deadline for the warden to respond may be extended once by an additional twenty days, upon written notice to the prisoner. *See id.* On the other hand, if a complaint is considered "to be of an emergency nature which threatens the inmate's immediate health or welfare," then the Warden must respond no later than the third calendar day following the date of filing. *See id.*

[30] *See id.* § 542.15(a).

[31] *See id.* § 542.18.

[32] *See id.* § 542.15(a). The filing deadlines for appeals may be extended for the same reasons described above with regard to filings at the institutional level. *See id.* § 542.15(a).

[33] *See id.* § 542.18. The deadlines for the regional office and the Central Office to respond may be extended once by an additional thirty days and twenty days respectively, upon written notice to the prisoner. *See id.*

[34] *See id.* § 542.17(b). Examples of correctable errors include failure to sign a form or to submit the required number of copies. *See* P.S. 1330.13, *supra* note 18, at 9. The additional period for resubmission is generally five days at the institutional level, ten days at the regional office level, and fifteen days at the central office level. *See id.*

The Bureau of Prisons also has established general procedures for the investigation of complaints that are filed under the Administrative Remedies Program. Once a request or appeal is accepted by one of the Bureau's offices, the complaint is assigned for investigation, review, and response.[35] The Bureau instructs its staff that all complaints and appeals are to be thoroughly investigated, with supporting documentation and notes maintained in the investigator's file.[36] Responses to a prisoner's complaint or appeal must state the decision and the reasons supporting the decision, with references to applicable statutes, regulations, and internal policies whenever possible.[37]

Issues that are raised initially through the Bureau of Prisons' administrative remedies program may become the bases for subsequent legal actions by prisoners in federal court. Claims raised in *Bivens* suits or habeas corpus petitions often involve a prisoner's conditions of confinement, issues that fall within the scope of the administrative remedies program. Exhaustion of these administrative remedies is a prerequisite to filing a *Bivens* suit or a petition for habeas corpus.[38] Specific examples of issues raised initially in administrative claims that might give rise to *Bivens* suits or habeas corpus petitions include challenges to disciplinary sanctions, mistreatment by staff, medical treatment decisions, losses of privileges, transfers between facilities, and sentence calculations.[39] In addition, prisoners may be able to

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When a problem with a complaint or appeal is not considered to be correctable, the prisoner may appeal this determination through the same process outlined above. *See id.* § 542.17(c).

[35] *See* P.S. 1330.13, *supra* note 18, at 10. Complaints involving specific staff members may not be investigated by either those staff members involved or any staff members under their direct supervision. *See id.* Allegations of physical abuse by institutional staff are referred to the Office of Internal Affairs for a separate investigation. *See id.*

[36] *See id.* Investigators may ask staff members to provide written statements, if necessary. *See id.*

[37] *See id.* However, responses are not to include the names of any prisoners, and should not include the names of staff or other persons unless absolutely essential. *See id.*

[38] Provisions in the Prison Litigation Reform Act require administrative exhaustion for *Bivens* suits. *See infra* Part II.E.1. Prisoners seeking habeas corpus relief to challenge the conditions of their confinement under 28 U.S.C. § 2241 also must exhaust any available administrative remedies. *See, e.g.*, Carmona v. United States Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001); Callwood v. Enos, 230 F.3d 627, 634 (3d Cir. 2001); United States v. Chappel, 208 F.3d 1069, 1069 (8th Cir. 2000); Rogers v. United States, 180 F.3d 349, 356 (1st Cir. 1999). Suits under the FTCA also require administrative exhaustion, through the special administrative program established by the Bureau of Prisons under the FTCA. *See infra* notes 62-63 and accompanying text.

[39] *See generally infra* Parts II.C.1, II.D.

seek judicial review of final administrative decisions in federal court through a claim under the Administrative Procedure Act, governed by the arbitrary and capricious standard.[40]

B. The Federal Tort Claims Act and the Bureau of Prisons

The FTCA creates a federal cause of action that allows federal prisoners to bring ordinary tort claims against the United States for injuries or losses caused by employees of the Bureau of Prisons. Although the FTCA constitutes an apparently broad waiver of sovereign immunity, recovery is limited by a number of doctrines, including a statutory exception for "discretionary" government functions and ordinary tort rules. Federal prisoners submitting claims also must comply with the general procedural requirements under the FTCA, as well as specific rules created by the Bureau of Prisons.[41] Although FTCA litigation actions involving the Bureau of Prisons are not common, federal prisoners file thousands of FTCA administrative claims every year, making this legal regime a critical component of the overall grievance system for challenging the conditions of their confinement.

1) Statutory and Regulatory Requirements Governing FTCA Claims Involving the Bureau of Prisons

The FTCA waives sovereign immunity, and allows individuals to bring ordinary tort claims against the United States for injuries or losses caused by federal employees,[42] including employees of the

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[40] *See, e.g.*, Thompson v. U.S. Federal Prison Industries, Inc., 492 F.2d 1082 (5th Cir. 1974) (holding that a prisoner may seek review of an Inmate Accident Compensation claim under the Administrative Procedure Act, governed by the arbitrary and capricious standard); Johnstone v. United States, 980 F. Supp. 148 (E.D. Pa. 1997) (same); *see generally* 5 U.S.C.A. §§ 701-06 (providing for judicial review to set aside agency action if, *inter alia*, it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[41] All administrative claims under the FTCA are governed by general regulations issued by the Department of Justice, but agencies are authorized to issue their own regulations to supplement these general provisions. *See* 28 C.F.R. § 14.11. The Bureau of Prisons has adopted additional regulations that provide answers to frequently asked questions about the procedures for filing an FTCA administrative claim. *See id.* §§ 543.30-.32.

[42] Sovereign immunity ordinarily bars suits against the United States, federal agencies, or federal employees, but Congress may waive sovereign immunity for specific claims by federal statute. *See, e.g.*, Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (recognizing that sovereign immunity generally shields the federal government and its agencies from suit, absent an explicit waiver); Lane v. Pena, 518 U.S. 187, 192 (1996) (holding that Congress may waive sovereign immunity only through an unequivocal statutory provision, and that such provisions must be strictly construed); *see generally* 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE JURISDICTION 3d. § 3654 (1998 ed.). The FTCA constitutes such a statutory waiver. *See, e.g.*, F.D.I.C. v. Meyer, 510 U.S. 471, 475 (recognizing that the FTCA waives the United States' sovereign immunity for certain torts committed by federal employees).

Bureau of Prisons.[43] Under the FTCA, an injured plaintiff may bring a claim in federal court against the United States as the named defendant for:

> [I]njury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[44]

In *United States v. Muniz*, 374 U.S. 150 (1963) the Supreme Court recognized that the FTCA encompasses actions against the United States for tort injuries suffered by federal prisoners during their incarceration that are caused by employees of the Bureau of Prisons.

In general, the United States is liable in actions under the FTCA "in the same manner and to the same extent as a private individual under like circumstances."[45] This includes liability for some intentional torts—assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution—but only when these acts are committed by a federal investigative or law enforcement officer.[46] Under provisions enacted in the Prison Litigation Reform Act of 1996,[47] prisoners who have been convicted of a felony may not bring a civil action under the FTCA "for mental or emotional injury suffered while in custody without a prior showing of physical injury."[48] In addition, awards for pre-

Does this cover BOP employees?

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[43] It should be noted that some claims under the FTCA for conduct involving the Bureau of Prisons' employees involve non-prisoner claimants such as staff members or visitors. *See* BUREAU OF PRISONS, PROGRAM STATEMENT 1320.05 FEDERAL TORT CLAIMS ACT 2 (2000) [hereinafter P.S. 1320.05].

[44] 28 U.S.C.A. § 1346(b)(1). Liability under the FTCA is determined by the law of the state in which the underlying incident(s) occurred. *See, e.g., Meyer*, 510 U.S. at 478.

[45] 28 U.S.C.A. § 2674. This choice of wording does not mean that the United States cannot be held liable for its employees' performance of functions that private persons generally do not perform. *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955) (rejecting this argument); Concrete Tie of San Diego, Inc. v. Liberty Constr., Inc., 107 F.3d 1368, 1371 (9th Cir. 1997) (same).

[46] *See* 28 U.S.C.A. § 2680(h). The term investigative or law enforcement officer includes "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," a definition that covers employees of the Bureau of Prisons. *Id.* This provision is an exception to the general rule under the FTCA that the United States is not liable for specified intentional torts committed by federal employees. *See* 28 U.S.C.A. § 2680(h).

[47] Prison Litigation Reform Act, Pub. L. No. 104-134, §806, 110 Stat. 1321, 1321-66 to -77 (Apr. 26, 1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

[48] 28 U.S.C.A. § 1346(b)(2).

judgment interest and punitive damages are excluded under the FTCA.[49] However, a prevailing party may be awarded costs and reasonable attorney's fees, within the court's discretion.[50] Venue for FTCA actions is limited to "the judicial district where the plaintiff resides or wherein the act or omission complained of occurred,"[51] and there is no right to a jury trial.[52]

The primary barriers to recovery under the FTCA are a series of statutory exceptions in which sovereign immunity is not waived.[53] The most important exception—in general and specifically as to claims involving employees of the Bureau of Prisons—is referred to as the discretionary function exception:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[54]

The stated purpose of the discretionary function exception is to prevent judicial review of government actions that are based on social, economic or political policy considerations.[55] With this purpose in mind, the exception only protects a federal employee's decision if two requirements are met. First, the decision must involve judgment or choice—"if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,'" then the exception does not apply.[56] Second, the decision must involve public policy considerations, meaning only that the nature of the conduct at issue lends itself

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[49] *See id.* § 2674.

[50] *See id.* § 2412(b) (1994). However, an attorney litigating a claim under the FTCA is limited to a fee no greater than twenty-five percent of any judgment or settlement of a claim filed in federal court, or twenty percent of any administrative settlement. *See id.* § 2678.

[51] *See id.* § 1402(b).

[52] *See id.* § 2402.

[53] Other exceptions bar liability for claims related to postal matters, *id.* § 2680(b), combatant actions by the armed forces during time of war, *id.* § 2680(j), and claims arising in a foreign country, *id.* § 2680(k). If one of the statutory exceptions applies, then the federal courts lack subject matter jurisdiction over the claim. *See, e.g.*, Alfrey v. United States, 276 F.3d 557, 561 (9th Cir. 2002); Tippett v. United States, 108 F.3d 1194, 1196 (10th Cir. 1997); Mundy v. United States, 983 F.2d 950, 952 (9th Cir. 1993).

[54] 28 U.S.C.A. § 2680(a). *See generally* WRIGHT, ET AL., *supra* note 42, at § 3658.1 (describing the discretionary function exception as "undoubtedly, one of the FTCA's most important and frequently litigated provisions").

[55] *See, e.g.*, United States v. Gaubert, 499 U.S. 315, 322-23 (1991); Berkovitz by Berkovitz v. United States, 486 U.S. 531, 536-37 (1988).

[56] *See, e.g.*, *Gaubert*, 499 U.S. at 322; *Berkovitz*, 486 U.S. at 536.

to policy analysis.[57] It also is important to remember that the discretionary function applies even if the actual conduct at issue is negligent or involves an abuse of discretion.[58]

If the FTCA applies, it becomes the exclusive remedy for a party who has been injured by a federal employee. Any tort claim against a federal employee that falls within the scope of the law will be preempted by the FTCA and barred.[59] However, an injured party may bring a tort claim against an individual federal employee if the complaint alleges a constitutional violation,[60] an exception that allows federal prisoners to sue individual officers in *Bivens* actions alleging "constitutional torts. " Plaintiffs who wish to pursue both remedies must proceed with caution, because an injured party who has accepted an administrative settlement or won a court judgment under the FTCA is barred from bringing any further claims involving the same subject matter.[61]

The FTCA encourages administrative adjustment of claims, by requiring plaintiffs to present their complaint to the appropriate federal agency for settlement before filing suit in federal court. An injured party may not file a civil action under the FTCA until he has presented an administrative claim to the

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[57] *See, e.g., Gaubert*, 499 U.S. at 324-25; *Alfrey*, 276 F.3d at 562. The subjective intent of the federal employee is irrelevant to this inquiry, and the courts will presume that a decision is guided by policy considerations when an employee is exercising discretion pursuant to established government policies. *See, e.g., Gaubert*, 499 U.S. at 324-25; Cohen v. United States, 151 F.3d 1338, 1341 (11th Cir. 1998) (noting that in determining whether the discretionary function exception applies, the court does "not focus on the subjective intent of the government employee or inquire whether the employee actually weighed social, economic, and political policy considerations before acting").

[58] *See* 28 U.S.C.A. § 2860(a) ("whether or not the discretion involved be abused"); *see also, e.g.*, Bailor v. Salvation Army, 51 F.3d 678, 685 (7th Cir. 1995); Blakey v. U.S.S. Iowa, 991 F.2d 148, 152 (4th Cir. 1993); Redmon v. United States, 934 F.2d 1151, 1157 (10th Cir. 1991).

[59] *See* 28 U.S.C.A. § 2679(b)(1) (barring any other civil claims or proceedings for money damages "by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee"). If a plaintiff brings a civil action against a federal employee and that claim is cognizable under the FTCA, the court is authorized to substitute the United States as the defendant and to treat the action as one under the FTCA. *See id.* § 2679 (d)(1) to (3).

[60] *See id.* § 2679(b)(2).

[61] The FTCA provides that the acceptance of an administrative settlement shall be "final and conclusive" and "constitute a complete release of any claim against the United States and against the employee. . .by reason of the same subject matter." *See id.* § 2672; 28 C.F.R. § 14.10(b); *see also* Serra v. Pichardo, 786 F.2d 237, 239 (6th Cir. 1986) (interpreting "by reason of the same subject matter" to mean "arising out of the same actions, transactions or occurrences"). Similarly, the Act provides that a judgment in any civil action under the FTCA "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." *See* 28 U.S.C.A. § 2676.

appropriate federal agency[62] and that claim has been "finally denied by the agency in writing."[63] The party who has suffered the loss generally must submit the claim himself, [64] within two years of the date that the claim accrues.[65] At a minimum, the claim must be in writing, provide sufficient detail in order for the agency to begin its own investigation of the incident, and claim a "sum certain" in damages.[66] The filing party may amend an administrative claim at any time, or may submit a written request for reconsideration to the agency once he receives a response.[67] A final denial of an FTCA administrative claim by an agency must be sent to the filing party or his agent or legal representative via certified or registered mail.[68] An individual whose administrative claim had been finally denied by the appropriate agent may file an action in federal court within six months of the notice's mailing date.[69] A litigation

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[62] The appropriate agency is the agency whose activities gave rise to the claim. *See* 28 C.F.R. § 14.2(b)(1). The Bureau of Prisons further requires a claimant to file an FTCA claim with the appropriate regional office for the region in which the underlying incident occurred. *See id.* § 543.31(c). A claim should be filed with the Bureau's Central Office if the incident occurred in the Central Office, *see id.*, or if it involves private halfway houses or prison facilities that are not assigned to any particular region. *See* Pybas Interview, *supra* note 15. If a claim is filed with the wrong office, it will be transferred to the appropriate Bureau office. *See* P.S. 1320.05, *supra* note 43, at 3.

[63] *See* 28 U.S.C.A. § 2675(a). The requirement of a final agency denial is a jurisdictional prerequisite that cannot be waived. *See, e.g.*, Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Kokotis v. U.S. Postal Service, 223 F.3d 275, 278-79 (4th Cir. 2000). However, if the agency fails to make a final decision within six months of a claim being filed, then the claimant may deem this lack of response to be a final denial and may bring a civil action. *See id.* In *McNeil v. United States*, 508 U.S. 106, 111-13 (1993) the Supreme Court settled a circuit split by holding that this requirement is not satisfied where a plaintiff receives a final agency denial after his civil action has been filed in federal court but prior to any substantial progress in the litigation.

[64] *See* 28 C.F.R. § 14.3 (requiring filing by the injured party or his agent or representative, with special provisions for a claim of wrongful death). The Bureau of Prisons also requires a claimant to provide a written statement verifying that a representative or agent has authority to act on his behalf. *See id.* § 543.31(a).

[65] *See* 28 U.S.C.A. § 2401(b).

[66] *See* 28 C.F.R. § 14.2(a)(1) (describing the minimal presentment requirements as "written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident"); *see also, e.g.*, Blair v. I.R.S., 304 F.3d 861, 864 (9th Cir. 2002); Burchfield v. United States, 168 F.3d 1252, 1254-55 (11th Cir. 1999); Bowden v. United States, 106 F.3d 433, 441 (D.C. Cir. 1997).

[67] *See* 28 C.F.R. § 14.2(c); *id.* § 14.9(b). Either of these actions will restart the six-month deadline for the agency to render a final decision. *See id.* §§ 14.2(c), 14.9(b). The Bureau of Prisons' regulations further specify that a prisoner who is dissatisfied with an initial denial and files a request for reconsideration of his claim should include additional evidence of injury or loss. *See id.* § 543.32(g).

[68] *See id.* § 14.9(a).

[69] *See* 28 U.S.C.A. § 2401(b).

action under the FTCA generally may not seek damages above the amount sought in the administrative claim[70]

The FTCA itself empowers the heads of all federal agencies to consider and settle claims properly brought under the Act, but settlements above a certain level may require prior approval from or consultation with the Department of Justice.[71] Any settlement of more than $5,000 must be approved by an agency head or his designee,[72] and settlements in excess of an agency's statutory authority ($10,000 for the Bureau of Prisons) must receive written approval from the Attorney General's office.[73] Regardless of the proposed settlement amount, an agency must consult with the Department of Justice if the settlement involves a new precedent or a question of policy, or if the United States or a federal employee or agent is involved in litigation arising out of the same incident or transaction.[74]

The Bureau of Prisons has adopted supplementary policies for the processing of FTCA administrative claims. When the Bureau receives a complete and properly-presented claim, it is referred out to the appropriate institution or office within the Bureau for further investigation.[75] For claims filed with a regional office, the Regional Counsel or his designee will review the results of the investigation and all supporting documents and decide how to proceed with the claim.[76] The appropriate Regional Counsel may make a settlement offer to a claimant if he determines that a settlement is in the best

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[70] *See* 28 U.S.C.A. § 2675(b). An exception is provided if a higher claim for damages is based on newly discovered evidence that was not previously available or on intervening facts that affect the amount of the claim. *See id.*

[71] *See generally id.* § 2672.

[72] *See* 28 C.F.R. § 14.5. These settlements also must be reviewed by the legal officer for the agency. *See id.*

[73] *See* 28 U.S.C.A. § 2672; 28 C.F.R. § 14.6(c); P.S. 1320.05, *supra* note 43, at 5.

[74] *See* 28 C.F.R. § 14.6(d)(1), (2). Consultation also is required if the United States might be entitled to indemnity or contribution from a third party, or if the settlement might affect the outcome of a related claim that is for an amount in excess of the agency's statutory authority to settle claims. *See id.* § 14.6(d)(1).

[75] *See id.* § 543.32(c). Prisoners may be required to provide additional information during the investigation of their claims, and failure to respond can result in denial or rejection of the claim. *See id.* If a claim is referred to an individual institution for investigation, the warden will appoint staff members to investigate the claim and prepare a report. *See* P.S. 1320.05, *supra* note 43, at 3. Claims involving medical care also must be reviewed by institution health services staff. *See id.* at 4. Claims that are properly filed with the Central Office are investigated by staff in that office. *See id.*

[76] *See* 28 C.F.R. § 543.32(d).

interests of the government.[77] The General Counsel performs the same function for claims properly filed with the Central Office.[78]

2) Case Law on Issues of Particular Concern for Federal Prisoners

One of the most common contested issues in FTCA actions—generally, and particularly those involving the Bureau of Prisons—is the scope of the discretionary function exception. While its application varies with the facts of each case, the courts appear more than willing to invoke the exception in FTCA claims by federal prisoners. Circuit court decisions have held that the exception applies to decisions concerning classification of prisoners and their assignment to particular institutions,[79] whether to warn prisoners about potential safety risks from other prisoners,[80] responses to threats from other prisoners,[81] and parole decisions.[82] In a high-profile example, *Buchanan v. United States*, 915 F.2d 969 (5th Cir. 1990), the Fifth Circuit affirmed that the discretionary function exception barred an FTCA claim by federal prisoners who had been held hostage during a prison uprising at the Federal Detention Center in Oakdale, Louisiana by Cuban nationals who had entered the United States during the Mariel boatlift. The court reasoned that the emergency responses by prison employees during the uprising involved judgment and public policy considerations, and were precisely the kind of discretionary decisions that the exception is intended to protect.[83] Cases against the Bureau of Prisons in which the discretionary function

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[77] *See* P.S. 1320.05, *supra* note 43, at 5. The regional counsels' settlement authority is limited to $2,500, so claims in excess of $2,500 but under $10,000 must be approved by the Central Office. *See id.* As noted above, settlements in excess of $10,000 must be approved by the Department of Justice. *See id.* Claimants must be notified when their claims are delayed pending approval. *See id.*

[78] *See* 28 C.F.R. § 543.32(d).

[79] *See Cohen*, 151 F.3d at 1341-44 (applying the exception to the decision to assign a prisoner to a minimum security prison, in a suit for injuries sustained by a fellow prisoner in an attack); *Bailor*, 51 F.3d at 685 (applying the exception to a decision to release a prisoner to a halfway house, in a suit by a victim of rape and violent assault committed by a prisoner who had escaped from the halfway house).

[80] *See* Dykstra v. United States Bureau of Prisons, 140 F.3d 791, 795-96 (8th Cir. 1998) (applying the exception to a claim alleging failure to warn a prisoner that he might be vulnerable to attacks by other prisoners, or to place him in protective custody).

[81] *See Alfrey*, 276 F.3d at 562-67 (applying the exception to a wrongful death claim, based on the alleged negligence of corrections officers in responding to a prisoner's threats against the deceased); Calderon v. United States, 123 F.3d 947, 949-51 (7th Cir. 1997) (same).

[82] *See* Payton v. United States, 679 F.2d 475, 480-82 (5th Cir. 1982) (applying the exception to a wrongful death action by the surviving family of a woman murdered by a prisoner who had been released on parole).

[83] *See* Buchanan v. United States, 915 F.2d 969, 971-72 (5th Cir. 1990).

exception has been raised and held to be inapplicable have involved action prescribed by regulations[84] or careless conduct.[85]

There are several other issues worth noting that often arise in FTCA claims brought by federal prisoners. While it is clear that the Inmate Accident Compensation program provides the exclusive remedy for prisoners' work-relate injuries,[86] it is not clear whether a prisoner may bring an FTCA claim for additional injuries caused by negligence or malpractice in the treatment of the prisoner's work-related injuries.[87] There also appears to be a circuit split over whether it is sufficient for an agency to send a notice of final denial of an administrative claim under the FTCA to a prisoner but not to his attorney.[88] Examples of ordinary tort questions that may arise in FTCA litigation brought by federal prisoners include statute of limitations calculations,[89] causation,[90] and whether an employee is acting within the

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[84] *See Alfrey*, 276 F.3d at 562-63 (holding that summary judgment based on the discretionary function exception was precluded by a fact issue as to whether regulations mandated monitoring and evaluation of a prisoner before placing him in a cell with another prisoner); *Payton*, 679 F.2d at 482 (holding that the discretionary function exception would not bar liability for a complaint alleging that the Bureau of Prisons failed to release a prisoner's records to the parole board, where disclosure of the records was required by statute).

[85] *See* Coulthurst v. United States, 214 F.3d 106, 109-11 (2d Cir. 2000) (holding that the discretionary function exception would not bar liability for an injury caused by failure to properly inspect a machine, if federal employees did not perform the inspections out of laziness or carelessness).

[86] *See Demko*, 385 U.S. at 152-54.

[87] *Compare* Vander v. United States Dep't of Justice, 268 F.3d 661, 663-64 (9th Cir. 2001) (holding that the Inmate Accident Compensation program provides the exclusive remedy for subsequent aggravation of a work-related injury) *with* Wooten v. United States, 825 F.2d 1039, 1044-45 (6th Cir. 1987) (holding that the Inmate Accident Compensation program is the exclusive remedy for subsequent aggravation of a work-related injury, but that a prisoner can bring an FTCA claim alleging denial of adequate medical care in the treatment of these injuries). *Cf.* Bagola v. Kindt, 131 F.3d 632, 642-45 (7th Cir. 1997) (holding that a prisoner suffering a work-related injury that is compensable under the Inmate Accident Compensation Program is not therefore barred from bringing a *Bivens* action under the Eighth Amendment alleging deliberate indifference to safety in the prison's working conditions).

[88] *Compare* Shoff v. United States, 245 F.3d 1266, 1268 (11th Cir. 2001) (per curiam) (holding that it was sufficient for an agency to send a notice of final denial to either a prisoner or his attorney) *with* Graham v. United States, 96 F.3d 446, 448-50 (9th Cir. 1996) (holding that when a federal agency knows that a federal prisoner is represented by counsel, then the agency must send the notice of final denial to the attorney or representative, and sending the notice only to the prisoner in such cases is not sufficient). In general, the Bureau of Prisons' policy is to communicate only with a lawyer or other appointed representative and not with the claimant himself. *See* 28 C.F.R. § 543.31(a)..

[89] *See, e.g.*, McCoy v. United States, 264 F.3d 792, 794-96 (8th Cir. 2001) (applying continuing treatment doctrine for tolling of statute of limitations to a prisoner's claim for medical malpractice); Diaz v. United States, 165 F.3d 1337, 1339-40 (11th Cir. 1999) (holding in medical malpractice claim for treatment of a prisoner who subsequently committed suicide that statute of limitations began to run when the prisoner's surviving personal representative knew or reasonably should have known that the prisoner had received psychological or medical treatment that was somehow linked to his subsequent suicide).

scope of his employment.[91] Finally, FTCA claims brought by federal prisoners are subject to many of the procedural and substantive limits imposed by the Prison Litigation Reform Act of 1996, which are discussed in further detail below.[92]

C. *Bivens* Claims Against Bureau of Prisons Officials

In addition to claims under the FTCA, federal prisoners may be able to bring civil rights actions against Bureau of Prisons officials under the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Litigation suits under *Bivens* seek monetary damages for injuries or losses caused by a federal employee who has violated a prisoner's constitutional rights. Although the scope of liability under *Bivens* is limited, and recovery often is barred by affirmative defenses, *Bivens* suits continue to provide a critical legal device for federal prisoners.

1) Federal Civil Rights Actions Under the Bivens *Case*

Under the Civil Rights Act of 1871, as amended and recodified at 42 U.S.C. § 1983,[93] a prisoner may bring suit for monetary damages in federal court when a person acting under color of state law deprives the prisoner of "any rights, privileges, or immunities secured by the Constitution and laws."[94] In the *Bivens* case the Supreme Court recognized a similar cause of action against federal officials, holding

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[90] *See, e.g.*, Jutzi-Johnson v. United States, 263 F.3d 753, 755-58 (7th Cir. 2001) (holding that the estate of a prisoner who had committed suicide failed to establish causation, because the plaintiffs did not prove that the suicide risk was foreseeable or that any treatment would have prevented the suicide).

[91] *See, e.g.*, Flechsig v. United States, 991 F.2d 300, 302-03 (6th Cir. 1993) (holding that a corrections officer was not acting within the scope of his employment when he took a female prisoner to his home and sexually assaulted her, when the officer was supposed to be transporting the prisoner to a medical appointment).

[92] Many provisions in the PLRA apply to actions "with respect to prison conditions," *see, e.g.*, 18 U.S.C.A. § 3626, 42 U.S.C.A. § 1997e(a), (c)(1), and (f)(1), a phrase that might appear not to encompass all FTCA actions. However, the Supreme Court has interpreted this language broadly to include "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 534 U.S. at 532. Nonetheless, certain provisions in the PLRA are not applicable to FTCA claims. For example, the FTCA itself already requires administrative exhaustion of all claims, making a similar requirement in the PLRA duplicative for prisoner suits under the FTCA. *See* 42 U.S.C.A. § 1997e(a). The PLRA also contains restrictions on attorney's fees that apply only to actions "in which attorney's fees are authorized under section 1988," 42 U.S.C.A. § 1997e(d), a statutory provision that applies to § 1983 actions.

[93] *See* 42 U.S.C.A. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .").

[94] *See generally* Monroe v. Pape, 365 U.S. 167 (1961) (describing the scope of liability under § 1983).

that an individual could bring a suit for damages in federal court alleging that a federal agent, acting under color of federal authority, had violated his constitutional rights under the Fourth Amendment.[95] The Supreme Court now describes a *Bivens* claims as "an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights."[96]

The substantive and procedural aspects of *Bivens* claims are governed by a combination of state and federal law. The statute of limitations for *Bivens* claims is determined by reference to the statute of limitations in the forum state that applies to personal injury actions.[97] *Bivens* suits fall under the principal federal venue statute, 28 U.S.C. § 1391,[98] and may be brought in a judicial district (1) where any defendant resides, if all defendants reside in the same State; (2) in which a substantial part of the events or omissions giving rise to the claim occurred; or (3) in which any defendant may be found, if there is no district in which the action may otherwise be brought.[99] The plaintiff in a *Bivens* claim may elect a jury trial.[100] In these latter two respects *Bivens* actions are more favorable to plaintiffs than suits under the FTCA, in which venue is limited to the place of injury and there is no right to a jury trial.[101]

Not every constitutional violation by a federal employee will give rise to liability under *Bivens*. Federal agencies themselves are not liable under *Bivens*,[102] nor are private entities acting under color of federal law.[103] These rules not only require a prisoner to style a complaint appropriately as one against an

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[95] *See Bivens*, 403 U.S. at 390-92, 395-97.

[96] Correctional Services Corp. v. Malesko, 534 U.S. 61, 66 (2001).

[97] *See, e.g.*, Papa v. United States, 281 F.3d 1004, 1009 (9th Cir. 2002); King v. One Unknown Federal Correctional Officer, 201 F.3d 910, 913 (7th Cir. 2000); Brown v. Nationsbank Corp., 188 F.3d 579, 590 (5th Cir. 1999).

[98] The venue statute also contains a special provision for actions brought against "an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States," 28 U.S.C.A. § 1391(e), but this provision does not apply to *Bivens* actions, which are brought against the defendants in their *individual* capacities. *See, e.g.*, Cameron v. Thornburgh, 983 F.2d 253, 256 (D.C. Cir. 1993).

[99] 28 U.S.C.A. § 1391(b).

[100] The Seventh Amendment guarantees the right to jury trial in actions at law, which typically includes all actions for monetary damages. *See generally* Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565, 570-73 (1990); *see also* Carlson v. Green, 446 U.S. 14, 22-23 (1980) (noting that *Bivens* plaintiffs may elect a jury trial).

[101] *See supra* notes 51 and 52 and accompanying text.

[102] *See Meyer*, 510 U.S. at 484-86.

[103] *See Malesko*, 534 U.S. at 70-74.

individual officer, but also have implications for available relief. In addition, the Court has declined to allow *Bivens* claims where "special factors counsel[] hesitation"[104] or where there is an explicit congressional statement that injured persons are to be compensated solely through "another remedy, equally effective in the view of Congress."[105]

Finally, there is some uncertainty regarding the outer reaches of *Bivens* liability. The Supreme Court has recognized *Bivens* claims for only three different substantive constitutional violations—under the Fourth Amendment (in the *Bivens* case itself),[106] the due process clause of the Fifth Amendment and its equal protection component,[107] and the Eighth Amendment bar against cruel and unusual punishment.[108] In *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001), Chief Justice Rehnquist's majority opinion interprets the paucity of recent cases extending *Bivens* liability as a refusal by the Court "to extend *Bivens* liability to any new context or new category of defendants."[109]

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[104] *See Bivens*, 403 U.S. at 397. Relying on this principle, the Court has declined to allow *Bivens* claims by military personnel, based on "special factors" that include the explicit constitutional delegation of authority over military matters to Congress and the degree of disruption that could result from judicial interference. *See* United States v. Stanley, 483 U.S. 669, 683-86 (1987); Chappell v. Wallace 462 U.S. 296, 298-305 (1983).

[105] *See Bivens*, 403 U.S. at 397. Relying on this second principle, the Court has refused to extend *Bivens* liability in cases where the plaintiffs have an existing remedy under federal law, even where these statutory remedies do not provide for monetary damages. *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 424-29 (1988); Bush v. Lucas, 462 U.S. 367, 380-90 (1983). *But see Carlson*, 446 U.S. at 19-23 (1980) (holding that a plaintiff could bring a *Bivens* action even though her allegations could state a claim under the Federal Tort Claims Act, because Congress intended these two causes of action to serve as parallel remedies).

[106] *See also* Robinson v. Jones, 142 F.3d 905, 906-07 (6th Cir. 1998) (recognizing a *Bivens* action for searches at prisoner's home and place of business, which preceded his prosecution and conviction); Del Raine v. Williford, 32 F.3d 1024, 1040-41 (7th Cir. 1994) (recognizing a *Bivens* action for a search in prison).

[107] *See* Davis v. Passman, 442 U.S. 228, 233-48 (1979) (holding that the former employee of a U.S. Congressman could bring a *Bivens* claim under the equal protection component of the Fifth Amendment due process clause, claiming sex discrimination in employment); *see also* Papantony v. Hedrick, 215 F.3d 863, 865 (8th Cir. 2000) (per curiam) (recognizing a *Bivens* action for violations of substantive due process rights, based on allegations that prison officials forcibly administered antipsychotic medication to a prisoner); Pena v. United States, 157 F.3d 984, 987 (5th Cir. 1998) (recognizing a *Bivens* claim for violations of due process rights, seeking property that prison officials had seized).

[108] *See Carlson*, 446 U.S. at 18-23. (holding that the administrator of a deceased federal prisoner's estate could bring a *Bivens* claim alleging that the prisoner suffered injuries from which he died because federal prison officials violated his Eighth Amendment rights); *see also* Farmer v. Brennan, 81 F.3d 1444, 1450-51 (7th Cir. 1996) (recognizing a *Bivens* claim for Eighth Amendment violations, based on allegations that prison officials failed to acknowledge and respond to a risk of physical harm to a prisoner); Terrell v. Brewer, 935 F.2d 1015, 1018-19 (9th Cir. 1991) (holding that a prisoner had stated a *Bivens* claim based on allegations that prison guards deliberately injured him and interfered with his attempt to receive immediate medicate treatment).

[109] *See also Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action. . .I would limit *Bivens* and its two follow-on cases (*Davis*

Nonetheless, the lower courts continue to recognize the possibility of *Bivens* liability for violations of the First Amendment,[110] and generally appear to assume that a *Bivens* remedy is available for any constitutional violation. Regardless of the ultimate outcome on this issue in the Supreme Court, most prisoner claims for damages stemming from constitutional violations will fall within the scope of claims already recognized by the Court.[111]

2) The Relationship Between FTCA and Bivens *Claims*

The overlap between prisoner claims under the FTCA and in *Bivens* suits has not raised many difficult issues, primarily because the courts have held that the two remedies are not mutually exclusive. In *Carlson v. Green*, 446 U.S. 14 (1980) the Supreme Court held that a plaintiff may pursue a Bivens action for a constitutional tort even when the same allegations could support a claim under the FTCA.[112] The Seventh and Ninth Circuit have applied the same reasoning to hold that *Bivens* suits and claims under the Inmate Accident Compensation Program are not mutually exclusive remedies.[113] Although *Bivens* and FTCA claims are not mutually exclusive, a judgment in one type of action may have a preclusive effect on a subsequent claim. A prior judgment in a suit under the FTCA—either favorable or

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v. Passman and *Carlson v. Green*) to the precise circumstances that they involved") (internal citations omitted).

[110] *See, e.g.*, Lederman v. United States, 291 F.3d 36, 46-48 (D.C. Cir. 2002); Trulock v. Freeh, 275 F.3d 391, 399-400 (4th Cir. 2001); McLaughlin v. Watson, 271 F.3d 556, 572-74 (3d Cir. 2001); Edwards v. Johnson, 209 F.3ed 772, 777, 779 (5th Cir. 2000).

[111] *See supra* notes 106, 107, and 108 (noting *Bivens* claims by prisoners under the Fourth Amendment, the Fifth Amendment due process clause, and the Eighth Amendment).

[112] In *Carlson*, the mother of a deceased federal prisoner brought suit claiming that her son's death while in federal custody had resulted from prison officials' deliberate indifference to his medical needs, allegations that could support an FTCA action or a *Bivens* suits under the Eighth Amendment. *See* 446 U.S. at 16-18. The Supreme Court concluded that Congress had intended the FTCA and *Bivens* claims to serve as "parallel, complementary causes of action." *Id.* at 19-20. The Court also noted that *Bivens* suits are more effective than FTCA actions in at least four respects—*Bivens* suits serve a deterrent purpose by imposing liability on the individual officials involved, punitive damages and jury trials are available in *Bivens* suits but not in FTCA actions, claims under the FTCA are subject to varying state laws, and in some cases will not be available at all. *See id.* at 20-23. Although *Bivens* suits may be preferable for all of these reasons, the standard of liability often will be lower under the FTCA—for example, in a medical care case such as *Carlson*, a prisoner proceeding on an Eighth Amendment *Bivens* claim must prove deliberate indifference, while an FTCA claim only requires proof of negligence. Michael Pybas, Senior Counsel in the Bureua's Office of General Counsel, reports that federal prisoners often prefer to file medical care claims under the FTCA rather than *Bivens*, because of the lower standard of liability. *See* Pybas Interview, *supra* note 15.

[113] *See Bagola*, 131 F.3d at 642-44; Vaccaro v. Dobre, 81 F.3d 854, 857 (9th Cir. 1996).

unfavorable to the plaintiff—will bar a subsequent claim under *Bivens* for the same subject matter.[114] However, a judgment in a prior *Bivens* suit against an individual official may not bar a subsequent FTCA claim for the same incident,[115] although any prior monetary award may be set off against any award for the same injuries in a subsequent action,[116] and general rules of res judicata would apply.

3) Restrictions on **Bivens** *Claims of Particular Concern for Federal Prisoners*

The critical issue in many *Bivens* claims, particularly those filed by federal prisoners, turns on an affirmative defense—whether the defendant's conduct is protected from liability by principles of absolute or qualified immunity.[117] Absolute immunity is limited to officials performing judicial functions, such as judges and prosecutors,[118] while government officials performing discretionary functions are protected by the concept of qualified immunity.[119] To overcome a claim of qualified immunity, a court must find that the plaintiff "has alleged the deprivation of an actual constitutional right," and "that right was clearly

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[114] *See* 28 U.S.C.A. § 2676; *see also, e.g.*, Farmer v. Perrill, 275 F.3d 958, 963 (10th Cir. 2001) (holding that *any* FTCA judgment, regardless of its outcome, bars a subsequent *Bivens* action on the same conduct); Hoosier Bancorp of Ind. v. Rasmussen, 90 F.3d 180, 184 (7th Cir. 1996) (same); Gasho v. United States, 39 F.3d 1420, 1437-38 (9th Cir. 1994) (same).

[115] *See* Sterling v. United States, 85 F.3d 1225, 1227-28 (7th Cir. 1996) (applying principles of issue preclusion to hold that a prior dismissal of a prisoner's *Bivens* claim did not bar a subsequent claim under the FTCA for the same alleged conduct, because *Bivens* liability requires a showing of intentional misconduct while FTCA liability may be premised on a lesser showing of negligence); *Gasho*, 39 F.3d at 1436-38 (holding that a plaintiff may concurrently pursue FTCA and *Bivens* remedies and may recover under both if the *Bivens* judgment is entered first); Kreines v. United States, 959 F.2d 824 (9th Cir. 1992) (allowing double recovery in the plaintiff's simultaneous *Bivens* and FTCA actions, because the court entered the *Bivens* judgment first). *Cf.* Engle v. Mecke, 24 F.3d 11 (10th Cir. 1994) (holding that when a plaintiff elects to continue an FTCA action after winning a jury award in a *Bivens* claim, success in the FTCA action may constitute grounds for vacating the prior *Bivens* award, based on election of remedies principles).

[116] *Cf. Bagola*, 131 F.3d at 645 n.17 (applying this principle to parallel claims under *Bivens* and the Inmate Accident Compensation program).

[117] The absolute and qualified immunity analyses are identical for Section 1983 and *Bivens* claims. *See* Butz v. Economou, 438 U.S. 478, 500-04 (1978) (holding that, in the absence of Congressional direction to the contrary, federal officials should be protected by the same principles of absolute and qualified immunity in *Bivens* suits as state officials are in § 1983 suits); *see also* Wilson v. Layne, 526 U.S. 603, 609 (1999) (noting that the qualified immunity analysis is identical for *Bivens* and § 1983 claims).

[118] *See generally* Buckley v. Fitzsimmons, 509 U.S. 259, 268-71 (1993); *see also* Imbler v. Pachtman, 424 U.S. 409, 418-19, 430-31 (1976) (recognizing absolute immunity for judges acting within their judicial duties, and prosecutors acting within their prosecutorial duties). As the name implies, absolute immunity confers absolute protection from liability. *See Buckley*, 509 U.S. at 268-69.

[119] *See Buckley*, 509 U.S. at 268.

established at the time of the alleged violation."[120] A constitutional right is clearly established if the contours of the rights are " sufficiently clear that a reasonable official would understand that what he is doing violates that right."[121]

In addition to immunity bars to liability, *Bivens* claims brought by federal prisoners are subject to many of the procedural and substantive limits imposed by the PLRA, which are discussed in further detail below.[122] One of the most significant limitations under the PLRA is that federal prisoners must exhaust any available administrative remedies before filing a *Bivens* action in federal court.[123]

D. Collateral Attacks and Habeas Corpus Petitions by Federal Prisoners

Federal prisoners may rely on two different statutory versions of the historical writ of habeas corpus for challenging the validity or the execution of their sentences. Under 28 U.S.C. § 2255, a federal prisoner may bring a motion in federal court attacking the validity of his sentence, a collateral attack akin to a habeas corpus petition filed by a state prisoner in federal court. While this is the primary form of habeas-like relief for federal prisoners, they also may bring habeas corpus petitions under 28 U.S.C. § 2241 to challenge the execution of their sentences or the conditions of their confinement. Claims in this latter category may overlap with the scope of claims that are cognizable under the FTCA or in a *Bivens* action. Although collateral attacks and habeas corpus petitions by federal prisoners are not the focus of this paper, it is important to understand the potential overlap among these different types of prisoner

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[120] *See Wilson*, 526 U.S. at 609. The Supreme Court has recently reiterated that the qualified immunity analysis must be treated as a threshold question, and must be answered in this prescribed order—first identifying a constitutional right, and then identifying whether the right was clearly established. *See* Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

[121] *See Wilson*, 526 U.S. at 614-15, *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This test is understood as one of "objective legal reasonableness." *See id.* at 614; *see also Katz*, 533 U.S. at 202 ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.")

[122] *See generally infra* Part II.E.1. As was noted above with respect to FTCA claims, *see supra* note 92, there are many provisions in the PLRA that apply to actions "with respect to prison conditions," brought under "Federal law," *see, e.g.*, 18 U.S.C.A. § 3626, 42 U.S.C.A. § 1997e(a), (c)(1), and (f)(1), a phrase that might appear not to encompass all *Bivens* actions. However, in *Porter v. Nussle*, the Supreme Court made clear that these statutory phrases apply to all *Bivens* claims. *See Porter*, 534 U.S. at 524. Other provisions in the PLRA are not directly applicable to *Bivens* claims. *See* 42 U.S.C.A. § 1997e(d) (restricting attorney's fees for actions "in which attorney's fees are authorized under section 1988," the statutory provision that authorizes attorney's fees for § 1983 actions).

[123] *See infra* Part II.E.1.

claims, particularly in light of the legislative reforms enacted in 1996 under the PLRA and the Anti-Terrorism and Effective Death Penalty Act. The following discussion provides only a brief introduction to the scope of habeas corpus relief for federal prisoners, which is necessary background for understanding the issues that arise in delineating various types of prisoner claims.

The current statutory provisions authorizing collateral attacks and habeas corpus petitions by federal prisoners date back to the first Judiciary Act of 1789.[124] The 1789 Act allowed federal prisoners in custody "under or by colour of the authority of the United States, or. . .committed for trial before some court of the same" to petition the federal courts for a writ of habeas corpus "for the purpose of an inquiry into the cause of commitment."[125] In 1948 Congress reorganized the existing habeas corpus remedies and added a new statutory remedy at 28 U.S.C. § 2255, which allows a federal prisoner to "move the court which imposed the sentence to vacate, set aside or correct the sentence" on the grounds that the sentence "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."[126] The purpose of the new § 2255 motion was to provide a substitute for a traditional collateral attack under a habeas corpus petition, creating a comparable remedy but changing the proper venue from the *confining* court to the *sentencing* court.[127] However,

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[124] The federal statutory provisions for habeas corpus relief are grounded in the common law writ of habeas corpus. At common law a court, upon petition of a prisoner, could issue a writ of habeas corpus against the executive authority that was detaining the prisoner, requiring that authority to produce the prisoner in court and to state the reasons for the detention. *See* 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 131-34, 138 (Wayne Morrision ed., 2001); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1284-85 (5th ed. 2003). These common law origins reflect a limited remedy, intended only to address arbitrary or secret detentions without cause. *See* 1 BLACKSTONE'S COMMENTARIES, *supra*, at 136; 3 Blackstone's Commentaries, *supra*, at 134. The Constitution enshrined the common law writ by providing that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art I., § 9, cl. 2.

[125] *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82 ("Sec. 14. . .the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*, That writs of *habeas corpus* shall in no case extend to prisoner in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for tiral before some court of the same.").

[126] *See* Act of June 25, 1948, ch. 646, part VI, ch. 153, §§ 2241-55, 62 Stat. 869, 964-68.

[127] Petitions for habeas corpus traditionally were brought in the district of confinement, *see, e.g.*, Ahrens v. Clark, 335 U.S. 188 (1948), but this jurisdictional requirement was problematic because as the number of habeas petitions

federal prisoners also could continue to bring traditional habeas corpus petitions pursuant to 28 U.S.C. § 2241, the general grant to the federal court of jurisdiction over habeas corpus actions, in cases in which the new remedy under § 2255 was "inadequate or ineffective to test the legality of [the] detention."[128]

For purposes of this paper, the critical issue to understand from modern federal habeas corpus practice is the potential overlap of claims that might be filed under § 2241 as a habeas corpus petition, or alternatively might be styled as an FTCA claim or a *Bivens* action. Much of the potential overlap between various prisoner claims arises because of the broad scope of claims by federal prisoners that have been recognized as cognizable under § 2241.[129] The courts have allowed § 2241 habeas corpus petitions when federal (or sometimes state) prisoners seek to challenge parole decisions,[130] sentence calculations,[131]

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filed by federal prisoners steadily increased, the federal districts containing the largest federal prisons became inundated. In the five years preceding the 1948 Act, 63% of all habeas petitions filed by federal prisoners were filed in five of the eighty-four federal district courts—Northern California (Alcatraz), Northern Georgia (Atlanta), Kansas (Leavenworth), Western Washington (McNeil Island), and Western Missouri (Springfield Medical Center). *See Hayman*, 342 U.S. at 213-14 and n.18. The chief purpose of the new section § 2255 remedy was to minimize these procedural and administrative difficultics, "by affording the same rights in another and more convenient forum." *See id.* at 219; *see also* Davis v. United States, 417 U.S. 33, 343 (1974) (noting that § 2255 was intended to provide "a remedy identical in scope to federal habeas corpus").

[128] 28 U.S.C.A. § 2255 ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.") This exception is also referred to as the "savings clause."

[129] On the general scope of § 2241, *see* FALLON, et al., *supra* note 124, at 1398; RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 41.2(b) (4th ed. 2001).

[130] *See, e.g.*, Gometz v. U.S. Parole Comm'n, 294 F.3d 1256, 1258 (10th Cir. 2002) (allowing challenge under § 2241 to a parole decision); Duckett v. Quick, 282 F.3d 844, 846 (D.C. Cir. 2002) (same); Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (per curiam) (same); Urbina v. Thoms, 270 F.3d 292, 293-94 (6th Cir. 2001) (same); Wilson v. U.S. Parole Comm'n, 193 F.3d 195, 196-97 (3d Cir. 1999) (same); Davis v. Fechtel, 150 F.3d 486, 486 (5th Cir. 1998) (same); Blair-Bey v. Quick, 151 F.3d 1036, 1039-40 (D.C. Cir. 1998) (same as to challenge to procedures for denying parole); Valona v. United States, 138 F.3d 693, 693-94 (7th Cir. 1998) (same as to parole decision); Martin v. U.S. Parole Comm'n, 108 F.3d 1104, 1105-06 (9th Cir. 1997) (per curiam) (same); United States v. Robinson, 106 F.3d 610, 611 (4th Cir. 1997) (same). *See also* RULE 1 of the RULES GOVERNING § 2255 PROCEEDINGS (noting that challenges to the revocation of parole or probation should be brought under habeas corpus rather than § 2255). *But see* Grady v. United States, 929 F.2d 468, 469-71 (9th Cir. 1991) (holding that § 2255 motion is appropriate method for challenging revocation of probation when that decision is made by the original sentencing court).

[131] *See, e.g.*, Ruggiano v. Reish, 307 F.3d 121, 126 (3d Cir. 2002) (allowing § 2241 petition for a challenge to computation of credit for time served on prior sentence); Weekes v. Fleming, 301 F.3d 1175, 1176 (10th Cir. 2002) (same); Greene v. Tennessee Dep't of Corrections, 265 F.3d 369, 370 (6th Cir. 2001) (same); United States v. Newman, 203 F.3d 700, 701-02 (9th Cir. 2000) (same for challenge seeking credit for pretrial detention period); Patterson v. Knowles, 162 F.3d 574, 575 (10th Cir. 1998) (same for challenge to computation of good time credits); Crowell v. Walsh, 151 F.3d 1050, 1051 (D.C. Cir. 1998) (same); Chambers v. United States, 106 F.3d 472, 473-74 Bell v. United States, 48 F.3d 1042, 1043-44 (8th Cir. 1995) (same for challenge to computation of credit for pretrial

eligibility determinations for early release programs,[132] prison disciplinary decisions,[133] transfers between facilities or placement decisions,[134] the implementation of fine payments,[135] pretrial detention,[136] extradition,[137] deportation,[138] mental health commitments,[139] and court martial proceedings.[140] The

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detention); McClain v. United States Bur. of Prisons, 9 F.3d 503, 504-05 (6th Cir. 1993) (per curiam) (same for denial of credit for time spent in federal prison awaiting sentencing); United States v. Garcia-Gutierrez, 835 F.2d 585, 586 (5th Cir. 1988) (same for credit for time in state custody). *But see* Story v. Collins, 920 F.2d 1247, 1250 (5th Cir. 1991) (holding that § 2255 motion, rather than § 2241 habeas petition, is proper method for challenging administrative revocation of good time credit).

[132] *See, e.g.*, Hamm v. Saffle, 300 F.3d 1213, 1216 (10th Cir. 2002) (allowing § 2241 petition for challenge to withdrawal from preparole conditional release program); Murphy v. Hood, 276 F.3d 475, 476 (9th Cir. 2001) (same for challenge to denial of eligibility for early release program); Cunningham v. Scibana, 259 F.3d 303, 305 (4th Cir. 2001) (same); Grove v. Federal Bureau of Prisons, 245 F.3d 743, 744-45 (8th Cir. 2001) (same); Cook v. Riley, 208 F.3d 1314, 1316-17 (11th Cir. 2000) (same); Orr v. Hawk, 156 F.3d 651, 651 (6th Cir. 1998) (same); Parsons v. Pitzer, 149 F.3d 734, 735 (7th Cir. 1998) (same); Stiver v. Meko, 130 F.3d 574, 576 (3d Cir. 1997) (same).

[133] *See, e.g.*, Wallace v. Nash, 311 F.3d 140, 141-42 (2d Cir. 2002) (allowing § 2241 petition for challenge to conviction in disciplinary proceeding, based on interpretation of the applicable regulations); Espinoza v. Peterson, 283 F.3d 949, 950-51 (8th Cir. 2002) (same for claim of denial of due process in disciplinary hearing); *Carmona*, 243 F.3d at 630 (same for challenge seeking to expunge disciplinary sanctions from record); Henson v. U.S. Bureau of Prisons, 213 F.3d 897, 897-98 (5th Cir. 2000) (per curiam) (same for challenge to revocation of good time credit in disciplinary proceedings); Moscato v. Federal Bureau of Prisons, 98 F.3d 757, 758-59 (3d Cir. 1996) (same for constitutional claims against disciplinary hearing procedures); Henderson v. U.S. Parole Comm'n, 13 F.3d 1073, 1075 (7th Cir. 1994) (same for challenge to punishment imposed).

[134] *See, e.g.*, Montez v. McKinna, 208 F.3d 862, 864-65 (10th Cir. 2000) (allowing § 2241 for challenge to determination as to where sentence will be served); *Rogers*, 180 F.3d at 357 (same for requesting state prison as place of confinement for federal sentence); United States v. Tubwell, 37 F.3d 175,1 77 (5th Cir. 1994) (same as to transfer between federal and state authorities); Dunne v. Keohane, 14 F.3d 335, 336-37 (7th Cir. 1994) (same for challenge to successive transfers between state and federal facilities); United States v. Jalili, 925 F.2d 889, 893-94 (6th Cir. 1991) (same for action seeking designation of particular facility for petitioner's sentence).

[135] *See, e.g.*, Matheny v. Morrison, 307 F.3d 709, 711-12 (8th Cir. 2002) (allowing § 2241 petition for challenge to payment of fines under Inmate Financial Responsibility Program); Montano-Figueroa v. Crabtree, 162 F.3d 548, 548-49 (9th Cir. 1998) (same).

[136] *See, e.g.*, Jacobs v. McCaughtry, 251 F.3d 596, 597-98 (7th Cir. 2001) (per curiam) (holding that § 2241 petition is proper remedy for challenging pretrial detention); Palmer v. Clarke, 961 F.2d 771, 772-73 (8th Cir. 1992) (same); Capps v. Sullivan, 13 F.3d 350, 351 (10th Cir. 1993) (same for speedy trial claim). Challenges to pretrial detention are a special case because they do not appear to fall within the plain language of either § 2254 habeas petitions for state prisoners or § 2255 motions for federal prisoners, both of which speak of claims by persons in custody pursuant to the judgment of a court. *See* 28 U.S.C.A. §§ 2254, 2255. The same applies to extradition, deportation, and mental health commitments, *infra* notes 137 to 139.

[137] *See, e.g.*, Murphy v. United States, 199 F.3d 599, 601 (2d Cir. 1999) (per curiam) (allowing § 2241 petition to challenge extradition order); *In re* Extradition of Drayer, 190 F.3d 410, 412 n.2 (6th Cir. 1999) (same); Mainero v. Gregg, 164 F.3d 1199, 1201-02 (9th Cir. 1999) (same); Ludecke v. Unites States Marshal, 15 F.3d 496, 497 (5th Cir. 1994) (same).

[138] *See, e.g.*, Leitao v. Reno, 311 F.3d 453, 454-55 (1st Cir. 2002) (allowing alien to file § 2241 petition to challenge deportation order); Gomes v. Ashcroft, 311 F.3d 43, 44 (1st Cir. 2002) (same).

[139] *See, e.g.*, Phelps v. U.S. Bureau of Prisons, 62 F.3d 1020, 1022 (8th Cir. 1995) (allowing § 2241 petition by insanity acquittee, claiming that he was not placed in a suitable facility); Cancel v. Rison, 985 F.2d 404, 405 (8th Cir. 1993) (per curiam) (same).

[140] *See, e.g.*, Clinton v. Goldsmith, 526 U.S. 529, 538 n.11 (1999) (noting that a final criminal conviction under the Uniform Code of Military Justice may be collaterally attacked under § 2241).

subject matter of these claims—concerning the execution of a sentence or conditions of confinement—do not appear to fall within the plain language of § 2255, which only extends to collateral attacks on the validity of a prisoner's *sentence*.[141] For such claims traditional habeas corpus relief under § 2241 is available, at least for federal prisoners, because § 2255 is simply inapplicable.[142] Problems arise because federal prisoners can raise many of these same claims in *Bivens* suits. The challenges presented by this and similar overlaps among different types of prisoner claims, and the responses by the federal courts to these challenges, are discussed in the following section.

E. Overlaps Among Prisoner Claims and Responses by the Courts

Any analysis of recent trends in litigation by federal prisoners must account for the theoretical overlaps among the four main causes of action available to federal prisoners (FTCA, *Bivens*, collateral attacks under 28 U.S.C. § 2255, and habeas corpus petitions under 28 U.S.C. § 2241), and the responses

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[141] Courts often draw this distinction between the scope of § 2241 and § 2255. *See, e.g.*, *Matheny*, 307 F.3d at 711 (allowing § 2241 petition to challenge implementation of fine payments under Inmate Financial Responsibility Program, characterizing this as an attack on the *execution* of the sentence rather than its validity); *Carmona*, 243 F.3d at 632 (same for challenge seeking to expunge disciplinary sanctions from prisoner's record); Rublee v. Fleming, 160 F.3d 213, 214 (5th Cir. 1998) (same for challenge to eligibility determination for early release program); *Bell*, 48 F.3d at 1043 (same for challenge to computation of credit for time served on prior sentence); *Jalili*, 925 F.2d at 893-94 (same for challenge to place of confinement). *See also* HERTZ & LIEBMAN, *supra* note 129, § 41.3(b) (noting that a federal prisoner's challenge to the execution of his sentence or the conditions of his confinement are cognizable under § 2241, while challenges to the validity or terms of the sentence are cognizable under § 2255).

[142] In holding that federal prisoners can (and must) bring these types of claims in a § 2241 habeas corpus petition, the courts usually speak in terms of subject matter jurisdiction, rather than relying on the savings clause to hold that § 2255 is "inadequate or ineffective." *See, e.g.*, Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001) ("Section 2241 is the only statute that confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence."); *Carmona*, 243 F.3d at 632 (holding that petitioner's claim, "as a challenge to the execution of his sentence rather than the underlying conviction, is properly brought via an application for a writ under § 2241"); Warren v. Miles, 230 F.3d 688, 694 (5th Cir. 2000) ("Section 2255 provides the primary means of collateral attack of a federal sentence. Section 2241, on the other hand, is the proper habeas remedy for challenging the execution of a sentence.") (internal citations omitted); Capaldi v. Pontesso, 135 F.3d 1122, 1123 (6th Cir. 1998) ("In general, a petition for a writ of habeas corpus under § 2241 is reserved for a challenge to the manner in which a sentence is executed, rather than the validity of the sentence itself."); *Bell*, 48 F.3d at 1043 ("In this claim, Bell is not contending that his conviction was illegal, he is only contesting the execution of his sentence. This type of claim is not cognizable under section 2255."). In addition to the claims noted in this discussion, a federal prisoner may resort to a traditional habeas corpus petition under § 2241 in circumstances in which § 2255 is deemed "inadequate or ineffective." *See generally* HERTZ & LIEBMAN, *supra* note 129, § 41.2(b), n. 19. The interpretation of this "savings clause" is beyond the scope of this paper.

by the federal courts to this problem.[143] The apparent overlaps among prisoner claims creates the potential for prisoner plaintiffs who are barred from filing suit under one cause of action—for example, by the restrictions imposed under the PLRA or the Anti-Terrorism and Effective Death Penalty Act (AEDPA)—to restyle their complaints in order to get into federal court. This potential for the "migration" of claims from one category to another is compounded by the fact that most of the prisoner plaintiffs are appearing pro se,[144] and thus may be more likely to err in the first place in explaining the bases for their claims. Courts have responded to these challenges by clarifying the lines between habeas corpus and civil rights actions, and by adopting informal rules for construing and re-classifying prisoner suits. This section provides the necessary legal background for assessing the data results on recent trends in prisoner litigation presented in Part IV.A.3(b), *infra*, which suggest that federal prisoners may be filing *Bivens*-type claims as petitions for habeas corpus under § 2241, in order to avoid the limitations imposed under the PLRA.[145]

Changes recently enacted under the PLRA and AEDPA are only part of the relevant calculus—there are a variety of strategic (and competing) considerations that might influence a prisoner's choice to style a complaint under a particular cause of action. Chart 2.1 summarizes some of the key differences among FTCA, *Bivens*, collateral attacks under § 2255, and habeas corpus petitions under § 2241 that might influence a prisoner's litigation choices.

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[143] Consider a federal prisoner's claim that officials have revoked his good time credit without providing him with due process—is this claim "an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights," *Malesko*, 534 U.S. at 66 (describing the *Bivens* cause of action), or a claim that the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States"? 28 U.S.C.A. § 2241(c)(3). This line between constitutional torts under *Bivens* and habeas corpus petitions under § 2241 has been one of the most difficult for the courts to draw.

[144] *See infra* Part IV.A.3(c).

[145] In the years since the implementation of the PLRA the federal courts have witnessed a decline in civil rights actions filed by federal prisoners, coupled with a rise in filings by federal prisoners under § 2241. *See infra* Part IV.A.3(b). When these two trends are considered together, it appears at least possible that the PLRA's intended effects have been mitigated by a migration of prisoner actions between these two categories.

Table 2.1 Comparison of Litigation Actions Under the FTCA, *Bivens*, & 28 U.S.C. §§ 2255 and 2241

	FTCA	*Bivens*	§ 2255	§ 2241 (Habeas)
Filing Fee[146]	$150	$150	None	$5
PLRA[147]	Yes	Yes	No	No
AEDPA[148]	No	No	Yes	No
Venue[149]	District where the plaintiff resides or where the act or omission complained of occurred	District where (1) any defendant resides, if all reside in the same State; (2) a substantial part the of events or omissions giving rise to the claim occurred; or (3) any defendant may be found, if (1) or (2) don't apply	District of the sentencing court	District of confinement
Statute of Limitations[150]	Two years from the alleged act or omission, and six months from the final denial of an administrative claim	Determined by state statute of limitations for personal injury actions	One year	One year
Jury Trial[151]	No	Yes	No	No
Proper Defendant[152]	United States	Officials (in their individual capacity)	United States	Agencies or officials (in their official capacity)

1) The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act

Because the PLRA and AEDPA each impose restrictions on some prisoner claims but not on others, it is important to understand the implications for those claims that fall under each statute. The following abbreviated review of the substantive and procedural limits imposed under the PLRA and

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[146] *See* 28 U.S.C.A. § 1914(a); Advisory Committee Note to RULE 3 of the RULES GOVERNING § 2255 PROCEEDINGS.

[147] *See infra* Part II.E.2.

[148] *See id.*

[149] *See* 28 U.S.C. §§ 1391, 1402(b), 2241, 2255; *supra* notes 51, 98, and 99 and accompanying discussion.

[150] *See* 28 U.S.C. §§ 2401(b), 2244(d)(1), 2255; *supra* notes 65 and 97 and accompanying discussion; *infra* note 165 and accompanying discussion.

[151] *See supra* notes 52 and 100 and accompanying discussion.

[152] The differences in the proper defendant for each action also are significant for prison administrators and staff. Michael Pybas, Senior Counsel in the Bureau of Prisons' Office of General Counsel, reports that the Bureau's staff and administrators generally prefer for federal prisoners to file claims challenging their conditions of confinement under either the FTCA or a habeas corpus petition, because suits under *Bivens* carry the possibility of individual liability. *See* Pybas Interview, *supra* note 15. FTCA claims also are preferred because settlements or awards above a certain amount are paid out of a general judgment fund—although eventually these amounts are supposed to be charged back to the Bureau, and ultimately to individual institutions. *See id.*

AEDPA is intended only to emphasize that federal prisoners now face different incentives in choosing how to style a potential claim. These statutory limits on prisoner suits and the incentives that they create are critical, given the apparent overlaps among different types of prisoner suits and the potential for the migration of claims from one category to another.

As noted above, provisions in the Prison Litigation Reform Act of 1996 apply to prisoner claims filed under the Federal Tort Claims Act and *Bivens* actions.[153] All of the Courts of Appeals have now held that the PLRA does not apply to collateral attacks by federal prisoners under § 2255,[154] and most of the courts of appeals also have held that the PLRA does not apply to § 2241 habeas corpus petitions.[155] The key provisions of the PLRA:

- Require a prisoner to exhaust "such administrative remedies as are available" prior to filing a civil action in federal court;[156]
- Require an indigent prisoner filing a civil action or appealing a judgment in a civil action to pay the applicable filing fee in full, through periodic payments,[157] and authorize the courts to dismiss a suit filed by an indigent prisoner at any time if the court determines that the claim of indigence is not true;[158]

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[153] *See* discussion *supra*, notes 92 and 122.

[154] *See Malave*, 271 F.3d at 1139-40; Walker v. O'Brien, 216 F.3d 626, 628-29 (7th Cir. 2000); Jennings v. Natrona County Detention Medical Facility, 175 F.3d 775, 779 (10th Cir. 1999); *Davis*, 150 F.3d at 489-90; *Blair-Bey*, 151 F.3d at 1039-40; Martin v. Bissonette, 118 F.3d 871, 874 (1st Cir. 1997); Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997); Smith v. Angelone, 111 F.3d 1126, 1129-31 (4th Cir. 1997); Anderson v. Singletary, 111 F.3d 801, 802 (11th Cir. 1997); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997); Santana v. United States, 98 F.3d 752 (3d Cir. 1996); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996).

[155] Several courts of appeals first held that the PLRA does not apply to § 2254 or § 2255 motions, and then have extended this holding to § 2241 petitions. *See Davis*, 150 F.3d at 488-90; *Blair-Bey*, 151 F.3d at 1039-40; McIntosh v. U.S. Parole Commission, 115 F.3d 809, 811 (10th Cir. 1997). The Seventh Circuit originally held that the PLRA would apply to § 2241 actions, *see* Newlin v. Helman, 123 F.3d 429, but reversed this decision in *Walker v. O'Brien*. *See Walker*, 216 F.3d at 628-29. Decisions from other courts of appeals have been less clear. *See Kincade*, 117 F.3d at 951 (holding that the PLRA does not extend to motions under § 2254 or § 2255, but not mentioning § 2241); *Santana*, 98 F.3d at 756 (same).

[156] *See* 42 U.S.C.A. § 1997e(a). The same requirement of administrative exhaustion applies even if a prisoner is seeking forms of relief that are not available through the prison administrative process (such as monetary damages). *See* Booth v. Churner, 532 U.S. 731, 736-40 (2001).

[157] *See* 28 U.S.C.A. § 1915(b). The law provides for initial payment of a partial filing fee, followed by monthly payments on the remaining balance. *See id.* This new requirement creates an exception to the general doctrine of *in forma pauperis*, which allows indigent plaintiffs to file suit without paying such fees. The current filing fee for a civil action in the federal district courts is $150. *See id.* § 1914(a). The current docketing fee for an appeal in a civil action in the federal courts of appeals is $100. *See id.* § 1913, Judicial Conference Schedule of Fees.

[158] *See id.* § 1915(e)(2). In addition, the court may dismiss such a suit at any time if the action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune. *See id.;* 42 U.S.C.A. § 1997e(c).

- Require a prisoner to pay all fees when due if on three or more prior occasions as a prisoner he has filed a civil action or appeal that was dismissed as frivolous or malicious, or for failing to state a claim upon which relief may be granted;[159]
- Require courts to screen prisoner suits against governmental entities or employees, either before docketing or as soon as practicable after docketing, and to dismiss those complaints that are frivolous, malicious, or fail to state a claim upon which relief can be granted, or that seek monetary relief from an immune defendant;[160]
- Authorize a court to order the revocation of the earned good time credit of a federal prisoner who files suit in federal court, if the court finds that the claim was filed for a malicious purpose or solely to harass the defendant, or if the prisoner testifies falsely or knowingly presents false evidence or information to the court;[161] and,
- Impose tight restrictions on the availability of prospective injunctive relief in prisoner suits,[162] and require prisoners seeking recovery for mental or emotional injury suffered while in custody to establish a physical injury.[163]

In 1996 Congress also enacted significant changes to federal habeas corpus practice and procedure in AEDPA. The key changes, which apply to petitions by both state and federal prisoners:[164]

- Establish a one-year statute of limitations for habeas corpus and § 2255 petitions,[165] which usually will run from the date on which the underlying criminal judgment becomes final;[166]
- Limit second or successive habeas corpus and § 2255 petitions to those relying on a new rule of constitutional law that was previously unavailable and that has been made retroactive to cases on collateral by review,[167] or relying on newly discovered evidence that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the prisoner guilty of the underlying offense;[168]

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[159] *See* 28 U.S.C.A. § 1915(g). There is an exception if the prisoner is "under imminent danger of serious physical injury." *Id.*

[160] *See id.* § 1915A. In addition, any defendant may waive the right to reply to such a prisoner action. *See* 42 U.S.C. § 1997e(g)(1). However, the court may require a defendant to reply "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits." *See id.* § 1997e(g)(2). The effect of these two provisions is to delay the defendant's answer until the court has determined that the prisoner has a reasonable opportunity of prevailing on the merits.

[161] *See* 28 U.S.C.A. § 1932.

[162] *See* 42 U.S.C.A. § 3626.

[163] *See id.* § 1997e(e); 28 U.S.C.A. § 1346(b)(2).

[164] In addition to these changes, AEDPA contained a new set of special procedures for habeas petitions in capital cases. *See generally id.* §§ 2261 to 2266.

[165] *See id.* § 2244(d)(1), § 2255. Prior to 1996, there was no fixed statute of limitations for federal habeas corpus petitions. *See* HERTZ & LIEBMAN, *supra* note 129, § 5.2.

[166] *See* 28 U.S.C.A. § 2244(d)(1), § 2255. The Supreme Court held in a case this term that a federal criminal conviction becomes final for these purposes when the Supreme Court affirms a conviction on direct review, or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. *See* Clay v. United States, 123 S Ct 1072, 1076 (2003).

[167] *See* 28 U.S.C.A. § 2244(b)(2)(A); § 2255.

[168] *See id.* § 2244(b)(2)(B); § 2255.

- Require prisoners seeking to file a second or successive petition first to obtain authorization from a three-judge panel of the court of appeals;[169] and
- Require prisoners seeking to appeal an adverse decision from the district court to the court of appeals first to obtain a certificate of appealability, which requires a "substantial showing of the denial of a constitutional right."[170]

It is important to note that AEDPA's restrictions on second or successive petitions and on appeals have been held not to apply to habeas petitions properly brought under § 2241.[171]

2) The Relationship Between **Bivens** *and Habeas Corpus Claims*

The Supreme Court essentially has eliminated the overlap between collateral attacks by federal prisoners under § 2255 and *Bivens* actions for constitutional violations, by holding that a § 2255 motion is the exclusive remedy for a federal prisoner raising any claim that challenges the fact or duration of his imprisonment.[172] In *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) the Court held that habeas corpus is the exclusive remedy where a prisoner is "challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment."[173] In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) the

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[169] *See id.* § 2244(b)(3).

[170] *See id.* § 2253(c).

[171] *See, e.g.*, Zayas v. INS, 311 F.3d 247, 255 (3d Cir. 2002) (holding that AEDPA's requirements for second or successive habeas petitions do not apply under § 2241); James v. Walsh, 308 F.3d 162, 166 (2d Cir. 2002) (noting generally that AEDPA applies to prisoner filings under § 2254 and § 2255, but not to petitions under § 2241); Barapind v. Reno, 225 F.3d 1100, 1111 (9th Cir. 2000) (holding that AEDPA's requirements for second or successive habeas petitions do not apply under § 2241); Sugarman v. Pitzer, 170 F.3d 1145, 1146 (D.C. Cir. 1999) (per curiam) (holding that a prisoner appealing a decision under § 2241 is not required to obtain a certificate of appealability under the new AEDPA restrictions); *Valona*, 138 F.3d at 694-95 (noting that AEDPA's requirements for second or successive petitions do not apply to § 2241); *McIntosh*, 115 F.3d at 810 n.1 (holding that a prisoner appealing a decision under § 2241 is not required to obtain a certificate of appealability under the new AEDPA restrictions); Ojo v. Immigration and Naturalization Service, 106 F.3d 680, 681-82 (5th Cir. 1997) (same).

[172] Although the Supreme Court cases discussed here all involve the conflict between federal habeas corpus relief for state prisoners and civil rights actions against state officials under § 1983, the lower courts have applied the same logic to bar *Bivens* claims brought by federal prisoners. *See, e.g.*, Whitmore v. Harrington, 204 F.3d 784, 784-85 (8th Cir. 2000) (per curiam); *Robinson*, 142 F.3d at 906-07; Clemente v. Allen, 120 F.3d 703, 705 (7th Cir. 1997) (per curiam); Crow v. Penry, 102 F.3d 1086, 1087 (10th Cir. 1996) (per curiam); Williams v. Hill, 74 F.3d 1339, 1340-41 (D.C. Cir. 1996) (per curiam); Abella v. Rubino, 63 F.3d 1063, 1065 (11th Cir. 1995); Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995) (per curiam); Stephenson v. Reno, 28 F.3d 26, 27 (5th Cir. 1994).

[173] Among the concerns raised by the Court was that a prisoner would not be required to exhaust state remedies before bringing a § 1983 action, but must exhaust state remedies before seeking federal habeas relief, raising the possibility that a prisoner could avoid the habeas exhaustion requirements by filing a § 1983 action. *See* 411 U.S. at 477. Although the bar to § 1983 suits created in *Preiser* appears to be broad, the Court indicated that § 1983 still

Supreme Court extended this rule by holding that a prisoner may not bring a civil rights action for damages "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,"[174] unless the underlying conviction has already been invalidated or called into question (for example, by a federal court having issued a writ of habeas corpus).[175] Finally, in *Edwards v. Balisok*, 520 U.S. 641, 645-49 (1997) the Court held that a prisoner may not bring a civil rights action for damages challenging the validity of disciplinary procedures used to revoke good time credits.[176] The Court reasoned that this case fell within the logic of the *Heck* rule because a decision in the prisoner's favor would *necessarily* imply the invalidity of the underlying punishment—even though the prisoner was challenging the *procedures* rather than the *result* itself, and even though he did not seek restoration of the revoked good time credit.[177] However, the Court indicated that a prisoner still might bring a civil rights action limited to prospective injunctive relief

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might be an appropriate remedy "for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *See id.* at 499.

[174] In this case the defendant filed a § 1983 action alleging various constitutional violations in the investigation and trial of the charges against him, and seeking damages but not injunctive relief. *See* 512 U.S. at 478-79. Because the defendant did not directly challenge the fact or duration of his sentence, he did not come within the rule of *Preiser*. *See id.* at 481.

[175] Appropriate evidence that the underlying conviction already has been invalidated or called into question includes reversal on direct appeal, expungement by executive order, a successful postconviction collateral attack in state court, or the issuance of a writ of habeas corpus in federal court. *See id.* at 486-87. An example of a civil rights claim that would escape this rule—because it would not *necessarily* imply the unlawfulness of the prisoner's conviction—would be a suit for damages for an unconstitutional search that produced evidence used at the prisoner's trial. *See id.* at 487 n.7. Because of doctrines such as independent source, inevitable discovery, and harmless error, a finding that such evidence was the result of an unconstitutional search would not necessarily require the invalidation of the prisoner's conviction. *See id.; see also* Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996) (per curiam) (holding that *Heck* does not bar a § 1983 action alleging excessive forced during arrest, because success in the suit would not necessarily imply the invalidity of the underlying conviction); Perez v. Sifel, 57 F.3d 503, 505 (7th Cir. 1995) (per curiam) (holding that a § 1983 action challenging the search and arrest of the defendant may not be barred under, as neither claim would necessarily undermine the validity of his conviction). *But see* Schilling v. White, 58 F.3d 1081, 1085-86 (6th Cir. 1995) (applying *Heck* to dismiss a § 1983 action alleging unconstitutional search and seizure); Jackson v. Vannoy, 49 F.3d 175, 177 (5th Cir. 1995) (applying *Heck* to dismiss a § 1983 action for unlawful arrest, because the arrest directly resulted in revocation of the petitioner's parole and probation, and a judgment in his favor would necessarily imply the invalidity of this revocation).

[176] The prisoner in this case sought a declaration that the procedures used in a disciplinary hearing violated his due process rights, a prospective injunction against future violations, and monetary damages. *See* 520 U.S. at 644.

[177] *See id.* at 644-4.

against allegedly unconstitutional procedures, because such relief would not necessarily imply the invalidity of a previous punishment.[178]

Despite this line of decisions, a significant area of overlap between *Bivens* and habeas corpus remains because a federal prisoner still may bring a *Bivens* action for damages regarding his *conditions* of confinement, claims that also may be cognizable in habeas corpus petitions under § 2241.[179] The courts have continued to allow prisoners to bring *Bivens* or civil rights actions for challenges to the following: (1) disciplinary hearing procedures and/or decisions, where revocation of good time credit is not involved;[180] (2) other losses of privileges, including administrative segregation;[181] (3) transfers to different

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[178] *See id.* at 648-49. The Court's decisions in *Preiser*, *Heck*, and *Edwards* have created a new dilemma—may a former prisoner, who has served his full term and no longer can bring a habeas corpus action, bring a civil rights claim for damages that necessarily would imply the invalidity of his underlying conviction? In *Spencer v. Kemna*, 523 U.S. 1 (1998), five justices endorsed the position taken by Justice Souter that the *Heck* rule should not apply where a former prisoner who is no longer in custody brings a civil rights action for damages, even when that action challenges the constitutionality of his conviction or confinement. The Second and the Seventh Circuits now have held that a former prisoner who is barred from seeking habeas relief may bring a civil rights actions for damages, even though his claims fall within the literal scope of *Heck*. *See* DeWalt v. Carter, 224 F.3d 607, 613 (7th Cir. 1999); Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999). Other courts of appeals have refused to rely on the *Spencer* dicta, emphasizing that they are bound by standing Supreme Court precedents until the Court chooses to overrule them. *See* Huey v. Stine, 230 F.3d 226, 230 (6th Cir. 2000); Randell v. Johnson, 227 F.3d 300, 301 (5th Cir. 2000); Figueroa v. Rivera, 147 F.3d 77, 81 n.3 (1st Cir. 1998).

[179] *See supra* notes 130-140 and accompanying discussion.

[180] *See, e.g.*, Strong v. David, 297 F.3d 646, 647 (7th Cir. 2002) (allowing a § 1983 action to challenge disciplinary sanctions that included segregation, loss of privileges, and transfer to another facility, noting that no loss of good time credits was involved); Torres v. Fauver, 292 F.3d 141, 142-43 (3d Cir. 2002) (same for a challenge to a decision resulting in disciplinary detention and administrative segregation, reasoning that only the conditions, and not the fact or duration, of confinement were at issue); Sims v. Artuz, 230 F.3d 14, 24 (2d Cir. 2000) (samef or challenging disciplinary hearing procedures, because the complaint did not challenge the prisoner's length of confinement); Whitlock v. Johnson, 153 F.3d 380, 389-90 (7th Cir. 1998) (same for general allegations of due process violations in a disciplinary hearing resulting in revocation of good time credits, as long as the petitioner does not seek restoration of the good time credits).

[181] *See, e.g.*, Khaimov v. Crist, 297 F.3d 783, 785-86 (8th Cir. 2002) (recognizing that a prisoner may bring a § 1983 action for complaints regarding prison mail and segregation, because he is not challenging the fact or duration of his confinement); Montgomery v. Anderson, 262 F.3d 641, 643-44 (7th Cir. 2001) (holding that a challenge to disciplinary segregation must be brought under §1983 because it is challenge to the severity rather than the duration of the sentence); Moran v. Sandalle, 218 F.3d 647, 650-51 (7th Cir. 2000) (per curiam) (holding that § 1983 is the proper cause of action for state prisoners challenging administrative segregation, exclusion from prison programs, or suspension of privileges); Brown v. Plaut, 131 F.3d 163, 168 (D.C. Cir. 1997) (allowing a § 1983 challenge to placement in administrative segregation, because it did not affect the length of confinement); Carson v. Johnson, 112 F.3d 818, 822-23 (5th Cir. 1997) (allowing a § 1983 action challenging the petitioner's placement in administrative segregation); Nelson v. Murphy, 44 F.3d 497, 499 (7th Cir. 1995) (holding that a § 1983 action rather than a habeas petition is the proper form for a challenge to a mental health facility's policy for off-grounds passes, which is a condition of confinement).

facilities, including the conditions of confinement at those facilities;[182] and (4) issues related to medical care, including forcible medical treatment.[183] In addition, there is a continuing circuit split on whether a prisoner may bring a civil rights action seeking prospective injunctive relief that may have the *indirect* result of shortening or ending a prisoner's sentence. Prior to the decision in *Edwards*, the courts of appeals had allowed prisoners to bring civil rights action challenging the procedures used in disciplinary hearings and determinations of parole eligibility.[184] Although the holding and reasoning of *Edwards* cast some doubt on these precedents, the courts of appeals have continued to divide over whether prisoners

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[182] *See, e.g.*, Boyce v. Ashcroft, 251 F.3d 911, 917-918 (10th Cir. 2001), *vacated as moot by* 268 F.3d 953 (10th Cir. 2001) (allowing a *Bivens* action to challenge the decision to transfer the petitioner to a higher-security facility and resulting changes in his conditions of confinement); Rael v. Williams, 223 F.3d 1153, 1154 (10th Cir. 2000) (indicating that a prisoner may bring a § 1983 action challenging his transfer to a privately-run prison facility and the resulting change in his conditions of confinement); *Moran*, 218 F.3d at 650-51 (holding that § 1983 is the proper cause of action for state prisoners challenging transfer to a new facility); *Montez*, 208 F.3d at 865 n.2 (noting that a prisoner might be allowed to bring a § 1983 action challenging conditions of confinement occasioned by a transfer to a private correctional facility); Pischke v. Litscher, 178 F.3d 497, 499-500 (7th Cir. 1999) (construing challenges to the conditions in which the petitioners are being held or will be held in privately-run prisons to which they have been or will be transferred as actions under § 1983); Abdul-Hakeem v. Koehler, 910 F.2d 66, 68-70 (2d Cir. 1990) (allowing a § 1983 action alleging abuse by guards and officers, following transfer to a new facility, because the suit challenges the conditions rather than the fact or duration of confinement).

[183] *See, e.g.*, Clark v. Hedrick, 233 F.3d 1093, 1094 n.1 (8th Cir. 2000) (noting that the petitioner's claim alleging deliberate indifference to his medical needs, could have been brought in a *Bivens* action); *Papantony*, 215 F.3d at 865 (construing a prisoner's challenge to prior forcible administration of antipsychotic drugs as a *Bivens* action for damages); Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam) (holding that a § 1983 action is the proper remedy for challenging a state law requiring convicted sexual offenders to submit a blood sample for placement in a DNA databank); Lee v. Winston, 717 F.2d 888, 890 (4th Cir. 1983) (allowing a § 1983 action to prevent the state from forcing the petitioner to undergo surgery to remove a bullet from his chest).

[184] *See, e.g.*, Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178, 1187-88 (6th Cir. 1997) (allowing a § 1983 action for a challenge to state clemency procedures, but not to any individual decision); Allison v. Kyle, 66 F.3d 71, 73-74 (5th Cir. 1995) (per curiam) (same for a prisoner seeking to require annual parole hearings, because the effect on his actual release is only indirect); Cook v. Tex. Dep't of Criminal Justice Transitional Planning Dep't, 37 F.3d 166, 168-69 (5th Cir. 1994) (same for challenge to general procedures followed by the parole board); Otey v. Hopkins, 5 F.3d 1125, 1130-32 (8th Cir. 1993) (same for allegations of due process violations in clemency procedures); Clark v. Thompkins, 960 F.2d 663, 664-65 (7th Cir. 1992) (same for challenge to the procedures used for considering parole, because it does not draw into question the basis for the petitioner's confinement); Akins v. Snow, 922 F.2d 1558, 1559 n.2 (11th Cir. 1991) (same for challenging the parole board's procedures for determining eligibility but not directly challenging the results). *But see* Spina v. Aaron, 821 F.2d 1126, 1128 (5th Cir. 1987) (holding that a prisoner challenging rules or procedures used by parole boards or by disciplinary officials must be pursued in habeas corpus if resolution of the claims would automatically entitle one or more prisoners to accelerated release). *Cf.* Richards v. Bellmon, 941 F.2d 1015, 1018 (9th Cir. 1991) (allowing a §1983 action for a challenge to the failure of state legislature to fund the public defender system, because the plaintiffs only seek monetary damages and prospective relief).

still can bring civil rights actions challenging the procedures used for determining parole or clemency *eligibility* (but not the ultimate *result*).[185]

The decisions in *Preiser*, *Heck*, and *Edwards* have eliminated any potential overlap between collateral attacks by federal prisoners under § 2255 and *Bivens* actions, but considerable overlap remains between *Bivens* suits and traditional habeas corpus petitions by federal prisoners under § 2241. It is precisely this remaining area of overlap that could lead to the migration of *Bivens* actions to petitions under § 2241, as federal prisoners seek to avoid the new requirements imposed under the PLRA.

3) Special Treatment of Pro Se Litigants and the Practice of Construing Filings

The ability of federal prisoners to avoid the consequences of the PLRA or AEDPA by restyling their complaints is diminished further by the special treatment of pro se filings in the federal courts, and the practice of construing and re-classifying prisoner filings. For claims filed by prisoners acting pro se, it not uncommon for the courts to construe a suit filed under one cause of action as actually stating a claim under another cause of action, a practice intended to benefit both litigants and the courts.[186]

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[185] *Compare* Dotson v. Wilkinson, 300 F.3d 661, 665-66 (6th Cir. 2002) (holding that the petitioner may pursue a § 1983 action challenging the regulations governing parole eligibility, because the only relief that he seeks is an injunction ordering a new parole eligibility hearing and this would "no immediate effect" on his sentence or conviction since all parole decisions are completely discretionary), Neal v. Shimoda, 131 F.3d 818, 824 (9th Cir. 1997) (allowing a § 1983 action to challenge the state policy of requiring sex offenders to admit guilt as a condition for parole eligibility, because the challenge is to the procedures rather than the results, and a favorable decision won't necessarily change the ultimate parole decision), *and* Woratzeck v. Ariz. Bd. of Executive Clemency, 117 F.3d 400, 403 (9th Cir. 1997) (allowing a § 1983 action challenging a clemency hearing, because the petitioner only sought a new clemency hearing which would not necessarily lead to a reduction in his sentence), *with* Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 373-76 (D.C. Cir. 2000) (holding that a prisoner seeking to overturn a disciplinary decision resulting in the loss of good time *and* eligibility for parole must bring a habeas petition, and adhering to a prior decision holding that habeas is the exclusive remedy even where a claim would "have a merely probabilistic impact on the duration of custody"). *See also* Bogovich v. Sandoval, 189 F.3d 999, 1003-04 (9th Cir. 1999) (allowing a prisoner to bring a claim that criteria preventing him from becoming eligible for parole violate the Americans with Disabilities Act, noting that success in the suit would not necessarily imply the invalidity of the underlying confinement because the Parole Board still might deny parole on a variety of other grounds); *Carson*, 112 F.3d at 822-23 (allowing a § 1983 action challenging the petitioner's placement in administrative segregation, even though reassignment would result in the petitioner being eligible for parole, because his parole still would be within the discretion of the parole board).

[186] *See, e.g.*, O'Ryan Castro v. United States, 290 F.3d 1270, 1272 (11th Cir. 2002), *quoting United States v. Jordan*, 915 F.3d 622, 624-25 (11th Cir. 1990) ("District courts have always had the power to recharacterize pro se petitioners' motions. In fact, due to the frequency in which pro se litigants draft incognizable motions, '[f]ederal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework.'"); *Chambers*, 106 F.3d at 475 ("It is routine for courts to construe prisoner petitions without regard to labeling in determining what, if any, relief the particular petitioner is entitled to."). Although the practice typically

Examples include construing civil rights actions filed under § 1983 or *Bivens* as habeas corpus petitions[187] and vice versa,[188] construing § 1983 actions as *Bivens* claims (because they are brought against *federal* rather than *state* officials),[189] and construing habeas petitions filed under § 2241 as petitions filed under § 2254 or § 2255[190] or vice versa.[191] However, this traditional practice of construing pro se petitions has

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is framed as benefiting the pro se litigants, the examples in the following notes should make clear that this is not always the case—for example, when courts construe civil rights actions as habeas corpus petitions, and then dismiss the suits under AEDPA. *See, e.g., infra* note 187.

[187] *See, e.g.*, Martinez v. Texas Court of Criminal Appeals, 292 F.3d 417, 420, 423 (5th Cir. 2002) (affirming a district court decision construing a § 1983 action challenging the state's appointment of counsel for indigent defendants as a "de facto habeas action," and dismissing the petition under AEDPA's gatekeeping requirements); Spivey v. State Bd. of Pardons & Paroles, 279 F.3d 1301, 1302 n.1, 1303-04 (11th Cir. 2002) (holding that because habeas corpus is the exclusive remedy for the petitioner's request for a stay of his execution, the court must "deem" his § 1983 action as the "functional equivalent" of a second habeas corpus petition and dismiss the petition under AEDPA's gateekeeping requirements); Harvey v. Horan, 278 F.3d 370, 374-75 (4th Cir. 2002) (treating a § 1983 claim seeking physical evidence for DNA testing as a habeas corpus petition, and dismissing under AEDPA's gatekeeping requirements); Williams v. Hopkins, 130 F.3d 333, 336 (8th Cir. 1997) (construing a § 1983 action challenging a prisoner's impending execution as the "functional equivalent of a successive habeas petition" and dismissing under AEDPA's gatekeeping requirements); *In re* Sapp, 118 F.3d 460, 462-63 (6th Cir. 1997) (same); McGrew v. Tex. Bd. of Pardons & Paroles, 47 F.3d 158, 161 (5th Cir. 1995) (holding that a prisoner's § 1983 action challenging the extension of his sentence should be construed as a habeas petition, and dismissed for failure to exhaust).

[188] *See, e.g., Papantony*, 215 F.3d at 864-65 (construing prisoner's petition for habeas relief against prior forcible administration of antipsychotic drugs as a *Bivens* claim, because a habeas claim would be moot); *Carson*, 112 F.3d at 820-21 (construing a prisoner's habeas petition challenging his administrative segregation as an action under § 1983 , and then applying provisions of the PLRA); *Kruger*, 77 F.3d at 1073 (noting that the district court should have construed a prisoner's habeas corpus petition as a § 1983 action, and then dismissed it as a successive claim that had already been rejected by the state courts); Keeton v. Oklahoma, 32 F.3d 451, 452 (10th Cir. 1994) (affirming district court decision construing prisoner's habeas petition raising an equal protection claim against the Oklahoma Prison Overcrowding Emergency Powers Act as a § 1983 action, and dismissing it on the merits).

[189] *See, e.g.*, Roman v. Townsend, 224 F.3d 24, 26 n.2 (1st Cir. 2000); Cuoco v. Moritsugu, 222 F.3d 99, 105 (2d Cir. 2000); Witherspoon v. White, 111 F.3d 399, 400 n.1 (5th Cir. 1997); *Tavarez*, 54 F.3d at 109-10.

[190] *See, e.g.*, Powell v. Ray, 301 F.3d 1200, 1201 (10th Cir. 2002) (treating a prisoner's § 2254 habeas petition "as if it had been filed under 28 U.S.C. § 2241," because it challenged the execution of the prisoner's sentence rather than its validity); Henderson v. Scott, 260 F.3d 1213, 1214 (10th Cir. 2001) (same); Reyes-Requena v. United States, 243 F.3d 893, 906 (5th Cir. 2001) (affirming a district court's decision to construe a § 2255 motion as a § 2241 habeas petition, based on a finding that § 2255 was inadequate or ineffective, and transferring the petition to the proper district court of the confining institution for adjudication); *Montez*, 208 F.3d at 864-65 (construing a prisoner's filing which the district court had treated as a petition under § 2254 as one arising under § 2241, because this was the proper remedy for a challenge to interstate transfers between facilities); Stringer v. Williams, 161 F.3d 259, 262 (5th Cir. 1999) (construing a prisoner's habeas petition which the district had construed as filed under § 2254 as filed under § 2241, because this was the proper remedy for a challenge to pending state prosecutions). *Cf. Davis*, 150 F.3d at 487-88 (affirming a district court decision construing a motion for mandamus under 28 U.S.C. § 1361 seeking an order against members of the U.S. Parole Commission as a habeas petition under § 2241); *In re* Davenport, 147 F.3d 605, 608 (7th Cir. 1998) (holding that a prisoner's petition for a writ under 28 U.S.C. § 1651, the All Writs Act, should be construed as a § 2241 habeas petition).

[191] *See, e.g.*, Roccisano v. Menifee, 293 F.3d 51 (2d Cir. 2002) (affirming a district court decision treating a § 2241 habeas petition as a petition filed under § 2255, because § 2255 was not inadequate or ineffective for his claim); Henderson v. Haro, 282 F.3d 862, 863-64 (5th Cir. 2002) (same); Jiminian v. Nash, 245 F.3d 144, 148 (2d Cir. 2001) (holding that when a prisoner files a § 2241 habeas petition raising claims that are properly the subject of a § 2255

been modified in recent years, because of the realization that this practice can result in unexpected and relatively severe consequences for prisoners under AEDPA or the PLRA.[192] To avoid imposing adverse procedural consequences on unsuspecting prisoner litigants, all but one of the courts of appeals have adopted special rules for construing prisoner filings that are affected by AEDPA.[193]

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motion, the district court should construe the petition as brought under § 2255). *Cf.* Fierro v. Johnson, 197 F.3d 147, 151 (5th Cir. 1999) (noting general rule that motions filed by state prisoners under Fed. R. Civ. Proc. 60(b), providing for relief from a judgment or order, are construed as second or successive habeas petitions under § 2254); Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998) (holding that the district court should have construed a § 2241 habeas petition challenging the Bureau of Prison's interpretation of a statute as an action seeking a declaratory judgment under 28 U.S.C. §§ 1331 and 2201); Mathenia v. Delo, 99 F.3d 1476, 1480 (8th Cir. 1996) (affirming a district court decision construing a motion under Fed. R. Civ. Proc. 60(b) as a successive habeas petition); Hawkins v. Evans, 64 F.3d 543, 546 (10th Cir. 1995) (construing a prisoner's habeas petition as a motion under Fed. R. Civ. Proc. 59(e) to amend the court's judgment on his prior habeas petition, because it was filed within 10 days of the district court's entry of judgment as required under the Rule).

[192] The most significant implication for federal prisoners may be that if a motion filed under a different heading is construed as the prisoner's initial § 2255 motion, then any subsequent § 2255 motion will be deemed second or successive and will be subject to AEDPA's stringent restrictions on successive petitions. *See, e.g.*, Raineri v. United States, 233 F.3d 96, 97 (1st Cir. 2000) ("This change in the law raised the stakes attendant to recharacterizing a post-conviction motion as a habeas petition: conversion, though initially meant to guide a prisoner through the thicket of legal technicalities, suddenly had the potential to deprive him of his one full and fair opportunity to seek habeas relief."); Moore v. Pemberton, 110 F.3d 22, 23-24 (7th Cir. 1997) (per curiam) (comparing § 1983 actions and habeas corpus petitions under § 2254, and emphasizing the disadvantages for both the prisoner and the defendants if the court recharacterizes a § 1983 action as a habeas petition). To cite another example, if a federal prisoner files a § 2255 motion that the court recharacterizes as a *Bivens* or FTCA claim, the filing fee jumps from nothing to $150 (an amount which must be paid in full under the PLRA), and dismissal of the suit may result in a "strike" under the PLRA. *See Moran*, 218 F.3d at 649; *Pischke*, 178 F.3d at 500.

[193] The general approach of the circuits has been to hold that before construing a post-conviction motion filed under a different label as an initial § 2255 motion, the district court must inform the prisoner of the potential consequences of recharacterizing the motion, and then allow the prisoner to choose whether the court should (1) rule on the filing as presented; (2) construe the filing as a § 2255 motion, and rule on the recharacterized motion; or (3) withdraw the motion, without prejudice to a subsequent filing. *See* Morales v. United States, 304 F.3d 764, 767 (8th Cir. 2002); *In re* Shelton, 295 F.3d 620, 622 (6th Cir. 2002) (per curiam); United States v. Palmer, 296 F.3d 1135, 1146 (D.C. Cir. 2002); O'Ryan Castro v. United States, 290 F.3d 1270, 1274 (11th Cir. 2002); United States v. Emmanuel, 288 F.3d 644, 649-50 (4th Cir. 2002); United States v. Kelly, 235 F.3d 1238, 1242 (10th Cir. 2000); United States v. Seesing, 234 F.3d 456, 464 (9th Cir. 2000); United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999); Adams v. United States, 155 F.3d 582, 584 (2d Cir. 1998). The Supreme Court has granted certiorari this term in the case from the Eleventh Circuit, *O'Ryan Castro v. United States*, on the question whether a district court's recharacterization of pro se prisoner's filing as a motion under § 2255 renders any subsequent motions under § 2255 a "second or successive petition" under AEDPA. *See O'Ryan Castro v. United States*, 123 S. Ct. 993 (2003).

III. AN INTRODUCTION TO THE DATA SOURCES

The analysis in this paper is based on statistics on administrative and litigation claims filed by federal (and state) prisoners gathered from two different sources, the Bureau of Prisons (BOP) and the Administrative Office of the United States Courts (AO). The first two sections below provide a general introduction to these two datasets, and note some of the distinctions between the two sources. Additional information on the datasets and raw data from both sources can be found in the Data Appendix. While combining these two data sources provides a comprehensive picture of the overall grievance system available to federal prisoners, it is important to recognize the limitations in each of the datasets. The third section below notes the limits in the data reported by the Bureau of Prisons, as well as some of the problems with the Administrative Office data that have been discovered in the course of prior research.

A. A General Introduction to the Datasets

Much of the analysis in this paper is based on a unique set of data provided by the Bureau of Prisons, which is not publicly available and has not been the subject of prior research. In response to a request under the Freedom of Information Act, the Bureau produced records containing data on administrative grievances and litigation actions filed by federal prisoners for various periods during the Fiscal Years 1992 through 2002.[194] These records include data on claims under the Bureau's Administrative Remedies Program, administrative claims and litigation actions filed under the Federal Tort Claims Act involving the Bureau's employees, and litigation actions brought in federal court as writs of habeas corpus or *Bivens* suits. For the Administrative Remedies Program, the Bureau tracks statistics on filings at the institutional level, appeals to the six regional offices, and appeals to the Central Office, as reported by counsel working in offices at each level.[195] For administrative claims under the FTCA and

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[194] *See* Letter from Margo Schlanger, Assistant Professor of Law, Harvard Law School, to Freedom of Information Act / Privacy Act Section, Office of General Counsel, Federal Bureau of Prisons (Apr. 17, 2001) (on file with the author).

[195] Recall that prisoners generally must file administrative remedies at the institutional level first, and then may appeal the decision to the regional office, and ultimately to the Central Office. *See supra* notes 23-25 and accompanying text. However, prisoners may file an administrative remedy with the appropriate regional office first

for all litigation actions, the Bureau tracks data on claims filed with or assigned to each of the six regional offices or to the Central Office, as reported by counsel working in each of these seven offices. [196] Although records are missing from each of these subsets for various quarters, the dataset still provides a fairly comprehensive picture of grievances and litigation initiated by federal prisoners during the past ten years.

In addition to the data provided by the Bureau of Prisons, the analysis in this paper is based on statistics compiled by the Administrative Office, and integrated into a database maintained by the Inter-university Consortium for Political and Social Research.[197] The AO data is collected through standard case status forms completed by the clerks of court at the time of filing (JS-5 Filing Report) and termination (JS-6 Termination Report) for all civil cases filed in the federal courts.[198] The AO data includes records for all litigation actions filed by both state and federal prisoners in the federal courts that were terminated between Fiscal Years 1970 and 2001, or that were still pending at the end of the Fiscal Year 2001.

B. Distinguishing Between the Two Datasets

As the above descriptions should indicate, the two datasets contain overlapping but distinct universes of legal claims by federal prisoners. In several respects the BOP dataset is more comprehensive, because it includes statistics on administrative claims filed under the Administrative Remedies Program and the FTCA that do not involve any action in federal court. The BOP dataset also

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(with appeal to the Central Office) if the claim involves a sensitive issue or the appeal of a decision by a Disciplinary Hearing Officer. *See id.*

[196] Recall that prisoners must file administrative claims under the Federal Tort Claims Act with one of the six regional offices or the Central Office, depending on where the alleged injury occurred. *See supra* notes 23, 28, and 32 and accompanying text. Unlike claims filed under the Administrative Remedies Program, FTCA administrative claims filed with the Central Office are not appeals of claims previously filed with one of the six regional offices. *See supra* note 62. A similar system governs the assignment of litigation actions to one of the six regional offices or to the Central Office.

[197] *See* Federal Judicial Center, Federal Court Cases: Integrated Data Base, 1970-2000 (pts. 38-55, 64-65, 73- 74, 86-88, 98, 103-04, 115-17 (civil terminations 1970-2000), 118 (civil pending 2000)) (ICPSR Study No. 8429, last updated Apr. 25, 2002), *at* http:// www.icpsr.umich.edu:8080/ICPSR-STUDY/08429.xml; Federal Judicial Center, Federal Court Cases: Integrated Data Base, 2001 (pts. 2 (civil terminations), 3 (civil pending)) (ICPSR Study No. 3415, last updated June 19, 2002), *at* http:// www.icpsr.umich.edu:8080/ICPSR-STUDY/03415.xml.

[198] *See id.*

includes statistics on litigation actions filed under the FTCA, a category that is not tracked separately in the AO data. However as to those litigation actions tracked by both sources—collateral attacks, habeas corpus petitions, and civil rights actions—the AO dataset appears to be much more comprehensive, including statistics on approximately ten times as many claims overall and twice as many civil rights actions than the BOP dataset.[199]

One explanation for the gap between the two data sources is that many litigation actions initiated by federal prisoners are dismissed before a complaint ever is served on the Bureau or its employees. The data on litigation actions compiled by the Bureau does not include statistics on any actions that are dismissed prior to service, because the Bureau never receives notice of such claims.[200] However, the AO data should include a record of every litigation claim that is filed in federal court, including those that are dismissed prior to service. The Rules Governing § 2255 Proceedings[201] and the provisions of the Prison Litigation Reform Act (PLRA) both provide mechanisms for summary dismissal of prisoner complaints prior to service.[202] Statistics from the AO dataset indicate that the vast majority of actions filed by prisoners are dismissed prior to trial or are resolved through a non-judgment disposition,[203] and these categories may include many summary dismissals prior to service.

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[199] A complication arises in comparing the two sets of statistics as to litigation claims, because the subject matter categories that are tracked by each source do not match perfectly. For purposes of this paper, I am assuming that the AO data on civil rights actions filed by federal prisoners roughly corresponds to the data on *Bivens* actions tracked by the Bureau of Prisons. For additional information on the classification of claims in each dataset, *see infra* Data Appendix, Part I.

[200] *See* Pybas Interview, *supra* note 15 (noting that the Bureau has no way of tracking claims that are dismissed prior to service, for example under the special provisions of the PLRA).

[201] A federal judge may summarily dismiss a § 2255 motion "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief." *See* RULE 4(b) of the RULES GOVERNING § 2255 PROCEEDINGS. Indeed, the clerk of the court may return a § 2255 motion to the petitioner if the motion "does not substantially comply" with the various requirements as to appropriate form and content. *See* RULE 2(d) of *id.* While the Rule requires the clerk to consult with the judge before returning the motion to the petitioner, *see id.*, in practice the clerks in some district courts may continue to return motions sua sponte. *See* HERTZ & LIEBMAN, *supra* note 129, § 15.1.

[202] *See supra* note 160 and accompanying text.

[203] *See infra* Data Appendix, Part II., Table 24.

C. Limitations in the Two Datasets

1) Limitations in the Bureau of Prisons Data

The BOP dataset, while providing a unique and rich source of information on legal claims initiated by federal prisoners, is limited in several critical respects. First, the Bureau only tracks a subset of all lawsuits filed by federal prisoners, namely those complaints that survive initial review by the courts and are served on the Bureau or its employees.[204] Second, the BOP dataset is limited in all categories by gaps in coverage for various quarters throughout the covered ten-year period, making it difficult to assess trends over time.[205] Finally, the information that can be gleaned from the BOP data in all categories is limited by the way that the statistics are collected and reported. For example, because the data is associated with quarterly totals rather than individual case files, the statistics cannot be disaggregated into subsets of claims. While it is possible to report the total number of prisoner victories or settlement amounts received over time under the Administrative Remedies Program or in all litigation actions, it is not possible to examine differences across different categories of administrative remedies or litigation actions. In this respect the statistics reported by the AO—which follow individual case files—allow for much finer distinctions in the data analysis.

2) Limitations in the Administrative Office Data

The AO dataset is the most comprehensive data source available on claims initiated by prisoners in federal court, but it is not without limitations. The following review of the existing literature on the AO data is not intended to be comprehensive, but simply to provide some recent and illustrative examples of the problems with the available data. For the purposes of this paper, the three most important limitations are potential errors in the classification of suits, the recording of judgments, and the recording of the total amounts for awards received by successful litigants.

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[204] However, there is no reason to believe that the reported data on administrative claims filed directly with the Bureau under the Administrative Remedies Program or pursuant to the FTCA are similarly limited.

[205] For additional information on the gaps in the BOP data, *see infra* Data Appendix, Part I.A.

(a) Limits in the Classification of Filings

The clerks of court face substantial challenges in attempting to classify prisoner complaints by the basis for the suit—the definitions of the various prisoner litigation categories are not always clear, and many prisoner complaints will present claims that appear to fit into multiple categories. Several authors have found minor problems of classification in the AO data that apparently stem from these types of errors, both in prisoner filings and in other civil cases.[206] However, studies comparing actual case dockets with the AO data generally have found the classification of cases to be highly reliable.[207]

A recent study of prisoner litigation in federal courts by Margo Schlanger identifies several recurring errors that are particular to the classification of prisoner cases under the AO data system.[208] First, the AO data system provides two categories for classifying prisoner civil rights cases, "Prisoner: Civil Rights" or "Prison Conditions," but it is unclear how these two categories are distinct.[209] The "Prison Conditions" category was created in 1997, and was intended to track cases that fall under the PLRA.[210] Problems arise because the vast majority of these cases formerly would have been classified as "Prisoner: Civil Rights," and it is not clear how the clerks of court are supposed to distinguish between

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[206] *See* Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 381 (2000) (finding minor errors in the AO data based on a comparison of actual court records with the AO data for a sample of cases, where cases were classified as "patent" trial cases but all patent claims were dismissed before trial); Eisenberg & Schwab, *supra* note 3, at 669 & n. 127 (noting minor errors in the AO data in not classifying cases as civil right actions, based on a comparison of actual court records with the AO data for a sample of cases); Eisenberg, *supra* note 3, at 535 n.237 (same as to the classification of civil rights actions as prisoner or nonprisoner cases); Turner, *supra* note 3, at 625 n. 85 (noting some errors in the AO data in the classification of prisoner cases as habeas corpus or civil rights, based on a comparison of actual case records with the AO data for a sample of prisoner cases).

[207] *See, e.g.* Eisenberg, *supra* note 3, at 524, 535 n. 237. In Eisenberg's study, a search of actual court records for prisoner civil rights actions filed in the Central District California during two fiscal years revealed very few cases that were not listed in the AO data, and also missed a handful of cases that were listed in the AO data. *See id.* This suggests that the AO data is close to complete, and also may be more accurate than a search of actual court records would be.

[208] *See generally* Schlanger, *supra* note 3, at 1699-1702.

[209] These are two of the seven categories provided for classifying suits filed by prisoners under the "Nature of Suit" variable in the AO data system. For additional information, *see infra* Data Appendix, Part I.B.

[210] *See* Schlanger, *supra* note 3, at 1699-1700.

these two categories.[211] For this reason, in the discussion below I have combined these two categories into one category as prisoner civil rights actions.

A second critical error occurs in the classification of prisoner cases into those filed by state prisoners and those filed by federal prisoners. The AO data system classifies civil actions into five categories, based on the basis for federal court jurisdiction in each case. The jurisdictional basis for most prisoner claims is either "Federal Question" or "U.S. Defendant." Under the AO instructions for coding new cases, all cases that involve a federal defendant should be coded as "U.S. Defendant," even if they also raise a federal question.[212] Since federal prisoner claims will be filed against federal officials as defendants, while state prisoner claims will be filed against state or local officials as defendants, it should follow that only claims filed by federal prisoners will be classified as prisoner suits based on jurisdiction for a U.S. Defendant, while claims filed by state prisoners will be classified as prisoner suits based on Federal Question jurisdiction.[213] Researchers using the AO data have assumed that all claims filed by federal prisoners can be isolated by selecting out the U.S. Defendant prisoner cases.[214] All other suits that are classified as involving claims by prisoners are presumed to be suits filed by state prisoners.[215]

Schlanger found that that many prisoner cases that are classified as based on Federal Question jurisdiction, rather than U.S. Defendant jurisdiction, actually are suits brought by federal prisoners against federal defendants. [216] The problem appears to stem from the way the suits are styled. If a federal prisoner files a suit against the "United States," this suit easily is recognized as based on U.S. Defendant jurisdiction. However, when the suit names an individual federal official as the defendant—such as the "U.S. Attorney General," or specifically "John Ashcroft"—it appears that in many cases the clerks of

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[211] *See id.*

[212] *See id.* at 1700-02.

[213] Prisoner suits can be separated from nonprisoner suits based on the Nature of Suit variable. *See infra* Data Appendix, Part I.B.

[214] *See generally, e.g.*, SCALIA, *supra* note 3.

[215] *See id.*

[216] *See* Schlanger, *supra* note 3, at 1700-02.

courts fail to classify these cases under U.S. Defendant jurisdiction.[217] The result is that researchers mistakenly place these cases in the category of claims filed by state prisoners. Schlanger performed a limited review of individual case captions for cases in the AO data system, and identified thousands of prisoner actions that had been coded under Federal Question jurisdiction, but that actually involved a U.S. Defendant and therefore should have been classified as filed by federal prisoners rather than state prisoners.[218]

The data results presented in this paper are based on a modified version of the AO data, in which the cases identified through Schlanger's review as erroneously classified have been re-coded as U.S. Defendant (and therefore federal prisoner) cases. It is important to emphasize that Schlanger's review was based on conservative assumptions, and therefore probably missed thousands of additional cases that have been placed in the state prisoner group but are actually suits by federal prisoners.

(b) Limits in the Recording of Judgments

In her review of the AO data, Margo Schlanger also identified some limitations in the recording of judgments for the plaintiff or defendant in prisoner cases. One of the categories tracked in the AO dataset is "Judgment For," which should be recorded only for cases that are disposed of with the entry of a final judgment. The options in the AO data system for this variable are (1) plaintiff; (2) defendant; (3) both; (4) unknown; and (5) not applicable. In a forthcoming study comparing the AO data with actual court records for a samples of prisoner suits filed in federal court, Schlanger and Theodore Eisenberg found that while the judgment for variable was generally accurate, there were notable errors in several subcategories of cases. The authors found that cases coded as judgments for "both" nearly always are cases that should be classified as judgments for the plaintiff.[219] Schlanger and Eisenberg also identified

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[217] *See id.*

[218] *See id.*

[219] *See* Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Empirical Analysis,* NOTRE DAME L. REV. (forthcoming 2003). Schlanger and Eisenberg report on the results of an audit of 126 cases filed by prisoners in federal court that were terminated in 1993, and in which the recorded award was greater than zero. *See id.* The authors found that of 26 cases classified as "judgment for both," all 26 actually were plaintiff victories. *See id.*; *see also* Schlanger, *supra* note 3, at 1702. Schlanger also has found

significant errors in the judgment for category for those cases in which the AO data records judgment for the plaintiff but a monetary award of zero.[220]

The data results presented in this paper are based on a modified version of the AO data in which attempts have been made to eliminate these errors. Those cases that were classified as judgments for both have been re-coded as judgments for the plaintiff. In addition, all cases in which the judgment for category was reported for the plaintiff but a monetary award of zero was recorded have been excluded from the dataset for purposes of reporting recorded judgments.

(c) Limits in the Recording of Monetary Awards

There are several apparent errors that may occur in the recording of total award amounts in the AO data, based on the design of the data system itself. The AO system requires the clerks of court to record awards in multiples of $1,000, for example recording an award of $5,000 as $5. If a clerk mistakenly records the actual amount of an award, then the data record will significantly overstate the actual amount. Further, all recorded awards must be rounded to nearest $1,000, and rounding errors may occur. Several authors have found evidence of rounding errors in the recording of award amounts in the AO data.[221] The AO data system also limits the clerks to recording four digits, so that the maximum amount that can be recorded is $9,999 for an award of $9,999,000. For awards over this amount, the data record will understate the actual amount. Many authors have noted this particular limitation in the AO award data.[222] Authors have noted several other potential errors in the recording of award amounts under

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that the two categories of "unknown" and "not applicable" are better classified as judgments for the defendant. *See* Schlanger, *supra* note 3, at 1702.

[220] *See* Eisenberg & Schlanger, *supra* note 219. Schlanger and Eisenberg report on the results of an audit of 41 cases filed by prisoners that were terminated in 1993, and in which the recorded award was zero. *See id.* The authors found 25 cases that were recorded as judgments for plaintiff, but that were actually defendant victories. *See id.* In addition, nine cases were recorded as judgments for both but were actually defendant victories; the remaining two cases that were recorded as judgment for both were actually plaintiff victories. *See id.*

[221] *See* Stewart J. Schwab, *Studying Labor Law and Human Resources in Rhode Island*, 7 ROGER WILLIAMS U.L. REV. 384, 395-96 (2002) (reporting that in two of twelve cases the award amount recorded in the AO data was 100 times the actual award amount, apparently because of digit errors).

[222] *See, e.g.*, Schwab, *supra* note 221, at 394; Moore, *supra* note 206, at 381; Theodore Eisenberg, John Goerdt, Brian Ostrom, & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U.L. REV. 433, 439 (1996). Eisenberg, et al. found some evidence of this problem when comparing federal and state jury award levels. *See id.*

the AO data system—(1) some monetary awards are never properly recorded in the AO data;[223] (2) the clerks of court occasionally may use the coding of "9999" to designate an unusual award, rather than an actual award amount;[224] and (3) different jurisdictions may apply slightly different rules in calculating the total award amount.[225]

In a forthcoming study comparing the AO data with actual court records for samples of tort and prisoner suits filed in federal court, Theodore Eisenberg and Margo Schlanger identify significant errors in the AO awards data. Eisenberg and Schlanger found evidence of two different types of errors, which they denote as rounding errors, based on simple arithmetic mistakes, and "digit" errors, where an award is incorrect because of the AO requirement that amounts be entered in the thousands of dollars.[226] The error rates appear to be particularly high in two subcategories of cases—where the AO records a plaintiff victory but an award of zero, and where the AO records an award of "9999."[227] Nonetheless, the authors found that the median award amount based on the AO data was fairly close to the actual median award

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[223] *See* Eisenberg & Schwab, *supra* note 3, at 686-87. Eisenberg and Schwab compared the AO data with actual court records for civil rights cases filed in the Central District of California, and found a number of cases with monetary awards that had not been recorded in the AO data. *See id.*

[224] *See* Schwab, *supra* note 221, at 395. In the process of verifying twelve award amounts in a sample of cases, Schwab discovered two cases in which the clerks had recorded "9999" but the docket sheets indicated modest awards that were later dismissed under settlement agreements. *See id.* Schwab posits that clerks may occasionally use the coding of "9999" to designate an unusual award. *See id.; see also* Eisenberg & Schlanger, *supra* note 219 (noting that a number of other fields in the AO data system use repeated 9s to indicate missing data or other special codes).

[225] *See* Moore, *supra*, note 206, at 381 & n.71. Moore started with a list of patent cases that had proceeded to trial between the years 1983 and 1999, based on the AO data, and then sought to verify the AO information by researching each case's court records. *See id.* at 380-83. Moore discovered that local practices varied, for example, on questions of whether to include pre- and post-judgment interests and attorneys' fees. *See also* Schwab, *supra* note 221, at 395 (noting that in one case the recorded award amount apparently included the compensatory but not the liquidated damages). The codebook for the AO dataset states that the recorded award should reflect the monetary judgment awarded, excluding costs. *See infra,* Data Appendix, Part I.B.

[226] *See* Eisenberg & Schlanger, *supra* note 219. In a sample of 291 tort cases filed in 2000 with recorded awards, rounding errors occurred in 34 percent of cases and digit errors occurred in 3 percent of cases. *See id.* By comparison, in a sample of 122 prisoner civil rights cases terminated in 1993 with recorded awards, rounding errors occurred in 17 percent of cases, while digit errors occurred in 51 percent of cases. *See id.* These two samples indicate that while both rounding and digit errors are common, their prevalence may vary across different cases categories. *See id.*

[227] In both samples of cases, the error rate for awards recorded as "9999" was 100 percent. *See id.* Further, the authors found that the error rate in each sample could be reduced by excluding these cases from the samples, or by replacing the data in these cases with the actual award amounts. *See id.*

amount based on court records.[228] They conclude that the AO awards data may provide a reasonable estimate for median awards for some research purposes.[229]

For the data results on awards presented in this paper, I have excluded all cases with reported awards of zero or "9999." This should lower the error rates, but these results still should be viewed skeptically.

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[228] *See id.*

[229] *See id.*

IV. DATA RESULTS & ANALYSIS - LEGAL CLAIMS INITIATED BY FEDERAL PRISONERS

The data results and analysis presented in this part of the paper are organized around the three main objectives described in the Introduction—to construct a descriptive narrative of the overall grievance system available to federal prisoners seeking to challenge the conditions of their confinement, to understand the relative significance of these different legal remedies for prisoners seeking relief, and to touch on the effects of the Prison Litigation Reform Act (PLRA) on legal activity by federal prisoners. The results presented below are based on raw data provided by the Bureau of Prisons (BOP) and the Administrative Office of the U.S. Courts (AO), described in greater detail in Part III. and in the Data Appendix that follows. The first section presents the data results for each of three major types of legal remedies that are available to federal prisoners seeking to challenge the conditions of their confinement—claims under the Bureau's Administrative Remedies Program, administrative claims and litigation actions under the Federal Tort Claims Act (FTCA), and *Bivens* suits. The second section briefly compares the litigation of civil rights actions in federal court by state and federal prisoners, demonstrating that while civil rights litigation in federal court by both sets of prisoners generally looks the same, there are some notable differences. The final section presents some concluding observations and analysis, again seeking to integrate the data results with the three main objectives of the paper.

A. Administrative Claims and Litigation Actions Filed by Federal Prisoners

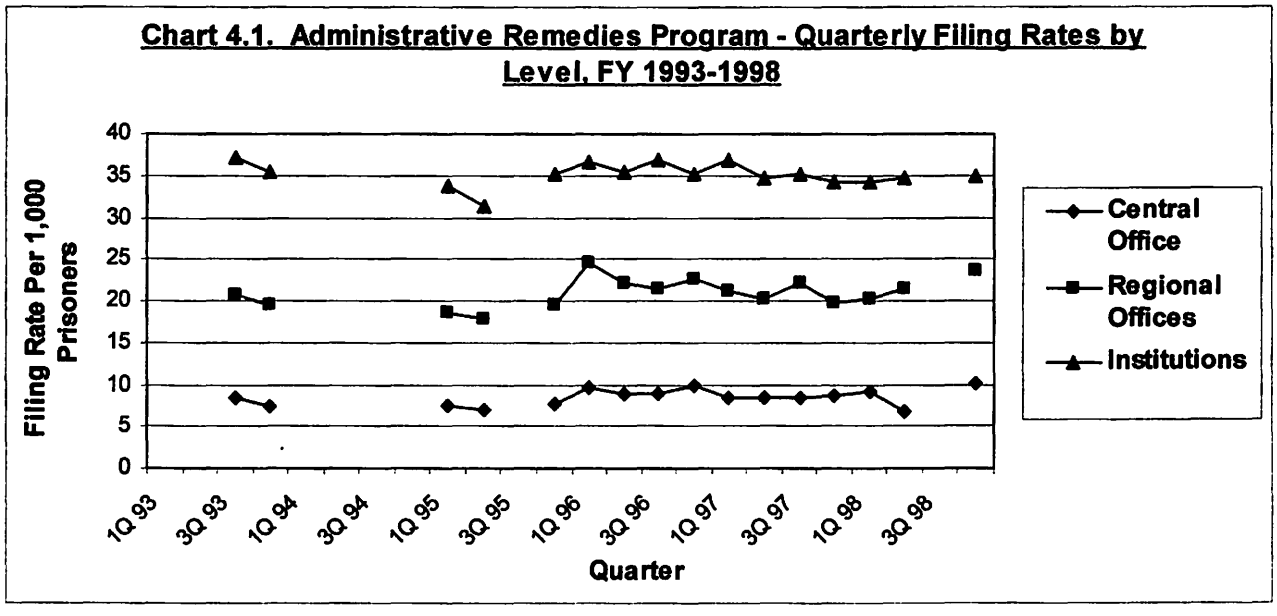
1) The Bureau of Prisons' Administrative Remedies Program

Piecing together the statistics compiled by the Bureau of Prisons, it is possible to sketch out a broad description of the Bureau's Administrative Remedies Program. The data presented here focuses on four related sets of issues (1) filing rates per prisoner population and total filings over time, overall and at each level within the internal system, (2) a breakdown of the filings by the subject matter underlying the complaints, (3) total grants and denials of complaints, overall and at each level within the system, and the reasons for denials, and (4) estimated rates of appeals of adverse decisions to the next highest level in the system. From these statistics, we can learn how frequently federal prisoners rely on the Administrative

Remedies Program, whether or not they are persistent in appealing denied claims to the highest levels, and how often these prisoners are granted some form of relief. A clearer picture emerges of the types of complaints that may feature prominently in daily life in the federal prison system. Putting all of these pieces of data together, we can gain some sense of the role that the Administrative Remedies Program plays in institutional management for the federal Bureau of Prisons.

(a) Filing Rates and Total Filings for Administrative Remedies

The filing rates for federal prisoners bringing claims under the Administrative Remedies Program–overall and at each level within the system—have remained relatively steady in recent years, while the total numbers of filings have increased. Based on averages for the period of Fiscal Years 1993 through 1998, federal prisoners filed approximately 258 administrative remedies per 1,000 prisoners per fiscal year—140 remedies at the institutional level, 84 appeals to the regional offices, and 34 appeals to the Central Office.[230] These figures suggest that up to 15 to 20 percent of the federal prisoner population



[230] For the raw data presented in the text in this discussion, and in Chart 4.1 and Table 4.1, *see infra* Data Appendix Part II, Tables 1, 3, 5, 7, and 8.

uses the Program every year.[231] As Chart 4.1 (based on quarterly filing rates) and Table 4.1 (providing estimated annual filing rates) illustrate, the filing rates at each level fluctuated moderately during the period between Fiscal Years 1993 and 1998. There were noticeable short-term increases in the filing rates (and total numbers of filings) across the board during Fiscal Year 1996.

Table 4.1. Administrative Remedies Program – Estimated Filing Rates Per 1,000 Prisoners & Total Remedies Filed, FY 1993-1998

Fiscal Year	Institutional Level		Regional Offices		Central Office	
	Rate Per 1,000 Prisoners	Total Filings	Rate Per 1,000 Prisoners	Total Filings	Rate Per 1,000 Prisoners	Total Filings
FY 1993	145	12,486	81	6,950	32	2,758
FY 1994	-	-	-	-	-	-
FY 1995	134	13,071	74	7,265	29	2,884
FY 1996	144	14,804	91	9,320	37	3,834
FY 1997	141	15,371	84	9,104	34	3,683
FY 1998	139	16,244	87	10,205	34	4,043

Although the filing rates have remained relatively steady, the total numbers of filings have continued to rise during this same period as the overall federal prisoner population has increased.

The sheer volume of complaints that are processed through the Administrative Remedies Program on an annual basis demonstrates the significance of this internal grievance system for institutional management. By Fiscal Year 1998, federal prisoners were filing almost 29,000 administrative remedies per fiscal year—more than 16,000 complaints at the institutional level, 8,000 appeals to the regional office, and 4,000 appeals to the Central Office.[232] As the data results presented below will make clear, these total numbers far outweigh the total numbers of administrative claims or litigation actions filed under the FTCA or other legal channels that are available to federal prisoners. From the perspective of federal prisoners, the Administrative Remedies Program appears to be a critical mechanism for presenting

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[231] It is impossible to estimate this figure accurately without knowing how many claims are submitted by repeat filers; these high-end estimates assume that each claim is filed by a different prisoner. Because at least half of the filings submitted to the regional offices actually are original filings rather than appeals, *see infra* Table 4.2 and note 240 and accompanying text, a rough estimate would be that federal prisoners submit 180+ original filings plus additional appeals per 1,000 prisoners per fiscal year, suggesting an overall usage rate of up to 15 to 20 percent.

[232] *See infra* Data Appendix, Part II., Tables 1, 3, 5, and 8.

complaints regarding the conditions of their confinement. On the other hand, the success of the program appears to impose a significant administrative burden on legal counsel and other staff within the Bureau of Prisons, who probably spend hours reviewing, investigating, and responding to these complaints.

Given the recent efforts under the PLRA to impose more stringent requirements of administrative exhaustion on prisoner litigants and generally to discourage malicious or frivolous complaints, it might seem surprising that filing rates under the Program have not changed in recent years.[233] If most prisoner civil rights actions had been proceeding to federal court without administrative exhaustion prior to the PLRA, then we might expect the new exhaustion requirements to have resulted in increased administrative filings. On the other hand, if many of the prisoner civil rights actions that were being filed before the PLRA's enactment were frivolous or without merit, then we might expect the new restrictions on litigation to have pushed these claims out of the legal system entirely, causing decreases in both litigation and administrative filings.

Nonetheless, there are a number of explanations for why the PLRA would not have affected filing rates under the Program. Federal prisoners may have been utilizing the Administrative Remedies Program to the fullest extent possible, even before the PLRA, particularly since administrative exhaustion was required for some complaints by federal prisoners under the Civil Rights of Institutionalized Persons Act.[234] If federal prisoners already were complying with administrative exhaustion, then the impact of the newer requirements under the PLRA would be minimal. Even if the PLRA has resulted in requiring exhaustion in some cases where it was not previously required, the numbers may be too small to have any substantial impact on overall filing rates under the Program. Finally, prisoners who are deterred from filing litigation actions under the PLRA, for whatever reason, still will have strong incentives to seek relief under the Administrative Remedies Program. All of these forces may have combined to produce no net impact on the filing rates under the Program.

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[233] The moderate increases in the filing rates for administrative remedies during Fiscal Year 1996 might have been a short-term reaction to the new requirements of the PLRA, which became effective on April 26, 1996, but this increase in filings was not sustained in subsequent fiscal years.

[234] *See generally* 42 U.S.C.A. § 1997e (West Supp. 1994) (since amended). The federal Bureau of Prisons' grievance system was approved under the CRIPA certification procedures. *See* Pybas Interview, *supra* note 15.

(b) Administrative Remedies Filings by Subject Matter

The figures on the subject matters underlying complaints filed through the Administrative Remedies Program indicate that the majority of claims involve one of a handful of recurring issues that epitomize the daily challenges of prison life. Examining claims filed at all levels within the system between Fiscal Years 1993 and 1998, the most common issues raised were Disciplinary Hearing Officer (DHO) decisions (21% of all filings at all levels), staff complaints (17%), Unit Disciplinary Committee (UDC) decisions (14%), medical care (11%), and classification decisions (10%).[235] Less common issues that were raised include transfers, credit for jail time, legal remedies, work assignments, and community programs.

Table 4.2. Administrative Remedies Program - Top Ten Issues Raised, by Level of Filing, FY 1993-1998

Overall	Institutions	Regional Offices	Central Office
DHO (21%)	Staff (19%)	DHO (47%)	DHO (39%)
Staff (17%)	UDC (17%)	Staff (14%)	Jail Time (15%)
UDC (14%)	Medical (12%)	UDC (10%)	Staff (14%)
Medical (11%)	Classification (9%)	Classification (9%)	Classification (12%)
Classification (10%)	Transfer (6%)	Medical (8%)	Medical (11%)
Transfers (7%)	Work Assignments (6%)	Jail Time (7%)	UDC (10%)
Jail Time (7%)	Legal Remedies (6%)	Transfer (7%)	Transfer (8%)
Legal Remedies (6%)	Special Housing Unit (6%)	Legal Remedies (5%)	Legal Remedies (7%)
Work Assignments (5%)	Community Programs (5%)	Community Programs (5%)	Community Programs (5%)
Community Programs (5%)	Jail Time (5%)	Special Housing Unit (4%)	Work Assignments (4%)

[235] For the raw data presented in the text in this discussion and in Table 4.2, *see infra* Data Appendix, Part II., Tables 2, 4, and 6.

The breakdown by subject matter varies somewhat by the level of filing. Because appeals of DHO decisions must be filed initially at the regional office level, rather than the institutional level,[236] claims involving DHO decisions predominate administrative remedies filed with the regional offices (47% of all claims) and the Central Office (39% of all claims). Complaints involving staff and UDC decisions were more prevalent at the institutional level, and less common at the regional office and Central Office levels.

(c) Grants and Denials of Administrative Remedies

While the Bureau of Prisons denies the majority of grievances that are filed under the Administrative Remedies Program, the rates of denial vary significantly by the level of filing. Examining claims at all levels, the Bureau granted only 24 percent of administrative remedies that were disposed of between Fiscal Years 1993 and 1998.[237] However, the denial rate varies significantly among the levels of filing. The Bureau granted 37 percent of claims submitted at the institutional level, 16 percent of claims filed with the regional offices, and only three percent of appeals filed with the Central Office.

A closer look at the reasons for denial suggests that focusing solely on the total numbers of denials may be somewhat misleading, because a substantial percentage of claims are denied for reasons that—if the applicable error(s) is corrected—would allow a prisoner to resubmit the claim for a final decision. Overall, one-third of all remedies are denied with instructions allowing the prisoner to correct and resubmit the claim. The percentage of claims denied with instructions to resubmit increases at each successive level of filing, so that appeals are more likely than initial filings to be denied for reasons that will allow the prisoner to resubmit the claim. Another one-third of all remedies are denied for various reasons that potentially are correctable, if the applicable filing deadline has not passed—18 percent are denied for failure to attempt informal resolution, 11 percent for submitting the claim to the wrong level, and eight percent for failing to provide the required attachments.[238] The reasons for denial also differ

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[236] *See supra* note 25.

[237] For the raw data presented in the text in this discussion and in Table 4.3, *see infra,* Data Appendix, Part II., Tables 2, 4, and 6.

[238] The key difference is that when claims are denied with instructions to resubmit, the prisoner also is granted an extension of the original filing deadline. *See supra* note 34.

slightly by the level of filing. Appeals to the Central Office are more likely to be denied as untimely, while filings at the institutional level are more likely to be denied for failure to attempt informal resolution of the complaint.

Table 4.3. Administrative Remedies Program - Top Five Reasons for Denial, by Level of Filing, FY 1993-1998

Overall	Institutions	Regional Offices	Central Office
Resubmit (33%)	No informal resolution (38%)	Resubmit (33%)	Resubmit (47%)
No informal resolution (18%)	Resubmit (26%)	Wrong level (12%)	Untimely (28%)
Untimely (16%)	Untimely (13%)	Untimely (12%)	Attachments (18%)
Wrong level (11%)	Wrong level (6%)	Attachments (10%)	Wrong level (16%)
Attachments (8%)		No informal resolution (8%)	

This breakdown in the reasons for denial also suggests that a small but not insignificant number of the administrative remedies that are reflected in the statistics may be duplicate submissions. Given the high rates of appeal by prisoners under the Administrative Remedies Program, discussed below, it seems likely that many of the prisoners who are allowed to resubmit a denied claim will do so. If this is true, then as many as ten percent of all new filings may be resubmitted claims.

Finally, because many claims are denied for reasons that can be characterized as procedural, focusing solely on the total number of annual filings may exaggerate the administrative costs of the Program. About half of all claims that are denied—comparable to one-fifth of all claims filed—are disposed of based on procedural flaws such as timeliness, submission to the wrong level, problems with attachments, or failure to attempt informal resolution. In most cases, disposing of claims on these grounds should require little more than a cursory examination of the prisoner's submission. Only those

claims that are granted or are denied on the merits should require significant time and resources for investigation and processing.

(d) Appeals of Adverse Decisions Under the Administrative Remedies Program

The rate at which prisoners appeal adverse decisions within the Administrative Remedies Program provides a measure of the persistence of prisoners in pursuing their claims, and also indicates the general role that the appeals process plays within the overall Program. If prisoners are selective in pursuing appeals then this self-selection might lead to a higher caliber of claims among the appeals filed, and we might expect the Bureau to investigate seriously and grant a significant number of appeals. On the other hand, if prisoners routinely appeal any adverse decision, then we would expect that many of these appeals will be dismissed, often on procedural grounds. Some evidence already has been presented to suggest that the quality of appeals differs little from initial filings under the Program. The rate of denial of claims increases at each successive level within the system, so that appeals to the regional offices and to the Central Office are much more likely to be denied compared to initial filings. In addition, appeals to the regional offices and to the Central Office frequently are denied for procedural reasons such as untimeliness, submission to the wrong level, or problems with attachments.

Comparing the total number of denials at each level to the total number of filings at the next level of decision suggests that prisoners file appeals to the vast majority of denials under the Program. If the rate of appeal is high, we would expect the number of appeals filed at each successive level during a particular time period to be roughly equal to the number of claims denied at the previous level within the system during the same time period. In the dataset provided by the Bureau for Fiscal Years 1993 through 1998, there were 15,174 claims that were denied at the regional office level, and 14,091 appeals filed with the Central Office, suggesting a close to 100 percent appeal rate.[239] Similarly, there were 14,693 administrative remedies that were denied at the institutional level during this time period, and close to that

[239] For the raw data presented in the text in this discussion, *see infra* Data Appendix, Part II., Tables 2, 4, and 6.

number of appeals filed with the regional offices.[240] These figures are subject to a number of caveats—for example, overall denials at one level cannot be compared exactly with appeals filed at the next level, because many denials include instructions to resubmit the claim to the initial level of filing. Nonetheless, these figures do provide a rough measure of the rate of appeal, and they suggest that prisoners file appeals in response to most adverse decisions under the Program.

2) Federal Tort Claims Act Administrative Claims and Litigation Actions

The statistics compiled by the Bureau of Prisons provide a limited account of the administrative claims and litigation actions involving the Bureau's employees that have been filed under the Federal Tort Claims Act (FTCA) in recent years. The data presented in this paper focuses on four related sets of issues (1) filing rates per prisoner population and total filings over time, for FTCA administrative claims, (2) filing rates per prisoner population and total filings over time, for FTCA litigation claims, (3) total settlements and denials of FTCA administrative claims, and (4) the relationship between the administrative claims system and subsequent litigation actions under the FTCA. From the statistics compiled by the Bureau, we can learn how frequently federal prisoners rely on the FTCA to seek damages, how often these prisoners are granted some form of relief, and how many administrative claims that are denied end up in federal court as litigation actions. The data presented here provide a general view of the role that the FTCA plays in providing relief for injuries allegedly suffered by federal prisoners at the hands of federal employees.

(a) Filing Rates and Total Filings for FTCA Administrative Claims

The filing rate for federal prisoners bringing administrative claims under the FTCA has decreased significantly in recent years, while the total number of filings has remained relatively steady. Based on averages for the period from Fiscal Years 1992 through 1998, federal prisoners filed approximately 43

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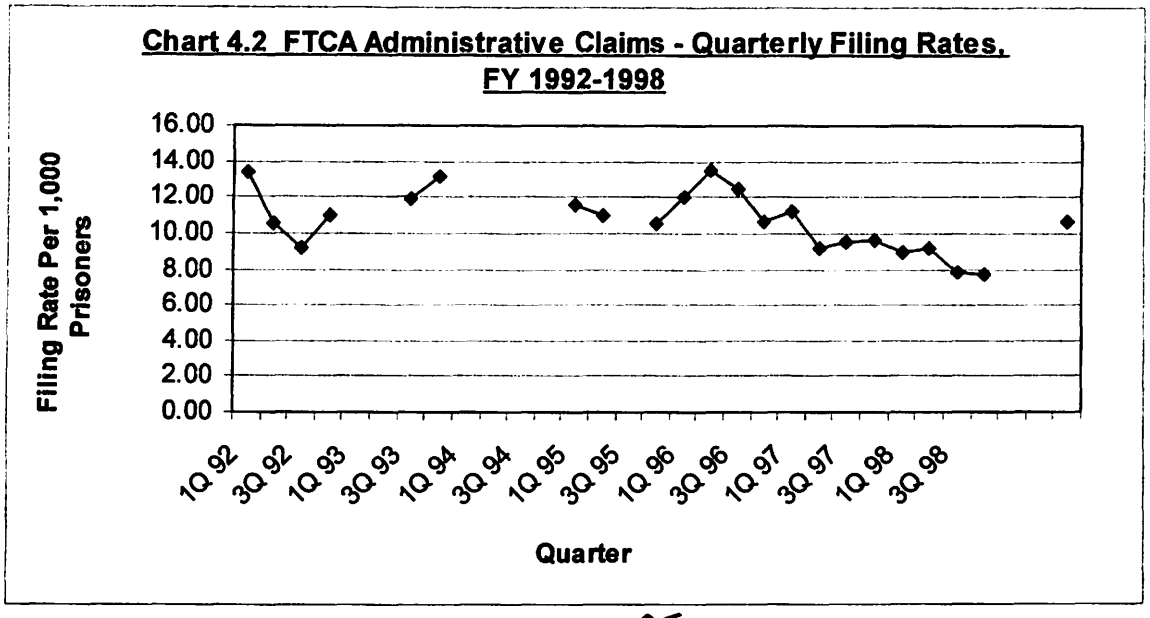
[240] Since challenges to Disciplinary Hearing Officer (DHO) decisions and filings involving sensitive issues are filed with the regional offices in the first instance, *see supra* notes 23-25 and accompanying text, it is difficult to differentiate between these initial filings and appeals at the regional office level. Excluding appeals of DHO decisions, there were 18,590 filings with the regional offices, a figure roughly comparable to the number of denials at the institutional level. *See infra* Data Appendix, Part II., Table 4.



FTCA administrative claims per 1,000 prisoners per ~~fiscal~~ year.[241] This suggests that, at most, only four percent of federal prisoner use the FTCA administrative process every year.[242] As Chart 4.2 (based on quarterly filing rates) and Table 4.4 (providing estimated annual filing rates) illustrate, the filing rate fluctuated a fair amount between Fiscal Ycars 1992 and 1998, but generally decreased.

Table 4.4. FTCA Administrative Claims – Estimated Filing Rates & Total Filings, FY 1993-1998

Fiscal Year	Filing Rate Per 1,000 Prisoners	Total Claims Filed
FY 1992	44	3,296
FY 1993	50	4,316
FY 1994		
FY 1995	44	4,311
FY 1996	49	5,016
FY 1997	40	4,305
FY 1998	34	3,952

[241] For the raw data presented in the text in this discussion, and in Chart 4.2 and Table 4.4, *see infra* Data Appendix, Part II., Tables 10 and 11.

[242] Again, it is impossible to estimate this figure accurately without knowing how many claims are submitted by repeat filers; these high-end estimates assume that each claim is filed by a different prisoner.

These general trends are confirmed by more recent, partial data from the six regional offices, which show that the total number of filings has remained steady, while the filing rate has continued to decline.[243] As was true under the Administrative Remedies Program, there is a moderate but noticeable short-term increase in the filing rate (and total number of filings) during Fiscal Year 1996.

While the total number of administrative claims filed has remained relatively steady in recent years, the decreasing filing rate has had a significant impact in restraining the growth of total filings. If the filing rate had remained around 45 to 50 claims per 1,000 prisoners during Fiscal Year 1998, the Bureau would have seen between 5,300 and 5,900 filings that year, compared to the actual figure of less than 4,000 claims filed.

The volume of complaints that are processed through the Bureau's administrative process under the FTCA suggests that this is another important component in the overall grievance system for prisoners seeking to challenge the conditions of their confinement. In recent years, federal prisoners consistently have filed between 4,000 and 5,000 FTCA administrative claims per fiscal year.[244] While federal prisoners file about four times as many claims annually under the Administrative Remedies Program, the total number of FTCA administrative claims remains significant and undoubtedly imposes significant administrative costs on the Bureau. As the data results presented below will make clear, these total numbers still far outweigh the total numbers of litigation actions filed by federal prisoners. Moreover, the FTCA administrative system is unique because it is offers the possibility of monetary relief, which is not available under the Administrative Remedies Program. This may be critical because approximately three-fourths of the administrative claims filed with the Bureau under the FTCA are for personal property damage.[245]

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[243] For Fiscal Years 1999 through the First Quarter 2002, data is available on the total number of FTCA administrative claims filed with the six regional offices; claims filed with the Central Office are not included. *See id.*, Table 12. These partial figures indicate that total FTCA administrative claim filings have remained around 4,000 per fiscal year, while the filing rate has declined further to around 30 claims per 1,000 prisoners per fiscal year. *See id.*

[244] *See id.*, Table 10 and 11.

[245] *See id.*, Table 10.

Although the recent decline in the filing rate for FTCA administrative claims could be related to legislative changes enacted under the PLRA, this explanation seems incomplete. The provisions of the PLRA directly affect only litigation actions brought in federal court by prisoners, not administrative claims. Nonetheless, filing an FTCA administrative claim is the first required step in a process that ultimately may lead a prisoner to bring an FTCA lawsuit in federal court. Prisoners could be discouraged from seeking relief through the FTCA administrative process in the wake of the PLRA, because they know that they will face stricter limitations if their administrative claims are denied and they wish to pursue litigation in federal court.

Yet this explanation seems incomplete. Why wouldn't prisoners instead conclude that they should try their best to win an FTCA administrative settlement, knowing that their chances of succeeding in an FTCA litigation suit are even lower? The PLRA explanation also is inconsistent with the fact that both the total number of filings and the filing rate increased significantly during Fiscal Year 1996, the first year that the PLRA became effective. Another explanation for the recent decline in the filing rate for FTCA administrative claims can be found in recent increases in the rate of denials for these claims, noted below. The increased rate of denials for administrative claims and the tighter restrictions on litigation actions may be working in tandem to discourage federal prisoners from seeking relief under the FTCA.

(b) Filing Rates and Total Filings for FTCA Litigation Actions

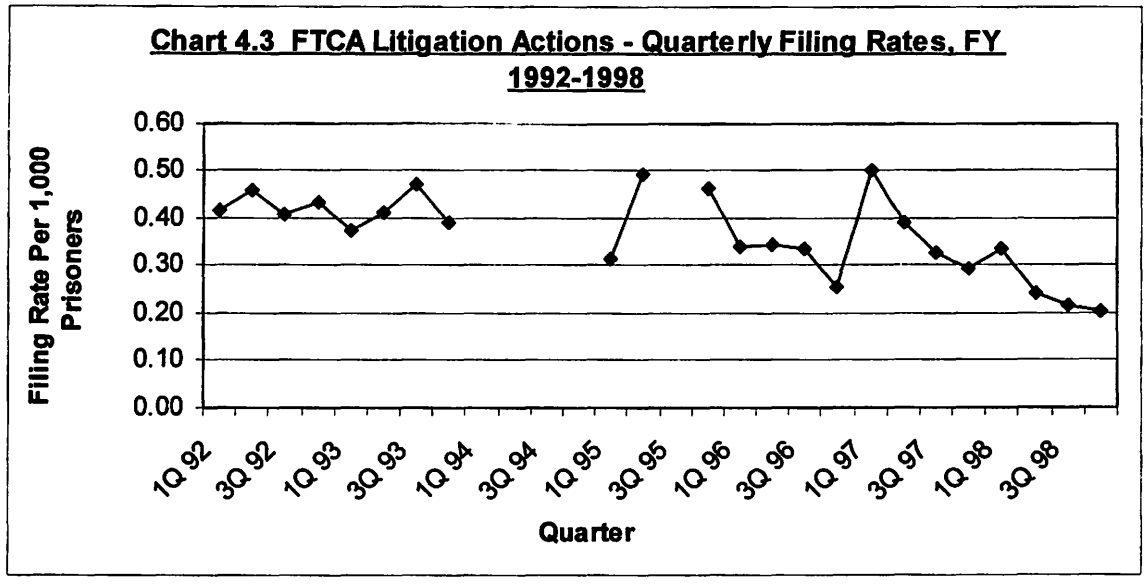
The filing rate for federal prisoners bringing FTCA litigation actions has declined in recent years, while the total number of filings has remained relatively steady, following a similar pattern as the figures for FTCA administrative claims. Based on averages for the period from Fiscal Years 1992 through 1998, federal prisoners filed approximately 1.5 FTCA litigation actions per 1,000 prisoners per fiscal year.[246] As Chart 4.3 (based on quarterly filing rates) and Table 4.5 (providing estimated annual filing rates) illustrate, the filing rate fluctuated a fair amount between Fiscal Years 1992 and 1998, but generally decreased. As a result the total number of filings has remained relatively steady in recent years, despite

[246] For the raw data presented in the text in this discussion, and in Chart 4.3 and Table 4.5, *see infra* Data Appendix, Part II., Tables 13 and 14.

significant increases in the federal prisoner population. If the filing rate for FTCA litigation claims had remained at 1.7 actions per 1,000 prisoners during 1998, then the Bureau would have seen approximately 200 new FTCA litigation actions that year, rather than the 117 actually filed.

Table 4.5. FTCA Administrative Claims – Estimated Filing Rates & Total Filings, FY 1993-1998

Fiscal Year	Filing Rate Per 1,000 Prisoners	Total Claims Filed
FY 1992	1.7	129
FY 1993	1.7	138
FY 1994		
FY 1995	1.7	167
FY 1996	1.3	131
FY 1997	1.5	164
FY 1998	1.0	117



The tiny volume of FTCA litigation actions filed by federal prisoners suggests that these lawsuits play a relatively minor role in the overall grievance system for challenging the conditions of their confinement. While federal prisoners file thousands of administrative claims every year under the Administrative Remedies Program or the FTCA administrative system, between the Fiscal Years 1992 and 1998 they filed an average of only 140 FTCA litigation actions annually. The Bureau of Prisons' perspective on the significance of these figures may be slightly different, because litigation is bound to be

more costly on a case-by-case basis than administrative adjustment. Nonetheless, the burden of defending against 140 litigation cases cannot compare to the costs of processing thousands of administrative claims.

The recent decline in the filing rate for FTCA litigation actions is exactly the result that would be expected in the wake of the legislative changes enacted under the PLRA. Federal prisoners now face additional costs if they pursue an FTCA litigation action in federal court, including the required payment of filing fees and more serious penalties for filing frivolous or non-meritorious lawsuits. We would expect to see the filing rate declining beginning in Fiscal Year 1996, and this is exactly what the Bureau of Prisons' statistics indicate. According to these figures, the filing rate for FTCA litigation actions by federal prisoners has declined by approximately 40 percent since the PLRA's enactment in 1996. These figures illustrate the fallacy of focusing solely on the total number of filings to assess time trends—the significant decline in the filing rate indicates that the modest decline in total filings is more significant than it appears.

(c) Settlements and Denials of FTCA Administrative Claims

While the Bureau of Prisons denies the vast majority of administrative claims that are filed under the FTCA, the claims that are settled result in a fair amount of monetary relief for successful claimants. Based on averages for the period of Fiscal Years 1992 through 1998, the Bureau settled only 15 percent of all FTCA administrative claims.[247] This a slightly lower success rate compared to claims filed under the Administrative Remedies Program, where the Bureau grants 24 percent of all claims filed. The year-to-year estimates in Table 4.6 indicate that the percentage of FTCA administrative claims that are settled has declined significantly in recent years, particularly in 1998, the last year for which complete data is available. As noted above, the declining success rate may be discouraging some claimants from filing, providing one explanation for the declining filing rate in recent years. As the figures in Table 4.6 indicate, the total amounts paid out by the Bureau to settle FTCA administrative claims are significant, averaging over $150,00 annually for the Fiscal Years 1992 through 1998. These settlements result in a

[247] For the raw data presented in the text in this discussion and in Table 4.6, *see id.*, Table 10.

reasonable amount of monetary relief for the successful claimants. On average the Bureau pays out almost $275 per settled claim, not an insubstantial amount of money for a prisoner in custody.

Table 4.6. FTCA Administrative Claims – Estimated Total Settlements, Percentage of Claims Settled, and Total Amounts Paid, FY 1992-1998

Fiscal Year	Total Settlements	Percentage of Claims Settled	Total Amounts Paid
FY 1992	503	22%	$139,826
FY 1993	676	31%	$92,336
FY 1994			
FY 1995	668	14%	$87,100
FY 1996	668	14%	$117,285
FY 1997	573	15%	$185,319
FY 1998	350	9%	$248,235

(d) The Relationship Between the FTCA Administrative System and Subsequent Litigation Actions

The statistics provided by the Bureau of Prisons suggest that relatively few FTCA administrative claims that are denied by the Bureau subsequently are appealed through the litigation process in federal court. Based on averages for the period of Fiscal Years 1992 through 1998, only twenty-eight percent of claimants whose administrative claims were denied by the Bureau decided to pursue their case by filing an FTCA litigation action in federal court.[248] This low rate of appeal contrasts sharply with the nearly one hundred percent rate of appeal observed under the Administrative Remedies Program. These figures suggest that the costs and difficulties of pursuing litigation in federal court—perhaps including the new restrictions under the PLRA—create a substantial barrier for federal prisoners.

3) Litigation Actions by Federal Prisoners

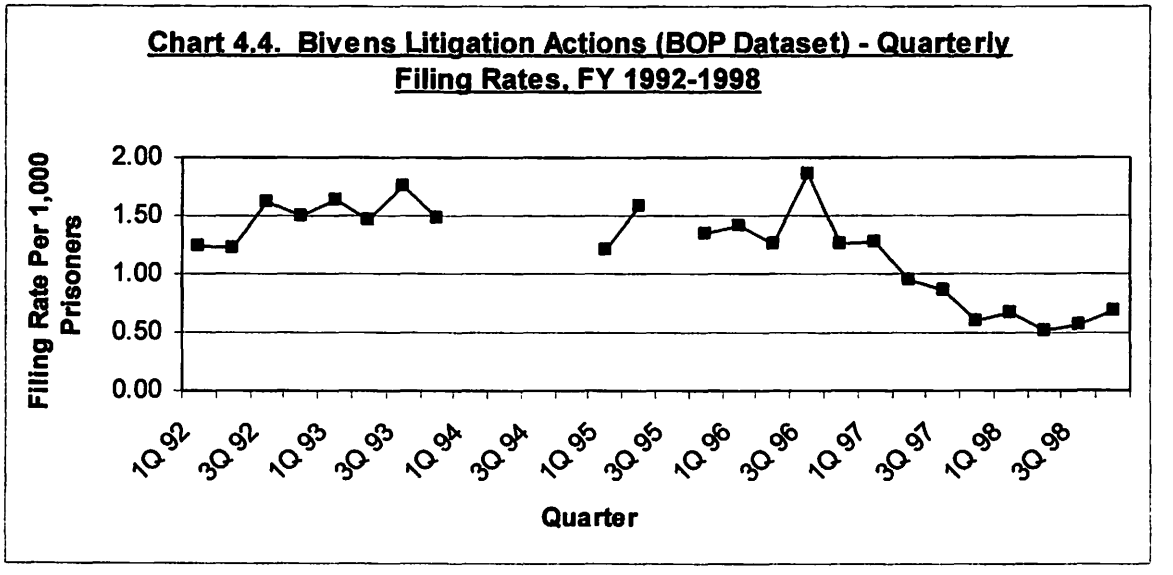
The Bureau of Prisons' (BOP) data and the Administrative Office (AO) data converge to provide a comprehensive description of litigation actions filed by federal prisoners in federal courts. The data presented in this paper focuses on six related sets of issues (1) filing rates per prisoner population and total filings over time, for all actions and specifically for civil rights actions, (2) a breakdown of all filings

[248] For the raw data presented in the text in this discussion, *see id.*, Tables 10, 11, and 13.

by the basis for the action, (3) the pro se status of the litigants in civil rights actions, (4) the disposition of civil rights actions, and the judgments entered, (5) the frequency of trials and trial outcomes for civil rights actions, and (6) awards and settlements in civil rights actions. While some references will be made to lawsuits under the FTCA, collateral attacks on sentences, and habeas corpus petitions, the focus of this section of the paper is on civil rights actions brought by federal prisoners under *Bivens*. The statistics compiled by the Bureau and by the Administrative Office provide valuable information about how frequently federal prisoners turn to litigation in federal courts, the types of suits that they file, the links between prisoners' pro se status and the outcomes of their suits, how often prisoner litigants are granted some form of relief, and the amount of monetary relief that they receive. The data presented here provide a general view of the significance of civil rights litigation actions in federal court for federal prisoners seeking to challenge the conditions of their confinement.

(a) Filing Rates and Total Filings for Civil Rights Actions

The filing rate for civil rights litigation actions by federal prisoners has declined significantly in recent years, beginning in the wake of the Prison Litigation Reform Act in 1996. Chart 4.4 (based on quarterly filing rates) and Table 4.7 (providing estimated annual filing rates) provide the results from the BOP dataset, which show a small spike in the filing rate and the total number of filings in Fiscal Year



1996, followed by marked declines in 1997 and 1998.[249] The impact of the declining filing rate in restraining the total number of filings has been significant. If the filing rate had remained around five to six *Bivens* actions per 1,000 prisoners during Fiscal Year 1998, the Bureau would have seen between 600 and 700 new *Bivens* actions that year, rather than the actual total of fewer than 300.

Table 4.7. *Bivens* Litigation Actions (BOP Dataset) – Estimated Filing Rates & Total Filings, FY 1992-1998

Fiscal Year	Filing Rate Per 1,000 Prisoners	Total Actions Filed
FY 1992	5.58	419
FY 1993	6.35	532
FY 1994		
FY 1995	4.71	539
FY 1996	5.80	597
FY 1997	3.68	399
FY 1998	2.43	286

The results from the AO dataset, presented in Table 4.8, also show a decline in the filing rate for civil rights actions by federal prisoners since 1996, but unlike the BOP data the AO figures indicate a slight increase in the total number of filings in recent years. The AO dataset also includes three more recent years, showing that the filing rate for civil rights actions by federal prisoners has continued to fall.

Table 4.8 Civil Rights Actions by Federal Prisoners (AO Dataset) – Filing Rates & Total Filings, FY 1992-2001

Fiscal Year	Filing Rate Per 1,000 Prisoners	Total Actions Filed
FY 1992	10.25	823
FY 1993	9.54	855
FY 1994	11.02	1,047
FY 1995	10.42	1,045
FY 1996	10.95	1,156
FY 1997	8.61	973
FY 1998	9.43	1,160
FY 1999	8.42	1,139
FY 2000	8.16	1,186
FY 2001	7.85	1,233

[249] For the raw data presented in the text in this discussion, and in Chart 4.4 and Tables 4.7 and 4.8, *see id.*, Tables 13 and 14.

The BOP and AO datasets provide slightly different views of the significance of civil rights actions for federal prisoners seeking to challenge the conditions of their confinement, but both sources suggest that the volume of cases is small but significant. The BOP statistics track an average of 459 *Bivens* actions annually between Fiscal Years 1992 and 1998, while the AO statistics show an average of 1,062 civil rights actions filed by federal prisoners annually for the Fiscal Years 1992 through 2001.[250] In either case, the number of civil rights litigation actions pale in comparison to the number of administrative claims that are submitted via the Administrative Remedies Program or under the FTCA. On the other hand, federal prisoners file approximately three to eight times more civil rights litigation actions than suits under the FTCA. Further, the burden of litigating hundreds of civil rights actions per year in federal court likely imposes considerable costs on the Bureau of Prisons, which may begin to approach the costs of the various administrative claims systems. At least as measured in terms of case volume, *Bivens* actions continue to play a significant role in the overall grievance system available to federal prisoners seeking to challenge the conditions of their confinement.

The observed declines in the filing rates for civil rights actions by federal prisoners suggests that the PLRA has succeeded, at least in part, by discouraging prisoners from resorting to litigation in the federal courts to challenge the conditions of their confinement. Both the BOP and the AO datasets show a short-term increase followed by a significant decline in the filing rate for civil rights actions by federal prisoners. Furthermore, it is possible that the more marked decline in the total number of filings and the filing rate in the BOP dataset mean that fewer prisoner complaints are surviving summary dismissal under the PLRA, thus widening the gap between the two datasets.[251] Other researchers have discussed the impact of the PLRA on the number of civil rights actions by federal prisoners. John Scalia has used an ARIMA model analysis to demonstrate that the PLRA has had a statistically significant impact on the

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[250] *See id.*, Table 18.

[251] Recall that the most significant difference between the two datasets is that the AO statistics include all complaints filed in federal court, while the BOP statistics include only those complaints that survive summary dismissal and are served on the defendants. *See supra* Part III.B.

number of civil rights actions filed by federal prisoners.[252] According to Scalia's calculations, federal prisoners filed 1,700 fewer civil rights actions between April 1996 and September 2000 as a result of the PLRA.[253] The figures from both the BOP and AO datasets support these findings.

(b) Litigation Actions by Type of Action

Although civil rights litigation actions filed by federal prisoners have declined since the PLRA, the possibility remains that prisoners are still filing litigation actions in federal court at the same rate, but under different labels. As discussed above in Part II.E., the considerable overlap among *Bivens* actions, FTCA suits, and habeas corpus petitions under 28 U.S.C. § 2241[254] creates the potential for prisoners to restyle their *Bivens* complaints in order to avoid the limitations imposed under the PLRA. If the decline in civil rights actions by federal prisoners has been coupled with an increase in other litigation actions, then the PLRA may not have achieved one of its key goals—reducing the overall caseload of prisoner suits in federal court. This possibility is supported by the data presented in Table 4.9, showing that the overall filing rate for all litigation actions filed in federal court by federal prisoners has not decreased since the passage of the PLRA, and that the total number of filings actually has increased as the total federal prisoner population has grown.[255] Recent declines in the filing rate for FTCA litigation actions, particularly since 1996, suggest that claims are not migrating from *Bivens* to FTCA litigation actions.[256]

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[252] *See* SCALIA (2002), *supra* note 3, at 6-7.

[253] *See id.*

[254] The potential for overlap between *Bivens* actions and collateral attacks under 28 U.S.C. § 2255 is not discussed here, but likely is minimal. As discussed in Part II.E.2, *supra,* the Supreme Court's decisions in *Heck v. Humphrey* and other cases has clarified and limited the potential overlap between *Bivens* actions and motions under § 2255.

[255] For the raw data presented in Table 4.9, *see infra* Data Appendix, Part II., Table 16. Of course, focusing on the entire federal prisoner docket is misleading, because there is little possibility that *Bivens* claims have migrated to motions to vacate sentence under § 2255 or other forms of collateral attack filed by federal prisoners. In addition, there are many other reasons why collateral attacks by federal prisoners may have increased since the passage of the PLRA because of, *inter alia,* the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995) and the application of AEDPA's new one-year statute of limitations to cases concluded prior to the law's passage as of April 1997. However, as the data presented in Table 4.10 below demonstrate, much of the recent growth in the federal prisoner docket has been in the category of habeas corpus petitions under § 2241, which may include challenges to a prisoner's conditions of confinement that previously would have filed as *Bivens* actions. Because the growth in this category of filings by federal prisoners far exceeds the recent decline in civil rights actions filed by federal prisoners, it is impossible to dismiss the possibility of the migration of *Bivens* actions into this category of habeas corpus claims without further analysis.

[256] *See supra* Part IV.A.2(b).

This leaves the possibility that prisoner claims have been migrating from *Bivens* actions to habeas corpus petitions under § 2241.

Table 4.9 Litigation Actions by Federal Prisoners (AO Dataset) – Filing Rates & Total Filings, FY 1992-2001

Fiscal Year	Filing Rate Per 1,000 Prisoners	Total Actions Filed
FY 1992	82.72	6,639
FY 1993	89.96	8,059
FY 1994	77.09	7,326
FY 1995	85.37	8,558
FY 1996	119.67	12,630
FY 1997	129.09	14,584
FY 1998	82.53	10,155
FY 1999	83.49	11,292
FY 2000	85.08	12,372
FY 2001	95.47	14,988

Although habeas corpus petitions by federal prisoners under § 2241 have increased significantly in the wake of the PLRA, it is impossible to determine if this is a result of claims migrating from *Bivens* actions. Table 4.10 shows a significant and sustained increase in habeas corpus petitions filed by federal prisoners under § 2241 since 1996.[257]

Table 4.10 Litigation Actions by Federal Prisoners (AO Dataset) – Filing Rates & Total Filings by Type of Suit, FY 1992-2001

Fiscal Year	§ 2241 Petitions		§ 2255 Motions		Civil Rights Actions	
	Rate Per 1,000 Prisoners	Total Filings	Rate Per 1,000 Prisoners	Total Filings	Rate Per 1,000 Prisoners	Total Filings
FY 1992	17.31	1,389	47.97	3,850	10.25	823
FY 1993	15.37	1,377	57.50	5,151	9.54	855
FY 1994	14.23	1,352	47.07	4,473	11.02	1,047
FY 1995	12.49	1,252	57.78	5,792	10.42	1,045
FY 1996	15.15	1,599	89.59	9,456	10.95	1,156
FY 1997	16.68	1,884	100.26	11,327	8.61	973
FY 1998	21.30	2,621	48.69	5,991	9.43	1,160
FY 1999	30.10	4,071	40.39	5,462	8.42	1,139
FY 2000	29.94	4,354	42.39	6,164	8.16	1,186
FY 2001	30.12	4,729	53.78	8,443	7.85	1,233

[257] For the raw data presented in Table 4.10, *see infra* Data Appendix, Part II., Table 18.

It is possible that the recent increase in § 2241 petitions represents a shift of claims that formerly would have been filed as *Bivens* actions, but there are several other equally plausible explanations. Many of the new restrictions enacted in 1996 under AEDPA apply to motions to vacate sentence under § 2255, but do not apply to habeas corpus petitions under § 2241,[258] creating incentives for federal prisoners to restyle their collateral attacks as petitions for habeas corpus relief. The data in Table 4.10 show that the filing rate for motions to vacate sentences also has declined since 1996, so it possible that at least part of the increase in the filing rate for petitions under § 2241 can be attributed to a migration of collateral attacks from § 2255 to § 2241. In addition, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) [259] limits review of deportation orders for certain resident aliens to a habeas corpus petition under § 2241,[260] another factor that may have increased filings in this category since 1996. While there is anecdotal evidence that at least some of the growth in § 2241 petitions has been due to migration of claims that previously would have filed as *Bivens* actions,[261] and this explanation seems plausible, it remains impossible to verify or quantify.[262]

A more general point to be made from the statistics in Table 4.10 is the overwhelming predominance of habeas corpus petitions and collateral attacks in the caseload of suits filed by federal prisoners. While federal prisoners filed an average of 1,062 civil rights actions annually during the period

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[258] *See supra* Part II.E.1.

[259] Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996) (codified at 8 U.S.C. §§ 1225a, 1229, 1229a to 1229c, 1231, 1324d, 1363a, 1365a, 1366 to 1375, 1623, 1624, 18 U.S.C. §§ 116, 611, 758).

[260] *See* I.N.S. v. St. Cyr, 533 U.S. 289, 314 (2001).

[261] *See* Pybas Interview, *supra* note 15. Michael Pybas, Senior Counsel in the Bureau of Prisons' Office of the General Counsel, reports that the Bureau has seen a shift in actions by federal prisoners challenging the conditions of their confinement from *Bivens* suits to § 2241 petitions since the passage of the PLRA. *See id.* Pybas theorizes that prisoners are trying to avoid the PLRA requirement that they pay the full $125 filing fee by filing habeas corpus petitions, which carry a filing fee of only $5. *See id.* However, counsel with the Bureau also have theorized that prisoners are filing petitions under § 2241 that should be brought as motions to vacate sentences under § 2255, in order to avoid the new requirements under AEDPA. *See id.* The official position of the Department of the Justice is that any action challenging a prisoner's conditions of confinement should be treated as *Bivens* claim, and thus subject to the requirements under the PLRA. *See id.* However, Pybas notes that staff within the Bureau may prefer for prisoners to file habeas corpus petitions rather than *Bivens* suits, because the latter carry the risk of personal liability, and tend to involve more formal, legally-complex proceedings. *See id.*

[262] *See* Schlanger, *supra* note 3, at 1637-41 (noting the probability that some civil rights actions by prisoners are being filed as § 2241 petitions, but concluding that this effect is impossible to quantify, given confounding factors such as the simultaneous passage of AEDPA and IIRIRA).

of Fiscal Years 1992 through 2001, they filed an average of 9,599 collateral attacks and habeas corpus petitions annually during the same period.[263] Moreover, the AO data shows that the majority of the actions in the second category are motions to vacate sentence (averaging 6,611 annually), not habeas corpus petitions under § 2241 that may be challenges to a prisoner's conditions of confinement (averaging 2,463 annually). The BOP statistics similarly show that collateral attacks and habeas corpus petitions constitute approximately three-fourths of all litigation actions filed by federal prisoners. These statistics suggest that much of the litigation "explosion" attributed to federal prisoners appears to stem from quasi-criminal suits challenging their sentences or convictions, rather than from civil actions challenging the conditions of their confinement.

(c) Pro Se Status of Litigants in Civil Rights Actions

The treatment of prisoner litigants in federal court, the disposition of their claims, and their ability to win judgments and /or monetary relief all may be colored by the fact that the majority of these suits involve pro se prisoner plaintiffs facing represented defendants. Beginning in the Fiscal Year 1997, the AO data for all civil cases filed in the federal courts includes statistics for each case on whether the plaintiff, the defendant, neither, or both appeared pro se.[264] The results presented in Table 4.11 confirm that over 90 percent of civil rights actions filed by federal prisoners in federal court involve pro se plaintiffs facing off against represented defendants.[265]

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[263] The category of collateral attacks and habeas corpus petitions includes motions to vacate sentence under § 2255, habeas corpus petitions under § 2241, habeas corpus petitions by death row inmates, and mandamus and other prisoner actions. For additional information on these categories, *see infra* Data Appendix, Part I.B.

[264] Even this data is limited because the pro se status variable was not recorded on a consistent basis during Fiscal Years 1997 or 1998. Examining cases filed by federal prisoners during these years, the pro se status variable is missing in 78 percent of civil rights actions filed during Fiscal Year 1997 and in 59 percent of such cases filed during Fiscal Year 1998. *See id.*, Table 21. The percentage results presented in Table 4.11 exclude cases for which the variable is coded as missing.

[265] For the raw data presented in the text in this discussion and in Table 4.11, *see infra* Data Appendix, Part II., Tables 21-25.

Table 4.11 Civil Rights Actions by Federal Prisoners (AO Dataset) – Pro Se Status of the Litigants, FY 1997-2001

Fiscal Year	Neither Party Pro Se	Pro Se Plaintiffs, No Pro Se Defendants	Pro Se Defendants, No Pro Se Plaintiffs	Both Parties Pro Se
FY 1997	9.91%	89.19%	0.90%	0.00%
FY 1998	7.64%	91.72%	0.42%	0.21%
FY 1999	5.56%	92.14%	1.24%	1.06%
FY 2000	4.97%	94.27%	0.34%	0.42%
FY 2001	4.38%	94.97%	0.24%	0.41%
Total	5.39%	93.47%	0.58%	0.56%

Statistics on the outcomes in civil rights actions filed by federal prisoners that were terminated since 1997 provide some empirical support for the intuitive notion that represented plaintiffs are likely to fare better than pro se plaintiffs.[266] Judgment was entered for the plaintiff in only two percent of those suits in which the plaintiff only was appearing pro se, compared to 16 percent of cases in which both parties were represented by counsel. When pro se plaintiffs faced represented defendants, 67 percent of the suits were dismissed before trial, compared to a pretrial dismissal rate of 51 percent in cases in which both parties were represented. Although settlements or trials are not common in any of these suits, a disposition ending with a settlement or trial was more likely in cases in which both parties were represented by counsel compared to those cases in which only the plaintiff was pro se, and represented plaintiffs were more likely to win in trials than unrepresented plaintiffs.[267]

(d) Dispositions, Trials, and Judgments in Civil Rights Actions

Federal prisoners filing civil rights actions in federal court have a remarkably low success rate. Examining civil rights actions filed by federal prisoners that were terminated between Fiscal Years 1992

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[266] Because the number of cases labeled as "pro se defendants, no pro se plaintiffs" or "both parties pro se" are too small to provide a good sample size, in this discussion I have focused only on cases whether neither party was pro se or where plaintiffs only were pro se.

[267] Trials occurred in 1.65% of cases in which both parties were represented, compared to 0.31% of cases in which only the plaintiff was appearing pro se. *See id,* Table 25. Settlements occurred in 6.17% of cases in which both parties were represented, compared to 1.83% of cases in which only the plaintiff was appearing pro se. *See id.*, Table 22. Plaintiffs won in 25% of trials in which both parties were represented, compared to 15% of trials in which the plaintiff only appeared pro se. *See id.*, Table 26. For similar results for all prisoner civil rights actions terminated in fiscal year 2000, *see* Schlanger, *supra* note 3, at 1609-11.

and 2001, the vast majority of these cases (85 percent) were dismissed prior to trial in favor of the defendant.[268] Plaintiffs voluntarily dismissed 4.7 percent of the cases prior to trial, 2.6 percent were settled, 0.8 percent resulted in a pretrial victory for the plaintiffs, and another 0.6 percent proceeded to trial. Although only a handful of civil rights actions filed by federal prisoners proceeded to trial, plaintiffs won in 13 percent of these cases.[269] By contrast, plaintiffs won a judgment in only 0.7 percent of cases in which a final judgment was entered. Even under the most liberal assumptions, plaintiffs achieved a "success" in only 8.2 percent of all civil rights actions filed by federal prisoners that were terminated between Fiscal Years 1992 and 2001.[270] If cases that were voluntarily dismissed prior to trial are assumed to be victories for the defendants, the plaintiff success rate falls to only 3.5 percent of all cases. Monetary relief for plaintiffs is even less common. For civil rights actions by federal prisoners that were terminated between Fiscal Years 1992 and 2001, 0.3 percent resulted in a monetary award and 0.6 resulted in an award of costs and/or attorneys' fees.

Although the BOP only reports figures for all litigation actions by federal prisoners—including collateral attacks, habeas corpus petitions, and FTCA suits, as well as *Bivens* actions—their data generally confirm low success rates for prisoner plaintiffs. For all litigation actions filed by federal prisoners that were closed between Fiscal Year 1992 and Fiscal Year 1998, the Bureau reported settlements in 3 percent of cases, and monetary awards in 0.4 percent of cases. These figures should be treated with some caution, however, because they include only those cases resulting in a *monetary* settlement or award for the plaintiff.[271] Many litigation actions by federal prisoners, particularly collateral attacks and habeas corpus

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[268] For the raw data presented in the text in this discussion and in Table 4.12, *see infra* Data Appendix, Part II., Tables 27A-31.

[269] However, these figures should be treated with caution because the sample size is so small. There were only 15 reported trials in civil rights actions filed by federal prisoners that were terminated between Fiscal Years 1992 and 2001, and plaintiffs won in two of these cases. *See id,* Tables 28-29.

[270] This figure includes all settlements and voluntary dismissals prior to trial as plaintiff victories, in addition to cases that resulted in pretrial victories for the plaintiff, and trial and directed verdicts for the plaintiff. It is impossible to know how many of the settlements and voluntary dismissals represent true "successes" for the plaintiffs. While all settlements will result in some relief for the plaintiff, the terms of some settlements may favor the defendant. A similar point can be made about voluntary dismissals—they may include out-of-court settlements, as well as cases that represent plaintiff failures. *See* Schlanger, *supra* note 3 , at 1592-93 and n. 104.

[271] For additional information on the Bureau's recording of settlements and awards, *see* Data Appendix, Part I.A.

petitions, may result in a non-monetary success for the plaintiff, and these cases are not included in the BOP figures.

A final question is whether the PLRA has had any noticeable impact on case dispositions or plaintiffs' success rates for civil rights actions filed by federal prisoners. If the PLRA has succeeded in reducing the number of frivolous civil rights actions by federal prisoners while preserving the docket for meritorious claims, we might expect to see some small impacts on case outcomes. The AO data presented in Table 4.12 show the outcomes for civil right actions filed by federal prisoners that were terminated between Fiscal Year 1992 and 2001, grouped by fiscal *filing* year. The data show no apparent improvements in case outcomes for case filed after Fiscal Year 1996 compared to those filed before then.[272] Indeed, the overall plaintiff success rate has fallen for cases filed since 1996.

Table 4.12 Civil Rights Actions by Federal Prisoners (AO Dataset) – Outcomes by Fiscal Year, FY 1992-2001

	Pretrial dismissal for defendant	Pretrial victory for plaintiff	Settlement	Voluntary Dismissal	Plaintiff Success Rate	Plaintiff Success Rate (with Voluntary Dismissals)
FY 1992	85.92%	0.00%	3.88%	3.88%	3.88%	7.77%
FY 1993	85.32%	0.00%	3.67%	4.59%	3.67%	8.26%
FY 1994	84.19%	0.00%	4.70%	5.56%	5.13%	10.68%
FY 1995	88.17%	0.00%	1.15%	5.73%	1.15%	6.87%
FY 1996	89.93%	0.69%	1.39%	3.47%	2.08%	5.56%
FY 1997	82.45%	0.00%	3.27%	7.35%	3.27%	10.61%
FY 1998	84.93%	0.37%	1.84%	3.31%	2.21%	5.51%
FY 1999	86.31%	0.00%	1.24%	4.15%	1.24%	5.39%
FY 2000	85.17%	0.00%	1.14%	4.56%	1.14%	5.70%
FY 2001	80.00%	0.00%	3.33%	1.67%	3.33%	5.00%

Likewise, the BOP data do not show any improvements since 1996 in the overall success rates for federal prisoners filing civil rights actions.[273]

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[272] The data for Fiscal Year 2001 are slightly off but this is probably because only a small percentage of prisoner suits filed in Fiscal Year 2001 had been terminated by the end of Fiscal Year 2001, when this dataset was ended.

[273] *See id.*, Part II., Table 13. For a similar analysis showing declining success rates for prisoner civil rights actions filed since 1996, *see* Schlanger, *supra* note 3, at 1658-64.

(e) Awards and Settlements in Civil Rights Actions

The figures recorded by the Bureau indicate that while few litigation actions result in a monetary award or settlement, the level of recovery in these few cases can be substantial. Based on averages for the Fiscal Years 1992 to 1998, the Bureau pays out $1,850,409 in settlements and $294,786 in court-ordered awards every fiscal year for litigation actions filed by federal prisoners. On average, federal prisoners win $58,784 per settlement and $62,779 per award—although the figures obviously vary a great deal from case to case. The award and settlement figures reported by the Bureau should be fairly accurate—if anything, they miss some cases that result in monetary relief. The Bureau's figures do not disaggregate these settlements and awards by case type, but it is likely that the majority of these monetary payouts are in *Bivens* suits.[274]

Recalling that the AO data on monetary awards are notoriously inaccurate, the one figure from the AO statistics that may be a close estimate is the median level of awards. The AO reports that the median award for civil rights actions by federal prisoners that were terminated between Fiscal Years 1992 and 2001 is $1,000. This suggests that the majority of awards in civil rights actions by federal prisoners are $1,499 or less.[275]

B. Comparisons of Civil Rights Actions in Federal Court by State and Federal Prisoners

The focus of this paper on administrative and legal claims initiated by federal prisoners begs the question of whether state prisoners have similar experiences when they seek to challenge the conditions of their confinement, or whether the federal prison system is somehow unique. Although a comprehensive comparison of the administrative and legal remedies available to state prisoners is beyond the scope of this paper, the AO data provides a simple means for comparing civil rights actions in federal court by state and federal prisoners.

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[274] Very few FTCA claims are filed, and relief in habeas corpus actions generally should be limited to non-monetary relief.

[275] Because $1,000 is the smallest amount that can be recorded in the AO data system, and because the clerks must round to the nearest $1,000, *see supra* Part III.C.2(c), an award of $1,000 should be recorded for any case with a monetary award of between $1 and $1,499.

At the outset it should be noted that this comparison necessarily is somewhat crude, because litigations actions in federal court serve different purposes for state and federal prisoners. State prisoners always have the option of pursuing civil rights actions or other civil relief in the state courts, while federal prisoners have no other choice of a judicial forum for pursuing their claims. Nonetheless, because state prisoners are not required to exhaust state judicial remedies before filing a civil rights action in federal court,[276] they have the same ability (and presumably similar incentives) as federal prisoners to bring such suits in federal court. The discussion below touches on the same basic research questions as the discussion above describing litigation actions by federal prisoners, and demonstrates that while civil rights litigation in federal court by both sets of prisoners is fairly similar, there are several notable differences.

1) Total Filings and Filing Rates for Civil Rights Actions

State prisoners file civil rights actions in federal court at a higher rate than federal prisoners, but the filing rate for state prisoners has fallen significantly since the implementation of the PLRA. Between Fiscal Years 1992 and 2001, state prisoners filed an average of 27 civil rights actions per 1,000 prisoners per year in federal court, compared to 9 civil rights actions per 1,000 prisoners annually for federal prisoners.[277] However, this gap in the filing rates has narrowed in recent years, following the passage of the PLRA. The recent decreases in the filing rates for civil rights actions is more pronounced for state prisoners (falling by 51percent between Fiscal Years 1996 and 2001) than for federal prisoners (falling by 28 percent during the same period), suggesting that the PLRA may have had a greater impact of state prisoners.

Because of the significantly higher prisoner population in state facilities compared to federal facilities (as well as the higher filing rate for state prisoners), over 95 percent of prisoner civil rights actions in federal

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[276] *See Monroe v. Pape*, 365 U.S. at 183 (noting that civil rights actions against state officials under § 1983 are a supplementary remedy to any state judicial remedies that are available, and that state judicial remedies need not be exhausted prior to bringing a § 1983 action in federal court). However, both state and federal prisoners are subject to the statutory requirements of administrative exhaustion, revised under the PLRA. *See* 42 U.S.C. § 1997e(a).

[277] For the raw data presented in the text in this discussion and in Table 4.13, *see infra* Data Appendix, Part II., Tables 16 and 17.

court are filed by state prisoners. One result is that the recent decline in the filing rate for state prisoners has had a profound impact on the overall federal docket of prisoner civil rights actions, causing a 42 percent decrease in the total number of new prisoner civil rights actions between Fiscal Years 1996 and 2001.[278]

Table 4.13 Civil Rights Actions by Federal & State Prisoners (AO Dataset) – Filing Rates, FY 1992-2001

Fiscal Year	Filing Rate Per 1,000 Prisoners for Federal Prisoners	Filing Rate Per 1,000 Prisoners for State Prisoners
FY 1992	10.25	34.54
FY 1993	9.54	35.04
FY 1994	11.02	37.00
FY 1995	10.42	37.01
FY 1996	10.95	34.44
FY 1997	8.61	22.31
FY 1998	9.43	19.71
FY 1999	8.42	18.37
FY 2000	8.16	17.99
FY 2001	7.85	16.79

There are many possible explanations for the higher filing rate of civil rights actions by state prisoners. The AO data presented below reveal at least one possibility—state prisoners enjoy a higher success rate in these suits than federal prisoners.

2) Pro Se Status of Litigants in Civil Rights Actions

State prisoners are slightly less likely to be represented by counsel in civil rights action filed in federal court than federal prisoners, but the differences are minimal. For civil rights actions filed between Fiscal Years 1997 and 2001 for which pro se status information is available, state prisoners were represented in 3.4 percent of cases (compared to 5.4 percent of cases for federal prisoners) and pro so

[278] The decline in the absolute number of cases is entirely attributable to decreased filings by state prisoners. While total filings by state prisoners fell 43% between Fiscal Years 1996 and 2001, total filings by federal prisoners actually rose by 7% during the same period, *see id.*, Tables 16 and 17, due to a continuing rising in the federal prisoner population and a less dramatic decline in the filing rate for federal prisoners.

state prisoners faced represented defendants in 95 percent of cases (compared to 93 percent of cases for federal prisoners).[279]

3) Dispositions, Trials, and Judgments in Civil Rights Actions

Overall, state prisoners filing civil rights actions in federal court have been more successful in recent years than federal prisoners. State prisoners were less likely to have their suits dismissed prior to trial in favor of the defendant.[280] On the other hand, state prisoners were more likely to settle or voluntarily dismiss their claims, and were more likely to proceed to trial. The result is that state prisoners enjoyed a higher success rate in civil rights actions than federal prisoners, winning successes of some kind in 12.8 percent of dispositions if voluntary dismissals are included (compared to 8.2 percent for federal prisoners), or in 6.5 percent of dispositions if voluntary dismissals are not counted (compared to 3.5 percent for federal prisoners).

Table 4.14 Civil Rights Actions by Federal & State Prisoners (AO Dataset) – Outcomes, FY 1992-2001

	Civil Rights Actions by Federal Prisoners (% of dispositions)	Civil Rights Actions by State Prisoners (% of dispositions)
Pretrial dismissal in favor of defendant	84%	79%
Pretrial victory for plaintiff	0.8%	0.6%
Settlement	2.6%	5.5%
Voluntary dismissal	4.7%	6.3%
Proceeding to trial	0.6%	2.8%
Trial victories for plaintiff	13%	11%
Success rate for plaintiffs – with voluntary dismissals	8.2%	12.8%
Success rate for plaintiffs – without voluntary dismissals	3.5%	6.5%

[279] *See id.*, Table 33.

[280] For the raw data presented in the text in this discussion and in Table 4.14, *see id.*, Tables 27A, 28-29, 34, and 37-38.

4) Awards in Civil Rights Actions

State prisoners also were slightly more likely than federal prisoners to recover monetary relief in civil rights actions in federal court, and may win slightly higher monetary awards. For civil rights actions that were terminated in Fiscal Years 1992 through 2001, state prisoners received monetary awards in 0.4 percent of all dispositions (compared to 0.3 percent of all dispositions for federal prisoners), and costs and/or attorneys' fees were awarded in 1.5 percent of all dispositions for state prisoners (compared to 0.6 percent of all dispositions for federal prisoners).[281] The AO reports that the median award for civil rights actions by state prisoners that were terminated between Fiscal Years 1992 and 2001 is $3,500, compared to only $1,000 for similar actions by federal prisoners. Although the AO data on the median monetary award appears to be more accurate than other measures, this comparison should be treated with caution, especially given the relatively small gap in the two figures.

5) Conclusions

The AO data show that the overall profile for civil rights actions filed by state prisoners in federal court is fairly similar to comparable actions filed by federal prisoners, with several important caveats. The filing rates for civil rights actions in federal court have fallen for both groups of prisoners in recent years, perhaps in response to new restrictions under the PLRA. The vast majority of both state and federal prisoners appear pro se in these actions, and both groups enjoy successes in a remarkably lower percentage of case dispositions. Behind these general similarities lie several significant differences. State prisoners file civil rights actions in federal court at two to three times the rate of federal prisoners, although the gap has narrowed in recent years. Perhaps because of their higher exposure, state prisoners appear to have been affected more than federal prisoners by the PLRA, with their filing rate dropping by 51 percent between Fiscal Years 1996 and 2001 (compared to a 28 percent decline for federal prisoners during the same period). However, state prisoners continue to enjoy higher success rates than federal

[281] For the raw data presented in the text in this discussion, *see id.*, Tables 32 and 39.

prisoners in civil right actions in federal court, including more pretrial victories and settlements and (possibly) higher monetary awards.

C. Analysis and Conclusions

The Administrative Remedies Program, administrative claims and litigation actions under the FTCA, and civil rights actions under *Bivens* each comprise one part of an overall grievance system available to federal prisoners seeking to challenge the conditions of their confinement. With the data results presented above I have attempted to meet the objectives put forward in the Introduction—to describe these three remedies, to understand their relative significance, and to touch on the effects of the PLRA. The discussion below reviews some of the lessons learned about each of the three major types of remedies for federal prisoners seeking to challenge the conditions of their confinement, makes some general observations about the strengths and weaknesses of each, and discusses some of the possible effects of the PLRA on legal claims initiated by federal prisoners.

1) Conclusions About Legal Remedies Available to Federal Prisoners

(a) The Administrative Remedies Program

The Bureau of Prisons' Administrative Remedies Program is designed to provide an informal, fast, and readily available means for federal prisoners to vent their complaints and, where appropriate, to obtain corrective action. Prisoners can submit claims related to any aspect of their confinement, and the actual data on submissions show that prisoners use the Program to raise a range of issues that are part and parcel of daily prison life—disciplinary decisions, staff complaints, medical treatment, and so forth. The Program is less formal and more collaborative than other legal regimes, requiring prisoners to resort to informal resolution and complaints at the institutional level before seeking outside intervention, and limiting recovery to corrective action. Short deadlines for both prisoners and responding administrators mean that all claims should be finally resolved within a period of months. In general, the governing rules are flexible and protective of prisoners—exceptions are built in to every procedural rule, and sensitive and emergency issues receive special attention. The Program is cost-free for prisoners, and the rules and filing requirements are relatively straightforward, providing several advantages over other legal remedies.

The data on filing rates under the Program can be viewed in a positive or negative light, depending on the appropriate baseline for judging usage and accessibility. The relatively high filing rates—approximately 250 administrative remedies filed per 1,000 prisoners per year—and the apparently high rate of appeals within the Program suggest that prisoners feel comfortable using this system. The significance of this Program, for both prisoners and administrators, is demonstrated by the fact that federal prisoners currently submit upwards of 30,000 administrative remedies annually. While these figures may seem impressive to some, to others they may seem too low. If the Program truly is accessible and cost-free, it is surprising that at most only twenty percent of the federal prisoner population uses the Program in any given year.

The data on the granting and denial of claims also raise questions about whether the Administrative Remedies Program is living up to its promises. Although the overall success rate for prisoners is higher under this Program than under any of the other legal regimes, the Bureau still denies three-fourths of submitted claims. More troubling is the fact that many claims are denied for what appear to be procedural reasons—e.g, submission to the wrong level, timeliness, incorrect attachments, or failure to attempt informal resolution. While some denied claims may be corrected and re-submitted, these figures nonetheless suggest that most of the prisoners' complaints are never fully reviewed or investigated. The Bureau may need to do a better job educating federal prisoners about how to use the Administrative Remedies Program, to ensure that complaints are submitted properly and can be considered on the merits.

(b) The Federal Tort Claims Act

Claims under the FTCA occupy a kind of halfway point between the Administrative Remedies Program and *Bivens* suits, providing a limited but meaningful remedy to those prisoners who can overcome the statutory limits on liability. Like the Administrative Remedies Program, claims under the FTCA begin with an administrative claims system that appears designed to provide relatively fast and simple relief. The filing requirements for an FTCA administrative claim are even more minimal than those under the Administrative Remedies Program, and the Bureau must respond to claims within six

months. On the other hand, there are no provisions for administrative appeal—the only option for a prisoner whose administrative claim is denied is to file a litigation action in federal court, subject to the limitations of the PLRA. Experience suggests that the discretionary function exception and ordinary tort doctrines are formidable barriers to recovery by federal prisoners, at least once claims reach the litigation stage.

Despite these limits on recovery, the FTCA administrative process provides a small number of federal prisoners with a unique and meaningful remedy. The FTCA is the only mechanism for a federal prisoner to seek monetary damages through an administrative process. Data on submissions show that approximately three-fourths of prisoners' administrative claims are for personal property damage, claims that could not be addressed through the Administrative Remedies Program. The average amount of settlement of almost $275 for successful administrative claims is small but not insignificant from the perspective of a federal prisoner in custody.

On the other hand, the data demonstrate that only a small percentage of federal prisoners bring claims under the FTCA, and even fewer are successful. While a significant number of FTCA administrative claims are filed by federal prisoners—between 4,000 and 5,000 annually—the filing rates are low, with no more than four percent of prisoners using the system ever year. The filing rates for litigation actions under the FTCA are even more sobering, amounting to approximately one litigation action for every 1,000 prisoners per year. Only 15 percent of administrative claims are granted, a lower success rate than under the Administrative Remedies Program, and only 28 percent of prisoners whose claims are denied seek to appeal this decision through a litigation action in federal court. This low appeal rate contrasts sharply with the high rate of appeal under the Administrative Remedies Program, and suggests that federal prisoners face significant barriers to filing suit in federal court, particularly under the FTCA. These figures demonstrate that the FTCA provides only a narrow remedy for federal prisoners, albeit one that is unique and meaningful for the few whose claims are successful.

(c) Civil Rights Actions Pursuant to Bivens

Bivens actions in federal court represent the most challenging, legally complex, expensive, and ultimately unsuccessful means for a federal prisoner to challenge the conditions of his confinement. The substantive requirements for establishing a constitutional violation can be daunting, and most defendants will be protected by qualified immunity, which itself involves complex and technical legal doctrines. The majority of federal prisoners will be forced to bring a *Bivens* suit pro se, and will be required under the PLRA to pay a sizable filing fee of $150. Other provisions of the PLRA encourage summary of dismissal of prisoners' *Bivens* suits and sanction prisoners whose claims are dismissed, particularly frequent filers. About 85 percent of federal prisoners' *Bivens* suits are dismissed prior to trial, and plaintiffs achieve partial successes in only three to eight percent of all suits. Trial victories or court judgments are exceedingly rare—the best a plaintiff can hope for is a settlement.

Given all of these barriers to recovery, it may be surprising that federal prisoners continue to file as many *Bivens* actions as they do. The AO data show that federal prisoners file about 1,000 *Bivens* actions per year in federal court. While these figures are high enough to be of concern for prison administrators, they translate into fewer than one percent of federal prisoners filing suit in any given year. The real significance of *Bivens* suits from the perspective of prison administrators (and perhaps prisoners themselves) may be that a small number of suits can result in a fairly large amount of monetary liability. In recent years the Bureau has paid out upwards of $2 million annually in settlements and awards for litigation actions, much of which probably can be attributed to *Bivens* suits. As long as *Bivens* suits hold out the promise of significant monetary recovery for litigants, and continue to impose significant administrative and liability costs on the Bureau, they will remain a mainstay for federal prisoners seeking to challenge the conditions of their confinement.

2) Comparisons Among the Administrative Remedies Program, the FTCA, and Bivens

The data presented in this paper demonstrate that administrative claims play a dominant role in the overall grievance system available to federal prisoners seeking to challenge the conditions of their confinement. Based on figures for the past ten years, federal prisoners file approximately 35,000

administrative claims per year under the Administrative Remedies Program and the FTCA, compared to only 1,000 litigation actions annually under the FTCA and *Bivens*. Viewed from this macro level, it appears that federal authorities have created a system of legal remedies that encourages administrative adjustment over litigation, at least as to civil claims concerning a prisoner's conditions of confinement. These figures also suggest that assertions about the litigiousness of federal prisoners are far more complex than they might appear.

Although the filing of administrative claims typically is a prerequisite for federal prisoners who want to pursue litigation in federal court, this fact should not obscure the strategic reasons that federal prisoners might prefer administrative adjustment of their claims. Administrative claims are essentially cost-free for prisoners, which cannot be said of civil litigation claims in federal court in the wake of the PLRA. Prisoners also may feel more comfortable pursing their claims under administrative systems that are informal and governed by relatively straightforward rules, especially since the majority of prisoners are proceeding without the assistance of counsel. Both the Administrative Remedies Program and the FTCA administrative system guarantee fast resolution of all claims, and together they cover a broad range of issues related to a prisoner's confinement and allow for both monetary and non-monetary relief.

Perhaps most important, the overall success rate is significantly higher when federal prisoners resort to administrative claims rather than litigation actions. Federal prisoners achieve at least partial successes in about 25 percent of administrative remedies, 15 percent of FTCA administrative claims, and less than 10 percent of all litigation actions. Viewed from this perspective, an administrative claim may be the best means available to a federal prisoner for securing relief.

3) The Effects of the PLRA on Legal Activity by Federal Prisoners

The data presented in this paper suggest that the PLRA has had mixed effects on legal activity by federal prisoners. Filing rates under the Administrative Remedies Program have remained steady since 1993, with the exception of a moderate but short-term increase in filings in Fiscal Year 1996. Filing rates for administrative claims under the FTCA also showed a moderated increase in Fiscal Year 1996, but appear to have fallen fairly significantly since then. The filing rates for litigation actions under the FTCA

and for *Bivens* actions both have fallen substantially since Fiscal Year 1996. In addition, the widening gap between the filing rates recorded by the BOP and the AO suggest that an increasing number of complaints are being dismissed summarily, prior to service on the Bureau or its officials. However, a sharp increase in the filing rate for habeas corpus petitions under 28 U.S.C. § 2241 raises the possibility that civil rights claims are being restyled as habeas petitions in order to avoid the restrictions under the PLRA. While this migration effect is impossible to quantify, it does raises questions about the effectiveness of the PLRA in decreasing the overall prisoner litigation docket.

Viewed solely in terms of its impact on litigation claims, it is difficult to say whether the PLRA has been effective, at least as applied to claims by federal prisoners. The law certainly has had an impact on the filing rate for civil rights actions by federal prisoners, and apparently for litigation actions under the FTCA by federal prisoners as well. However, even this achievement fades when compared to recent decreases in the filing rates for civil rights actions by state prisoners, where the impact has been nearly twice as strong. Furthermore, the effect on the overall litigation docket by federal prisoners is less clear and difficult to untangle, because of the complicated overlaps with habeas corpus petitions.

Viewed in terms of its impact on overall legal activity by federal prisoners, the effects of the PLRA appear more substantial. Filing rates under the Administrative Remedies Program remain strong, but filing rates in all other areas have fallen. To fully appreciate the impact of these recent declines in the filing rates, it is necessary to consider what the picture would have been if filing rates had remained at their pre-1996 levels. During Fiscal Year 1998, federal prison administrators would have seen approximately 2,000 additional administrative claims under the FTCA, 80 more litigation actions under the FTCA, and 400 more *Bivens* suits. Whether these change are attributed to the PLRA, AEDPA, or some other complex of factors, the relief for the Federal Bureau of Prisons has been substantial.

V. CONCLUSION

Much of the debate about legal claims initiated by prisoners has focused on the explosive growth of litigation actions filed by state and federal prisoners in federal court. The Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act are but two examples of recent response to this perceived crisis. Whatever the merits of these legislative reforms, the data results presented in this paper demonstrate that litigation actions are only one component in a complex and multi-layered system of legal remedies that are available to federal prisoners seeking to challenge the conditions of their confinement. This paper has explored the legal framework governing the components of this system and their actual operation within the Federal Bureau of Prisons, drawing on previously unexplored data sources that have been overlooked by previous studies. The results provide a more complete (and more complex) picture of the overall grievance system available to federal prisoners seeking to challenge the conditions of their confinement.

DATA APPENDIX

I. DESCRIPTION OF THE DATA SOURCES DA-2

A. The Federal Bureau of Prisons Dataset DA-2

1) Constructing the Dataset **..... DA-3**

2) Additional Notes on Litigation Actions **..... DA-3**

B. The Administrative Office of the United States Courts Dataset DA-3

C. Prisoner Population Figures DA-6

II. RAW DATA DA-8

Index to Tables of Raw Data DA-8

Raw Data DA-10

I. DESCRIPTION OF THE DATA SOURCES

A. The Federal Bureau of Prisons Dataset

1) Constructing the Dataset

The Bureau of Prisons dataset was constructed from raw data contained in documents produced by the Bureau in response to a request submitted by Margo Schlanger, Assistant Professor of Law at Harvard Law School, pursuant to the Freedom of Information Act.[1] The documents produced by the Bureau cover various periods between the Fiscal Years 1992 and 2000.

The document productions primarily consist of quarterly reports generated by counsel in the Bureau of Prisons' six regional offices, which contain statistics and narrative descriptions for pending legal claims within the jurisdiction of that regional office. The Central Office aggregates the data provided by each of the regional offices to produce system-wide quarterly reports, which also include information on legal claims submitted to the Central Office. The six regional offices also submit monthly reports to the Central Office, which cover the same basic categories of data but generally are less comprehensive.

For all categories of statistics, the primary sources used to construct the dataset were the quarterly reports generated by the Central Office. When data from the Central Office were not available, the next sources used were the regional quarterly reports, and if these were not available then the monthly reports submitted by the regional offices were used.

The Bureau of Prisons reports track legal claims in a number of categories: (1) litigation actions filed against the Bureau and / or its employees in federal court, typically collateral attacks under § 2255 and habeas corpus petitions under § 2241, suits under the Federal Tort Claims Act, or *Bivens* actions; (2) administrative claims filed with the Bureau pursuant to the Federal Tort Claims Act; (3) administrative claims filed by prisoners pursuant to the Bureau's Administrative Remedies Program; (4) requests filed with the Bureau pursuant to the federal Freedom of Information Act and Privacy Act; and (5) criminal investigations and prosecutions initiated against federal prisoners currently under the custody of the Bureau. This paper focuses on the first three categories of legal claims. While the vast majority of these claims are initiated by federal prisoners, it should be noted that some litigation actions and administrative claims under the Federal Tort Claims Act may involve non-prisoners, including employees, visitors, and other third parties who have contact with the Bureau and its employees.

For the Administrative Remedies Program, complete data is available for 16 of the 24 quarters between the First Quarter 1993 through the Fourth Quarter 1998 (October 1, 1993 through September 30, 1998). For those quarters, statistics are available on filings at the institution level, appeals to the six regional offices, and appeals to the Central Office. The Bureau also provided more limited data on administrative remedies for the First Quarter 1999 through the First Quarter 2002, covering 12 of the 13 quarters during this time period. This dataset is limited to the total number of appeals filed with the six regional offices for each quarter.

For administrative claims filed pursuant to the FTCA, complete data is available for 21 of the 28 quarters between the First Quarter 1992 through the Fourth Quarter 1998 (October 1, 1992 through September 30, 1998). For these quarters, statistics are available for filings with the six regional offices and with the Central Office. The Bureau also provided more limited data on FTCA administrative claims for the First Quarter 1999 through the First Quarter 2002, covering 12 of the 13 quarters during this time period. This dataset is limited to the total number of administrative claims filed with the six regional offices for each quarter.

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[1] Letter from Margo Schlanger, Assistant Professor of Law, Harvard Law School, to Freedom of Information Act / Privacy Act Section, Office of General Counsel, Federal Bureau of Prisons (Apr. 17, 2001) (on file with the author).

For all litigation actions, complete data is available for 23 of the 28 quarters between the First Quarter 1992 through the Fourth Quarter 1998 (October 1, 1992 through September 30, 1998). For these quarters, statistics are available for litigation actions assigned to the six regional offices and the Central Office. The Bureau also provided more limited data on litigation actions filed during the First Quarter 1999 through the Second Quarter 2000, covering six of the six quarters for this time period. This dataset is limited to litigation actions assigned to the six regional offices for each quarter.

2) Additional Notes on Litigation Actions

For the number of awards, the number of settlements, and the amount of settlements and awards, all reported figures were checked against the narrative descriptions provided in the quarterly (and when necessary, the monthly) reports. When there were discrepancies between the Central Office reports and the regional reports, or between either of these reports and the narrative descriptions, first an attempt was made to resolve any arithmetic errors, and then I defaulted first to the narrative description (where available), and second to the figures in the regional reports. Through this process of review, I also separated the statistics on the amount of settlements and awards into two separate categories.

In this review of the reported statistics on awards and settlements compared to the narrative descriptions in the same reports, I discovered that the recording of non-monetary settlements and awards is inconsistent and generally lacking. In most cases, the number of settlements and settlements reported by the regional offices and the Central Office do not appear to include various non-monetary outcomes in favor of prisoners that are recounted in the narrative descriptions. For this reason, I excluded any non-monetary outcomes when they were included in the statistics. The reported number of awards and settlements in the final dataset only reflects settlements or awards resulting in monetary relief.

B. The Administrative Office of the United States Courts Dataset

The Administrative Office of the United States Courts (AO) dataset was constructed from raw data that is collected by the Administrative Office of the United States and the Federal Judicial Center, and is maintained in a publicly-accessible database through the Inter-university Consortium for Political and Social Research.[2] The AO dataset includes statistics on all cases terminated in the federal courts since the Fiscal Year 1970, as well as cases that were pending as of the end of Fiscal Year 2001.

The following chart provides a summary for some of the variables tracked in the AO dataset, which are relied on in this paper:

Label	Description	Coding Options
Jurisdiction	• The basis of jurisdiction for filing the case in federal court.	• 1 - U.S. Plaintiff • 2 - U.S. Defendant • 3 - Federal Question • 4 - Diversity of Citizenship • 5 - Local Question (territorial districts only) • -8 - Missing or out-of-range
Nature of Suit	• The nature of the action filed.	• 510 - Vacate sentence (2255) • 520 - Parole Board Review • 530 - Habeas Corpus • 535 - Habeas Corpus – Death Penalty • 540 - Mandamus and Other

[2] *See* Federal Judicial Center, Federal Court Cases: Integrated Data Base, 1970-2000 (pts. 38-55, 64-65, 73- 74, 86-88, 98, 103-04, 115-17 (civil terminations 1970-2000), 118 (civil pending 2000)) (ICPSR Study No. 8429, last updated Apr. 25, 2002), *at* http:// www.icpsr.umich.edu:8080/ICPSR-STUDY/08429.xml; Federal Judicial Center, Federal Court Cases: Integrated Data Base, 2001 (pts. 2 (civil terminations), 3 (civil pending)) (ICPSR Study No. 3415, last updated June 19, 2002), *at* http:// www.icpsr.umich.edu:8080/ICPSR-STUDY/03415.xml.

Label	Description	Coding Options
		• 550 - Prisoner - Civil Rights • 555 - Prison Conditions • -8 Missing or out-of-range
Judgment For (1979 -)	• Identifies the party favored by the judgment of the court for actions disposed of by the entry of a final judgment.	• 1 – Plaintiff • 2 – Defendant • 3 – Both • 4 - Unknown (or not applicable) • -8 - Out-of-range • -9 - Data not collected (SY70 - SY78)
Nature of Judgment (1979 -)	• The nature of the judgment for those actions disposed of by the entry of a final judgment.	• 0 - No monetary award • 1 - Monetary award only • 2 - Monetary award and other • 3 – Injunction • 4 - Other, forfeiture, foreclosure, condemnation, remand, etc. • 5 - Costs only • 6 - Costs and attorney fees • -8 - Missing or out-of-range • -9 - Data not collected (SY72 - SY78)
Amount Received	• The monetary judgment amount awarded (excluding costs) in thousands of dollars.	• 9999 - Coded for amounts greater than $9,999,000 • 0 - Missing (blank) • -8 - Out-of-range (contains alphas)
Pro Se (1998 -)	• The pro se status of the plaintiffs and defendants.	• -9 – Data not collected this year • -8 – Missing • 0 – No pro se plaintiffs or defendants • 1 – Pro se plaintiffs, no pro se defendants • 2 – Pro se defendants, no pro se plaintiffs • 3 – Both pro se plaintiffs and defendants

The results in this paper are based on a revised dataset, in which the raw data provided by the AO has been altered in several respects by Professor Margo Schlanger.[3] The chart below provides a summary for some of the new variables created by Schlanger, which are relied on in this paper.

Schlanger identified and recoded cases that had been coded by the AO data system as not involving federal parties, but that were found to involve a U.S. defendant.[4] The "Federal plaintiff or defendant – all" category under the new U.S. Party Status Total variable includes these newly re-coded cases. All analyses in this paper rely on this new coding.

The AO data system creates a new data file every time a case is reopened in the district courts, resulting in the double-counting of a number of cases. In order to exclude duplicates in the dataset, Schlanger created a new variable to track whether a particular data file was the first appearance, last appearance, or only appearance of that case in the district courts. The results presented in this paper regarding case filings and pro se status are limited to those cases that Schlanger coded as first or only appearances, and the results regarding case dispositions are limited to those cases that Schlanger coded as last or only appearances.

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[3] For additional information on the construction of the revised dataset, *see* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1557, 1698-1706.

[4] *See supra* Part III.C.2(b).

Finally, Schlanger recoded the filing and termination years to make these fields consistent over time, and she combined the data from several fields into summary variables.

Label (Years)	Description	Coding Options
Fiscal Year of Filing	• The year of filing, based on the federal fiscal year of October 1 through September 30.	• Fiscal Year 1970 – 2001
Fiscal Year of Termination	• The year of termination, based on the federal fiscal year of October 1 through September 30.	• Fiscal Year 1970 – 2001
Initial Appearance?	• New variable.	• 0 – Initial appearance or unknown • 1 – Subsequent appearance
Final Appearance?	• New variable.	• 0 – Nonfinal appearance • 1 – Only or final appearance
Nature of Suit Summary	• Combines the AO Nature of Suit variable into two categories. • Habeas, etc. includes 510 – Motion to Vacate Sentence (2255) , 520 - Parole Board Review, 530 - Habeas Corpus, 535 Habeas Corpus – Death Penalty, and 540 - Mandamus and other. • Inmate civil rights includes 550 - Prisoner - Civil Rights and 555 - Prison Conditions.	• 0 - Habeas, etc. – 500s • 1 - Inmate civil rights – 550 or 555
U.S. Party Status Total	• Combines the AO jurisdiction variable into two categories. • Federal defendant or plaintiff includes 1 - U.S. Plaintiff and 2 - U.S. Defendant. • Non-federal parties includes all other categories, 3 - Federal Question, 4 - Diversity of Citizenship, and 5 - Local Question (territorial districts only).	• 0 – Non-federal parties – all • 1 – Federal defendant or plaintiff - all
Outcome Summary (1979 -)	• Combines AO data from the Disposition variable to create a new variable.	• -8 – Data not reliably collected this year • -1 – Missing • 0 – Non-judgment disposition • 1 – Pretrial dismissal (defense victory) • 2 – Pretrial plaintiffs victory • 3 – Arbitration appeal, plaintiffs victory • 4 – Arbitration appeal, defense victory • 5 – Pretrial resolution, unknown victor • 6 – Voluntary dismissal • 7 – Settled • 8 – Jury verdict for defendant • 9 – Jury verdict for plaintiff • 10 – Jury verdict for unknown party • 11 – Directed verdict for plaintiff • 12 – Directed verdict for unknown party • 13 – Directed verdict for defendant • 14 – Bench verdict for defendant • 15 – Bench verdict for plaintiff • 16 – Bench verdict for unknown party • 17 – Still pending
Judgment For Summary (1979 -)	• Combines the AO Judgment For variable into four categories. • Plaintiff or both includes 1 – Plaintiff	• 1 – Plaintiff or both • 2 – Defendant • 4 - Unknown (or not applicable)

Label (Years)	Description	Coding Options
	and 3 – Both.	• -9 - Data not collected (SY70 - SY78)
Nature of Judgment Summary (1979 -)	• Combines the AO Nature of Judgment variable into six categories. • Money award includes 1 - Monetary award only and 2 - Monetary award and other. • Costs w/ and w/out atty fees includes 5 - Costs only and 6 - Costs and attorney fees.	• 0 – No award coded • 1 – Money award • 3 – Injunction • 4 – Forfeiture, etc. • 5 – Costs w/ and w/out atty fees • -9 - Data not collected (SY72 - SY78)
Nature of Trial Summary	• Combines AO data from the Disposition variable to create a new variable.	• 0 – No trial • 1 – Jury trial • 2 – Bench trial
Trial Outcomes	• Combines AO data from the Outcome variable to create a new variable.	• -9 – Unknown victory • 1 – Defendant victory • 2 – Plaintiff victory
Plaintiff Win But Award = 0	• New variable created to identify cases in which a judgment has been recorded for the plaintiff, but an award of zero is reported.	• 0 – No • 1 - Yes

C. Prisoner Population Figures

Calculation of the filing rates required population figures for state and federal prisoners. The Bureau of Justice Statistics surveys departments of corrections in each of the fifty states, the District of Columbia, and the federal Bureau of Prisons to obtain yearend and midyear counts of prisoners. The counts used in this paper include prisoners *under the jurisdiction* of the state or federal authorities, meaning that the state or the federal government has legal authority over the prisoner. Prisoners under a state's jurisdiction may be in the custody of a local jail, another state's prison, or another correctional facility. Similarly, the Bureau of Prisons reports that prisoners under its jurisdiction include inmates confined in privately-operated prisons, detention centers, community corrections centers, and juvenile facilities, and correctional facilities and detention centers operated by state and local governments. It is important to note that these figures do not include persons on probation, parole, or similar forms of non-custodial supervision.

In order to calculate filing rates for the Bureau of Prisons dataset, it was necessary to estimate the federal prisoner population figures on a quarterly basis for the entire period of 1992 through 2001. For the years 1995 through 2001, population figures were available for three of the four quarters of the fiscal year—reported as of June 30, September 30, and December 31. For all other years, only yearend population figures were available, reported as of December 31. To fill in the missing quarters I used a method of linear interpolation, based on the quarterly figures that were available for each period. This method of interpolation—which assumes linear growth from quarter to quarter—was tested on the years for which population data was nearly complete, and was found to be more accurate than a similar method of interpolation based on assumptions of fixed percentage growth from quarter to quarter.

All filing rates in this paper are reported for the Fiscal Years 1977 through 2001, because consistent population figures from the following sources were only available for these years.

Yearend population figures are based on data from the Bureau of Justice Statistics:

- Paige M. Harrison, Ph.D. & Allen J. Beck, Ph.D., Bureau of Justice Statistics, Prisoners in 2001 (2002); Allen J. Beck, Ph.D., & Paige M. Harrison, Ph.D., Bureau of Justice Statistics, Prisoners in 2000 (2001); Allen J. Beck, Ph.D., Bureau of Justice Statistics, Prisoners in 1999 (2000); Allen J. Beck, Ph.D., & Christopher J. Mumola, Prisoners in 1998 (1999); Darrell K. Gilliard & Allen J. Beck, Ph.D., Prisoners in 1997 (1998); Christopher J. Mumola & Allen J. Beck, Ph.D., Prisoners

in 1996 (1997); Darrell K. Gilliard & Allen J. Beck, Ph.D., Prison and Jail Inmates, 1995 (1996); Allen J. Beck, Ph.D., & Darrell K. Gilliard, Prisoners in 1994 (1995).

- George Hill & Paige Harrison, Bureau of Justice Statistics, Prisoners Under State or Federal Jurisdiction, 1998 – 1977 (2000)

Midyear population figures are based on data from the Bureau of Justice Statistics:

- Allen J. Beck, Ph.D., Jennifer C. Karberg, & Paige M. Harrison, Prison and Jail Inmates at Midyear 2001 (2002); Allen J. Beck, Ph.D., & Jennifer C. Karberg, Prison and Jail Inmates at Midyear 2000 (2001); Allen J. Beck, Ph.D., Prison and Jail Inmates at Midyear 1999 (2000); Darrell K. Gilliard, Prison and Jail Inmates at Midyear 1998 (1999); Darrell K. Gilliard, & Allen J. Beck, Ph.D., Prison and Jail Inmates at Midyear 1997 (1998); Darrell K. Gilliard, & Allen J. Beck, Ph.D., Prison and Jail Inmates at Midyear 1996 (1997).

Population figures as of September 30 (the end of the federal fiscal year) are based on data from the Bureau of Prison's annual reports, State of the Bureau, 2001 to 1995.

INDEX TO TABLES OF RAW DATA

Index to Tables of Raw Data 8

Table 1. Administrative Remedies Program – Central Office Appeals, FY 1993-1998 10

Table 2. Administrative Remedies Program – Central Office Appeals, FY 1993-1998 11

Table 3. Administrative Remedies Program – Regional Office Appeals, FY 1993-1998 12

Table 4. Administrative Remedies Program – Regional Office Appeals, FY 1993-1998 13

Table 5. Administrative Remedies Program – Institutional Filings, FY 1993-1998 14

Table 6. Administrative Remedies Program – Institutional Filings, FY 1993-1998 15

Table 7. Administrative Remedies Program – Filing Rates, FY 1993-1998 16

Table 8. Administrative Remedies Program – Estimated Total Filings and Filing Rates per Fiscal Year, FY 1993-1998 16

Table 9. Administrative Remedies Program – Regional Office Appeals, FY 1993-2002 17

Table 10. Federal Tort Claims Act Administrative Claims, FY 1992-1998 18

Table 11. Federal Tort Claims Act Administrative Claims – Estimated Figures per Fiscal Year, FY 1992-1998. 19

Table 12. Federal Tort Claims Act Administrative Claims – Total Filings with the Six Regional Offices and Filing Rates, FY 1992-2002 20

Table 13. Litigation Actions by Federal Prisoners (BOP Dataset), FY 1992-1998 22

Table 14. Litigation Actions by Federal Prisoners (BOP Dataset) – Percentage Weight & Filing Rates, FY 1992-1998 24

Table 15. Litigation Actions by Federal Prisoners (BOP Dataset) – Actions Filed with the Six Regional Offices, FY 1992-2000 26

Table 16. Litigation Actions by Federal & State Prisoners (AO Dataset) – Total Filings & Filing Rates, FY 1992-2001 28

Table 17. Civil Rights Actions by State & Federal Prisoners (AO Dataset) – Total Filings, Percent State & Federal, and Annual Percent Change, FY 1992-2001 28

Table 18. Litigation Actions by Federal Prisoners (AO Dataset) – Total Filings & Filing Rates by Type of Action, FY 1992-2001 29

Table 19. Litigation Actions by Federal Prisoners (AO Dataset) – Collateral Attacks and Habeas Corpus Petitions by Type of Action, FY 1992-2001 30

Table 20. Litigation Actions by State Prisoners (AO Dataset) – Total Filings & Filing Rates by Type of Action, FY 1992-2001 31

Table 21 Civil Rights Actions by Federal Prisoners (AO Dataset) – Pro Se Status of Litigants, FY 1997-2001 32

Table 22. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Outcomes, FY 1997-2001 32

Table 23. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Judgment For, FY 1997-2001 33

Table 24. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Nature of Judgment, FY 1997-2001 33

Table 25. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Nature of Trials, FY 1997-2001 34

Table 26. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Trial Outcomes, FY 1997-2001 34

Table 27A. Civil Rights Actions by Federal Prisoners (AO Dataset) – Outcomes by Fiscal Year of Termination, FY 1992-2001 35

Table 27B. Civil Rights Actions by Federal Prisoners (AO Dataset) – Outcomes by Fiscal Year of Filing, FY 1992-2001 36
Table 28. Civil Rights Actions by Federal Prisoners (AO Dataset) – Nature of Trial, FY 1992-2001 37
Table 29. Civil Rights Actions by Federal Prisoners (AO Dataset) – Trial Outcomes, FY 1992-2001 37
Table 30. Civil Rights Actions by Federal Prisoners (AO Dataset) – Judgments For, FY 1992-2001 38
Table 31. Civil Rights Actions by Federal Prisoners (AO Dataset) – Nature of Judgments, FY 1992-2001 38
Table 32. Civil Rights Actions by Federal Prisoners (AO Dataset) – Awards (in Thousands of Dollars), FY 1992-2001 39
Table 33. Civil Rights Actions by State Prisoners (AO Dataset) – Pro Se Status of Litigants, FY 1997-2001 40
Table 34. Civil Rights Actions by State Prisoners (AO Dataset) – Outcomes, FY 1992-2001 41
Table 35. Civil Rights Actions by State Prisoners (AO Dataset) – Judgments For, FY 1992-2001 42
Table 36. Civil Rights Actions by State Prisoners (AO Dataset) – Nature of Judgments, FY 1992-2001 42
Table 37. Civil Rights Actions by State Prisoners (AO Dataset) – Nature of Trial, FY 1992-2001 43
Table 38. Civil Rights Actions by State Prisoners (AO Dataset) – Trial Outcomes, FY 1992-2001 43
Table 39. Civil Rights Actions by Federal Prisoners (AO Dataset) – Awards (in Thousands of Dollars), FY 1992-2001 44
Table 40. Prisoner Population Figures – Federal & State, FY 1977-2001 45
Table 41. Federal Prisoner Population Figures by the Quarter (Estimated), FY 1992-2001 46

Table 1. Administrative Remedies Program – Central Office Appeals, FY 1993-1998

Central Office Appeals	Total Filed	Total Granted	Total Denied	Ratio of Claims Denied to Claims Granted	Denied - Untimely	Denied - No Informal Resolution	Denied - Attachments	Denied - Wrong Level	Denied - Resubmit	Total Pending	Total Overdue
1Q 93											
2Q 93											
3Q 93	717	27	408	15.11	129	1	54	46	1	461	38
4Q 93	662	18	390	21.67	128	0	77	49	184	299	24
1Q 94											
2Q 94											
3Q 94											
4Q 94											
1Q 95	703	21	361	17.19	127	0	57	54	141	253	10
2Q 95	677	15	409	27.27	145	0	59	49	171	220	15
3Q 95											
4Q 95	783	10	410	41.00	92	0	90	69	183	289	8
1Q 96	958	14	425	30.36	103	0	88	77	213	313	10
2Q 96	912	16	597	37.31	181	3	99	89	293	407	12
3Q 96	917	12	657	54.75	180	4	84	144	310	377	21
4Q 96	1,047	10	582	58.20	156	1	112	100	314	357	8
1Q 97	882	9	545	60.56	159	1	79	79	285	278	15
2Q 97	899	7	520	74.29	171	2	90	87	233	304	25
3Q 97	940	13	517	39.77	123	10	85	113	245	391	38
4Q 97	962	13	569	43.77	141	2	116	84	311	356	16
1Q 98	1,033	6	605	100.83	158	1	119	90	311	252	7
2Q 98	772	80	433	5.41	123	1	75	76	212	320	13
3Q 98											
4Q 98	1,227	13	677	52.08	128.00	10	171	111	399	496	8
Total	14,091	284	8,105	28.54	2,244	36	1,455	1,317	3,806	5,373	268
Percent of Total					27.69%	0.44%	17.95%	16.25%	46.96%		
Average Per Quarter	880.69	17.75	506.56		140.25	2.25	90.94	82.31	237.88	335.81	16.75
Average per FY	3,522.75	71.00	2,026.25		561.00	9.00	363.75	329.25	951.50	1,343.25	67.00

Table 2. Administrative Remedies Program – Central Office Appeals, FY 1993-1998

Central Office Appeals	Total Filed	DHO	UDC	Special Housing Unit	Staff	Medical	Mental Health	Classification	Transfer	Work Assignment	Cmty Programs	Jail Time	Legal Remedies	Food Remedies
1Q 93														
2Q 93														
3Q 93	717	269	58	17	93	64	5	118	47	52	51	70	66	9
4Q 93	662	221	63	34	74	69	2	141	64	31	46	59	52	7
1Q 94														
2Q 94														
3Q 94														
4Q 94														
1Q 95	703	280	72	13	92	84	4	83	51	33	35	66	48	32
2Q 95	677	298	76	19	84	78	1	71	63	33	33	70	51	27
3Q 95														
4Q 95	783	252	85	22	85	99	2	87	53	51	50	82	71	8
1Q 96	958	295	75	26	119	75	2	87	51	35	49	269	43	3
2Q 96	912	490	82	49	94	81	5	93	67	37	35	189	43	8
3Q 96	917	571	86	56	104	80	2	72	72	29	35	134	67	11
4Q 96	1,047	404	97	58	137	98	7	116	97	45	39	158	74	19
1Q 97	882	347	80	32	134	102	3	129	81	36	36	149	46	7
2Q 97	899	347	87	25	121	91	2	128	68	37	42	141	66	8
3Q 97	940	328	87	41	141	114	5	104	79	29	48	185	43	14
4Q 97	962	354	110	36	142	109	4	115	71	42	55	131	78	19
1Q 98	1,033	350	108	27	178	124	4	125	99	45	34	140	81	13
2Q 98	772	277	87	25	119	100	1	91	58	32	26	90	61	12
3Q 98														
4Q 98	1,227	369	89	37	186	166	7	136	96	58	42	205	95	17
Total	14,091	5,452	1,342	517	1,903	1,534	56	1,696	1,117	625	656	2,138	985	214
Percent of Total		38.69%	9.52%	3.67%	13.51%	10.89%	0.40%	12.04%	7.93%	4.44%	4.66%	15.17%	6.99%	1.52%
Average Per Quarter	880.69	340.75	83.88	32.31	118.94	95.88	3.50	106.00	69.81	39.06	41.00	133.63	61.56	13.38
Average per FY	3,522.75	1,363.00	335.50	129.25	475.75	383.50	14.00	424.00	279.25	156.25	164.00	534.50	246.25	53.50

Table 3. Administrative Remedies Program – Regional Office Appeals, FY 1993-1998

Regional Office Appeals	Total Filed	Total Granted	Total Denied	Ratio of Claims Denied to Claims Granted	Denied - Untimely	Denied - No Informal Resolution	Denied - Attachments	Denied - Wrong Level	Denied - Resubmit	Total Pending	Total Overdue
1Q 93											
2Q 93											
3Q 93	1,764	156	639	4.10	76	5	157	114	1	446	0
4Q 93	1,711	146	691	4.73	61	16	168	79	160	541	3
1Q 94											
2Q 94											
3Q 94											
4Q 94											
1Q 95	1,759	188	673	3.58	124	11	69	90	169	530	1
2Q 95	1,731	196	598	3.05	106	22	68	74	110	547	3
3Q 95											
4Q 95	1,959	180	888	4.93	181	5	64	99	186	680	2
1Q 96	2,452	217	1,103	5.08	168	23	84	146	276	854	5
2Q 96	2,262	202	1,077	5.33	136	71	112	97	373	858	76
3Q 96	2,214	201	1,177	5.86	155	172	82	187	396	934	38
4Q 96	2,392	199	980	4.92	97	129	101	194	341	835	30
1Q 97	2,246	135	1,037	7.68	122	123	74	139	390	663	2
2Q 97	2,182	132	1,062	8.05	102	147	61	151	398	835	13
3Q 97	2,448	197	955	4.85	91	87	65	104	348	862	15
4Q 97	2,228	227	920	4.05	92	81	87	59	391	740	4
1Q 98	2,289	204	1,022	5.01	76	62	73	93	434	725	21
2Q 98	2,473	198	1,096	5.54	104	56	119	111	457	960	12
3Q 98											
4Q 98	2,892	201	1,256	6.25	123	155	102	81	491	1,118	63
Total	35,002	2,979	15,174	5.09	1,814	1,165	1,486	1,818	4,921	12,128	288
Percent of Total					11.95%	7.68%	9.79%	11.98%	32.43%		
Average per Quarter	2,187.63	186.19	948.38		113.38	72.81	92.88	113.63	307.56	758.00	18.00
Average per FY	8,750.50	744.75	3,793.50		453.50	291.25	371.50	454.50	1,230.25	3,032.00	72.00

Table 4. Administrative Remedies Program – Regional Office Appeals, FY 1993-1998

Regional Office Appeals	Total Filed	DHO	UDC	Special Housing Unit	Staff	Medical	Mental Health	Classification	Transfer	Work Assignment	Cmty Programs	Jail Time	Legal Remedies	Food Remedies
1Q 93														
2Q 93														
3Q 93	1,764	704	161	50	225	127	2	228	132	77	135	83	102	23
4Q 93	1,711	677	138	56	182	140	5	241	144	73	134	101	85	14
1Q 94														
2Q 94														
3Q 94														
4Q 94														
1Q 95	1,759	883	191	53	190	143	5	142	107	78	112	96	80	45
2Q 95	1,731	805	178	36	191	132	4	166	119	75	74	80	83	52
3Q 95														
4Q 95	1,959	904	214	54	241	171	8	209	117	81	85	132	94	13
1Q 96	2,452	1,452	230	86	284	165	10	206	138	75	109	262	83	11
2Q 96	2,262	1,304	215	138	311	143	5	175	168	68	69	147	98	32
3Q 96	2,214	1,197	223	140	339	164	7	164	148	80	113	162	133	25
4Q 96	2,392	1,070	256	117	361	195	9	207	158	74	123	176	101	25
1Q 97	2,246	1,048	236	89	232	194	6	229	160	79	135	158	123	28
2Q 97	2,182	1,006	256	85	349	175	7	216	175	81	104	199	86	26
3Q 97	2,448	1,080	284	110	383	198	10	207	140	76	119	161	99	37
4Q 97	2,228	958	252	64	380	200	6	193	159	84	94	151	107	23
1Q 98	2,289	1,034	254	69	406	222	6	227	168	85	79	133	117	28
2Q 98	2,473	1,013	258	96	378	240	10	214	168	102	98	196	140	28
3Q 98														
4Q 98	2,892	1,277	264	97	474	299	13	239	187	102	116	200	181	46
Total	35,002	16,412	3,610	1,340	4,926	2,908	113	3,263	2,388	1,290	1,699	2,437	1,712	456
Percent of Total		46.89%	10.31%	3.83%	14.07%	8.31%	0.32%	9.32%	6.82%	3.69%	4.85%	6.96%	4.89%	1.30%
Average per Quarter	2187.63	1025.75	225.63	83.75	307.88	181.75	7.06	203.94	149.25	80.63	106.19	152.31	107.00	28.50
Average per FY	8,750.50	4,103.00	902.50	335.00	1,231.50	727.00	28.25	815.75	597.00	322.50	424.75	609.25	428.00	114.00

Table 5. Administrative Remedies Program – Institutional Filings, FY 1993-1998

Institution Level Filings	Total Filed	Total Granted	Total Denied	Ratio of Claims Denied to Claims Granted	Denied - Untimely	Denied - No Informal Resolution	Denied - Attachment	Denied - Wrong Level	Denied - Resubmit	Total Pending	Total Overdue
1Q 93											
2Q 93											
3Q 93	3,153	496	643	1.30	70	211	0	32	7	763	187
4Q 93	3,090	494	559	1.13	67	220	0	23	44	814	162
1Q 94											
2Q 94											
3Q 94											
4Q 94											
1Q 95	3,214	472	736	1.56	103	289	0	58	50	744	106
2Q 95	3,038	465	700	1.51	127	265	0	33	65	794	124
3Q 95											
4Q 95	3,551	556	759	1.37	122	330	0	50	142	908	171
1Q 96	3,682	589	802	1.36	135	298	1	64	142	931	235
2Q 96	3,603	542	958	1.77	135	372	0	58	196	1,111	231
3Q 96	3,817	596	1,208	2.03	158	463	0	63	309	1,133	249
4Q 96	3,702	485	1,035	2.13	116	383	0	64	342	1,245	287
1Q 97	3,891	553	1,003	1.81	129	364	0	65	337	1,074	318
2Q 97	3,753	533	986	1.85	124	346	0	51	302	1,313	358
3Q 97	3,873	516	912	1.77	113	326	0	63	298	1,249	301
4Q 97	3,854	572	994	1.74	111	413	0	65	361	1,245	319
1Q 98	3,873	573	1,071	1.87	138	401	0	46	372	1,145	320
2Q 98	4,035	555	1,075	1.94	126	339	0	76	397	1,315	340
3Q 98											
4Q 98	4,275	542	1,252	2.31	107	508	0	95	453	1,336	358
Total	58,404	8,539	14,693	1.72	1,881	5,528	1	906	3,817	17,120	4,066
Percent of Total					12.80%	37.62%	0.01%	6.17%	25.98%		
Average per Quarter	3,650.25	533.69	918.31		117.56	345.50	0.06	56.63	238.56	1,070.00	254.13
Average per FY	14,601.00	2,134.75	3,673.25		470.25	1,382.00	0.25	226.50	954.25	4,280.00	1,016.50

Table 6. Administrative Remedies Program – Institutional Filings, FY 1993-1998

Instit. Level Filings	Total Filed	DHO	UDC	Special Housing Unit	Staff	Medical	Mental Health	Classifi-cation	Transfer	Work Assign-ment	Cmty Programs	Jail Time	Legal Remedies	Food Remedies
1Q 93														
2Q 93														
3Q 93	3,153	55	349	131	560	342	12	367	224	212	213	128	185	70
4Q 93	3,090	34	342	120	520	356	9	365	277	213	206	120	146	56
1Q 94														
2Q 94														
3Q 94														
4Q 94														
1Q 95	3,214	72	520	163	547	432	15	253	176	215	209	103	211	75
2Q 95	3,038	49	502	114	538	349	18	307	173	244	195	103	160	65
3Q 95														
4Q 95	3,551	77	538	129	604	393	23	358	184	223	200	178	180	48
1Q 96	3,682	87	669	241	601	396	16	337	192	190	181	226	214	85
2Q 96	3,603	79	601	285	694	371	18	313	223	190	148	209	196	74
3Q 96	3,817	99	688	294	686	460	26	342	233	214	197	195	258	81
4Q 96	3,702	101	704	255	697	399	20	392	240	186	214	206	181	83
1Q 97	3,891	82	738	244	696	448	15	382	232	237	226	188	224	79
2Q 97	3,753	61	659	176	738	443	20	339	221	202	182	256	211	83
3Q 97	3,873	75	726	267	737	426	18	322	216	241	189	194	210	104
4Q 97	3,854	65	729	183	810	476	16	324	262	214	171	219	206	71
1Q 98	3,873	58	755	207	792	531	22	341	251	228	146	165	270	84
2Q 98	4,035	94	809	248	754	489	24	343	188	218	175	223	217	76
3Q 98														
4Q 98	4,275	116	686	212	944	598	28	390	252	248	167	216	283	103
Total	58,404	1,204	10,015	3,269	10,918	6,909	300	5,475	3,544	3,475	3,019	2,929	3,352	1,237
Percent of Total		2.06%	17.15%	5.60%	18.69%	11.83%	0.51%	9.37%	6.07%	5.95%	5.17%	5.02%	5.74%	2.12%
Average per Quarter	3,650.25	75.25	625.94	204.31	682.38	431.81	18.75	342.19	221.50	217.19	188.69	183.06	209.50	77.31
Average per FY	14,601.00	301.00	2,503.75	817.25	2,729.50	1,727.25	75.00	1,368.75	886.00	868.75	754.75	732.25	838.00	309.25

Table 7. Administrative Remedies Program – Filing Rates, FY 1993-1998

Quarter	Central Office Appeals	Regional Office Appeals	Institutional Level Filings	Prisoner Population	Central Office Filing Rate Per 1,000 Prisoners	Regional Office Filing Rate Per 1,000 Prisoners	Institutional Level Filing Rate Per 1,000 Prisoners
1Q 93				80,259			
2Q 93				82,591			
3Q 93	717	1,764	3,153	84,923	8.44	20.77	37.13
4Q 93	662	1,711	3,090	87,255	7.59	19.61	35.41
1Q 94				89,587			
2Q 94				90,949			
3Q 94				92,311			
4Q 94				93,672			
1Q 95	703	1,759	3,214	95,034	7.40	18.51	33.82
2Q 95	677	1,731	3,038	97,250	6.96	17.80	31.24
3Q 95				99,466			
4Q 95	783	1,959	3,551	100,958	7.76	19.40	35.17
1Q 96	958	2,452	3,682	100,250	9.56	24.46	36.73
2Q 96	912	2,262	3,603	101,986	8.94	22.18	35.33
3Q 96	917	2,214	3,817	103,722	8.84	21.35	36.80
4Q 96	1,047	2,392	3,702	105,432	9.93	22.69	35.11
1Q 97	882	2,246	3,891	105,544	8.36	21.28	36.87
2Q 97	899	2,182	3,753	107,852	8.34	20.23	34.80
3Q 97	940	2,448	3,873	110,160	8.53	22.22	35.16
4Q 97	962	2,228	3,854	112,289	8.57	19.84	34.32
1Q 98	1,033	2,289	3,873	112,973	9.14	20.26	34.28
2Q 98	772	2,473	4,035	115,941	6.66	21.33	34.80
3Q 98				118,908			
4Q 98	1,227	2,892	4,275	122,316	10.03	23.64	34.95
Average per Quarter					8.44	20.97	35.12
Average per FY					33.76	83.89	140.48

Table 8. Administrative Remedies Program – Estimated Total Filings and Filing Rates per Fiscal Year, FY 1993-1998

Fiscal Year	Central Office Appeals	Regional Office Appeals	Institutional Level Filings	Fiscal Year	Central Filing Rate per 1,000 prisoners	Regional Office Filing Rate per 1,000 prisoners	Institutional Level Filing Rate per 1,000 prisoners
FY 1993	2,758	6,950	12,486	FY 1993	32.06	80.76	145.08
FY 1994				FY 1994			
FY 1995	2,884	7,265	13,071	FY 1995	29.49	74.28	133.64
FY 1996	3,834	9,320	14,804	FY 1996	37.27	90.67	143.97
FY 1997	3,683	9,104	15,371	FY 1997	33.79	83.58	141.14
FY 1998	4,043	10,205	16,244	FY 1998	34.45	86.98	138.71

Table 9. Administrative Remedies Program – Regional Office Appeals, FY 1993-2002

	Total Filings for Six Regions	Prisoner Population	Claims Filed Per 1,000 Prisoners
1Q 93		80,259	
2Q 93		82,591	
3Q 93	1,764	84,923	20.77
4Q 93	1,711	87,255	19.61
1Q 94		89,587	
2Q 94		90,949	
3Q 94		92,311	
4Q 94		93,672	
1Q 95	1,759	95,034	18.51
2Q 95	1,731	97,250	17.80
3Q 95		99,466	
4Q 95	1,959	100,958	19.40
1Q 96	2,452	100,250	24.46
2Q 96	2,262	101,986	22.18
3Q 96	2,214	103,722	21.35
4Q 96	2,392	105,432	22.69
1Q 97	2,246	105,544	21.28
2Q 97	2,182	107,852	20.23
3Q 97	2,448	110,160	22.22
4Q 97	2,228	112,289	19.84
1Q 98	2,289	112,973	20.26
2Q 98	2,473	115,941	21.33
3Q 98		118,908	
4Q 98	2,892	122,316	23.64
1Q 99	3,170	123,041	25.76
2Q 99	3,186	126,710	25.14
3Q 99	3,270	130,378	25.08
4Q 99	3,118	133,689	23.32
1Q 00	2,914	135,246	21.55
2Q 00	3,189	138,888	22.96
3Q 00	3,374	142,530	23.67
4Q 00		145,125	
1Q 01	3,061	145,416	21.05
2Q 01	3,055	149,102	20.49
3Q 01	3,168	152,788	20.73
4Q 01	3,150	156,572	20.12
1Q 02	3,393		
Total	73,050		
Average per Quarter	2,608.93		21.68
Average per FY	10,435.71		86.73
Average for New Quarters	3,170.67		22.72
FY 96	9,320		90.67
FY 97	9,104		83.58
FY 98			
FY 99	12,744		99.31
FY 00			
FY 01	12,434		82.39

Table 10. Federal Tort Claims Act Administrative Claims, FY 1992-1998

	Total Claims Filed	Total Personal Property	Total Personal Injury	Claims Settled	Amount Paid	Claims Denied	Ratio of Claims Denied to Claims Settled	Claims Pending	Other Decisions	Claims Overdue	Prisoner Population	Claims Filed Per 1,000 Prisoners
1Q 92	956			71	$17,174	437	6.15				71,608	13.35
2Q 92	782			136	$58,121	518	3.81				73,771	10.60
3Q 92	701			144	$33,828	408	2.83				75,934	9.23
4Q 92	857			152	$30,703	432	2.84				78,096	10.97
1Q 93											80,259	
2Q 93											82,591	
3Q 93	1,011	761	227	152	$24,774	290	1.91	1,485	0	182	84,923	11.90
4Q 93	1,147	857	290	186	$21,394	465	2.50	1,601	0	151	87,255	13.15
1Q 94											89,587	
2Q 94											90,949	
3Q 94											92,311	
4Q 94											93,672	
1Q 95	1,104	879	223	171	$10,776	715	4.18	1,225	353	154	95,034	11.62
2Q 95	1,066	833	230	172	$20,755	663	3.85	1,132	378	124	97,250	10.96
3Q 95											99,466	
4Q 95	1,063	787	276	158	$33,794	766	4.85	1,098	269	149	100,958	10.53
1Q 96	1,211	949	262	138	$34,390	531	3.85	1,342	301	84	100,250	12.08
2Q 96	1,376	1,119	257	211	$25,131	717	3.40	1,336	307	298	101,986	13.49
3Q 96	1,300	1,012	288	177	$31,747	796	4.50	1,293	342	226	103,722	12.53
4Q 96	1,129	861	267	142	$26,017	742	5.23	1,293	318	226	105,432	10.71
1Q 97	1,187	928	264	163	$38,538	486	2.98	1,293	222	236	105,544	11.25
2Q 97	991	748	222	128	$24,163	576	4.50	1,585	266	543	107,852	9.19
3Q 97	1,050	807	240	109	$92,377	486	4.46	1,585	307	543	110,160	9.53
4Q 97	1,077	784	293	173	$30,241	622	3.60	1,368	337	319	112,289	9.59
1Q 98	1,010	787	220	92	$41,817	511	5.55	1,375	409	314	112,973	8.94
2Q 98	1,067	796	275	95	$29,946	577	6.07	1,300	294	155	115,941	9.20
3Q 98	930	713	216	82	$12,008	540	6.59	1,225	294	76	118,908	7.82
4Q 98	945	661	281	81	$164,464	495	6.11	1,072	321	62	122,316	7.73
Total	21,960	14,282	4,331	2,933	$802,158	11,773		22,608	4,718	3,842		
Percent of Total		76.73%	23.27%									

	Total Claims Filed	Total Personal Property	Total Personal Injury	Claims Settled	Amount Paid	Claims Denied	Ratio of Claims Denied to Claims Settled	Claims Pending	Other Decisions	Claims Overdue	Prisoner Population	Claims Filed Per 1,000 Prisoners
Average per Quarter	1,045.71	680.10	206.24	139.67	$38,198	560.62	4.01	1,076.57	224.67	182.95		10.68
Average per FY	4,182.86	2,720.38	824.95	558.67	$152,792	2,242.48	16.06	4,306.29	898.67	731.81		42.74

Table 11. Federal Tort Claims Act Administrative Claims – Estimated Figures per Fiscal Year, FY 1992-1998

Fiscal Year	Total Filings	Filing Rate	Total Settlements	Total Denials	Other Decisions	Percent Settled	Total Settlements
FY 1992	3,296	44.16	503	1,795	0	22%	$139,826
FY 1993	4,316	50.10	676	1,510	0	31%	$92,336
FY 1994							
FY 1995	4,311	44.14	668	2,859	1,333	14%	$87,100
FY 1996	5,016	48.81	668	2,786	1,268	14%	$117,285
FY 1997	4,305	39.56	573	2,170	1,132	15%	$185,319
FY 1998	3,952	33.69	350	2,123	1,318	9%	$248,235

Table 12. Federal Tort Claims Act Administrative Claims – Total Filings with the Six Regional Offices and Filing Rates, FY 1992-2002

	Total Claims Filed for Six Regions	Prisoner Population	Claims Filed Per 1,000 Prisoners
1Q 92	934	71,608	13.04
2Q 92	753	73,771	10.21
3Q 92	678	75,934	8.93
4Q 92	841	78,096	10.77
1Q 93		80,259	
2Q 93		82,591	
3Q 93	969	84,923	11.41
4Q 93	1,086	87,255	12.45
1 Q 94		89,587	
2Q 94		90,949	
3Q 94		92,311	
4Q 94		93,672	
1Q 95	1,040	95,034	10.94
2Q 95	1,013	97,250	10.42
3Q 95	1,059	99,466	10.65
4Q 95	1,006	100,958	9.96
1Q 96	1,154	100,250	11.51
2Q 96	1,318	101,986	12.92
3Q 96	1,222	103,722	11.78
4Q 96	1,076	105,432	10.21
1Q 97	1,144	105,544	10.84
2Q 97	945	107,852	8.76
3Q 97	982	110,160	8.91
4Q 97	1,010	112,289	8.99
1Q 98	929	112,973	8.22
2Q 98	1,014	115,941	8.75
3Q 98	929	118,908	7.81
4Q 98	941	122,316	7.69
1Q 99	1,064	123,041	8.65
2Q 99	1,009	126,710	7.96
3Q 99	1,026	130,378	7.87
4Q 99	1,100	133,689	8.23
1Q 00	1,009	135,246	7.46
2Q 00	934	138,888	6.72
3Q 00	1,053	142,530	7.39
4Q 00		145,125	
1Q 01	993	145,416	6.83
2Q 01	963	149,102	6.46
3Q 01	1,000	152,788	6.55
4Q 01	1,084	156,572	6.92
1Q 02	1,004		
Total	34,282		
Average per Quarter	1,008.29		9.28
Average per FY	4,033.18		37.12
Average for New Quarters	1,019.92		7.37

	Total Claims Filed for Six Regions	Prisoner Population	Claims Filed Per 1,000 Prisoners
FY 92	3,206		42.95
FY 95	4,118		41.97
FY 96	4,770		46.42
FY 97	4,081		37.51
FY 98	3,813		32.48
FY 99	4,199		32.71
FY 01	4,040		26.76

Table 13. Litigation Actions by Federal Prisoners (BOP Dataset), FY 1992-1998

	Total Actions Filed	Total Habeas Corpus	Total FTCA	Total Bivens	Total Other	Number of Litigation Reports Filed	Total Actions Pending	Total Actions Closed	Total Hearings or Trials	Number of Settle-ments	Total Amount of Settlements	Number of Awards	Total Amount of Awards	Total Amount of Awards & Settlements
1Q 92	265	103	30	89	46	119	1438	229	31	4	$92,897	0	$ -	$92,897
2Q 92	274	116	34	90	62	148	1304	191	23	12	$1,374,671	1	$750	$1,375,421
3Q 92	371	143	31	123	73	194	1825	184	68	8	$183,467	1	$258,460	$441,927
4Q 92	352	150	34	117	48	186	1411	205	17	6	$3,602	1	$13	$3,615
1Q 93	354	149	30	132	35	364	1750	489	13	8	$142,750	1	$156,000	$298,750
2Q 93	330	142	34	121	27	230	1899	305	25	6	$138,290	3	$35,214	$173,504
3Q 93	382	143	40	150	50	204	1944	195	37	6	$118,216	2	$627	$118,842
4Q 93	334	141	34	129	30	199	1661	286	17	3	$390,000	1	$10,000	$400,000
1Q 94														
2Q 94														
3Q 94														
4Q 94														
1Q 95	348	119	30	114	85	326	1785	227	11	2	$5,150	0	$ -	$5,150
2Q 95	413	131	48	155	79	279	1807	229	17	5	$194,550	1	$ -	$194,550
3Q 95														$ -
4Q 95	358	143	47	135	33	178	2995	311	24	13	$951,062	1	$13	$951,074
1Q 96	340	131	34	142	20	245	2037	340	12	7	$992,620	2	$140,000	$1,132,620
2Q 96	385	178	35	129	34	313	2135	241	15	7	$91,380	0	$ -	$91,380
3Q 96	416	141	35	193	35	349	2132	202	35	11	$571,471	2	$153,466	$724,937
4Q 96	365	171	27	133	29	207	1506	146	18	8	$533,825	2	$86,450	$620,275
1Q 97	496	244	53	135	57	198	2153	250	28	7	$228,600	1	$173	$228,773
2Q 97	423	228	42	102	49	259	2588	292	23	12	$339,267	2	$6,258	$345,525
3Q 97	377	203	36	95	33	208	2713	233	39	11	$1,579,983	0	$ -	$1,579,983
4Q 97	384	220	33	67	197	217	2926	243	45	10	$102,111	0	$ -	$102,111
1Q 98	360	199	38	76	46	245	3064	174	27	4	$69,895	3	$10,799	$80,694
2Q 98	301	170	28	59	42	217	1944	476	24	10	$1,029,835	0	$ -	$1,029,835
3Q 98	268	146	26	67	34	154	2402	305	37	11	$714,150	1	$45,000	$759,150
4Q 98	315	142	25	84	52	145	2655	359	26	10	$792,063	2	$791,800	$1,583,863

	Total Actions Filed	Total Habeas Corpus	Total FTCA	Total Bivens	Total Other	Number of Litigation Reports Filed	Total Actions Pending	Total Actions Closed	Total Hearings or Trials	Number of Settle-ments	Total Amount of Settlements	Number of Awards	Total Amount of Awards	Total Amount of Awards & Settlements
Total	8,211	3,653	804	2,637	1,196	5,182	48,074	6,112	612	181	$10,639,854	27	$1,695,022	$12,334,876
Average per Quarter	357.00	158.83	34.96	114.65	52.00	225.30	2,090.17	265.74	26.61	7.87	$462,602	1.17	$73,697	$536,299
Average per FY	1,428.00	635.30	139.83	458.61	208.00	901.22	8,360.70	1,062.96	106.43	31.48	$1,850,409	4.70	$294,786	$2,145,196
FY 1992	1,262	512	129	419	229	645	5,978	809	139	30	$1,654,637	3	$259,223	$1,913,860
FY 1993	1,400	575	138	532	142	997	7,254	1,275	92	23	$789,256	7	$201,841	$991,096
FY 1995 (Estimated)	1,492	524	167	539	263	1,044	8,783	1,023	69	27	$1,534,349	3	$17	$1,534,366
FY 1996	1,506	621	131	597	118	1,114	7,810	929	80	33	$2,189,296	6	$379,916	$2,569,212
FY 1997	1,680	895	164	399	336	882	10,380	1,018	135	40	$2,249,961	3	$6,430	$2,256,391
FY 1998	1,244	657	117	286	174	761	10,065	1,314	114	35	$2,605,943	6	$847,599	$3,453,542

Table 14. Litigation Actions by Federal Prisoners (BOP Dataset) – Percentage Weight & Filing Rates, FY 1992-1998

	Habeas as % of Total	FTCA as % of Total	Bivens as % of Total	Other as % of Total	Prisoner Population	Total Claims Filed Per 1,000 Prisoners	Habeas Claims Filed Per 1,000 Prisoners	FTCA Claims Filed Per 1,000 Prisoners	Bivens Claims Filed Per 1,000 Prisoners	Other Claims Filed Per 1,000 Prisoners
1Q 92	38.87%	11.32%	33.58%	17.36%	71,608	3.70	1.44	0.42	1.24	0.64
2Q 92	42.34%	12.41%	32.85%	22.63%	73,771	3.71	1.57	0.46	1.22	0.84
3Q 92	38.54%	8.36%	33.15%	19.68%	75,934	4.89	1.88	0.41	1.62	0.96
4Q 92	42.61%	9.66%	33.24%	13.64%	78,096	4.51	1.92	0.44	1.50	0.61
1Q 93	42.09%	8.47%	37.29%	9.89%	80,259	4.41	1.86	0.37	1.64	0.44
2Q 93	43.03%	10.30%	36.67%	8.18%	82,591	4.00	1.72	0.41	1.47	0.33
3Q 93	37.43%	10.47%	39.27%	13.09%	84,923	4.50	1.68	0.47	1.77	0.59
4Q 93	42.22%	10.18%	38.62%	8.98%	87,255	3.83	1.62	0.39	1.48	0.34
1Q 94					89,587					
2Q 94					90,949					
3Q 94					92,311					
4Q 94					93,672					
1Q 95	34.20%	8.62%	32.76%	24.43%	95,034	3.66	1.25	0.32	1.20	0.89
2Q 95	31.72%	11.62%	37.53%	19.13%	97,250	4.25	1.35	0.49	1.59	0.81
3Q 95					99,466					
4Q 95	39.94%	13.13%	37.71%	9.22%	100,958	3.55	1.42	0.47	1.34	0.33
1Q 96	38.53%	10.00%	41.76%	5.88%	100,250	3.39	1.31	0.34	1.42	0.20
2Q 96	46.23%	9.09%	33.51%	8.83%	101,986	3.78	1.75	0.34	1.26	0.33
3Q 96	33.89%	8.41%	46.39%	8.41%	103,722	4.01	1.36	0.34	1.86	0.34
4Q 96	46.85%	7.40%	36.44%	7.95%	105,432	3.46	1.62	0.26	1.26	0.28
1Q 97	49.19%	10.69%	27.22%	11.49%	105,544	4.70	2.31	0.50	1.28	0.54
2Q 97	53.90%	9.93%	24.11%	11.58%	107,852	3.92	2.11	0.39	0.95	0.45
3Q 97	53.85%	9.55%	25.20%	8.75%	110,160	3.42	1.84	0.33	0.86	0.30
4Q 97	57.29%	8.59%	17.45%	51.30%	112,289	3.42	1.96	0.29	0.60	1.75
1Q 98	55.28%	10.56%	21.11%	12.78%	112,973	3.19	1.76	0.34	0.67	0.41
2Q 98	56.48%	9.30%	19.60%	13.95%	115,941	2.60	1.47	0.24	0.51	0.36
3Q 98	54.48%	9.70%	25.00%	12.69%	118,908	2.25	1.23	0.22	0.56	0.29
4Q 98	45.08%	7.94%	26.67%	16.51%	122,316	2.58	1.16	0.20	0.69	0.43
Total	44.49%	9.79%	32.12%	14.57%	Average per Quarter	3.73	1.63	0.37	1.22	0.54

	Habeas as % of Total	FTCA as % of Total	Bivens as % of Total	Other as % of Total	Prisoner Population	Total Claims Filed Per 1,000 Prisoners	Habeas Claims Filed Per 1,000 Prisoners	FTCA Claims Filed Per 1,000 Prisoners	Bivens Claims Filed Per 1,000 Prisoners	Other Claims Filed Per 1,000 Prisoners
					Average per FY	14.91	6.54	1.47	4.87	2.17
FY 1992	40.57%	10.22%	33.20%	18.15%	FY 1992	16.81	6.81	1.72	5.58	3.06
FY 1993	41.07%	9.86%	38.00%	10.14%	FY 1993	16.73	6.88	1.65	6.35	1.70
FY 1995 (Estimated)	35.12%	11.17%	36.10%	17.61%	FY 1995 (Estimated)	12.32	5.02	1.27	4.71	1.26
FY 1996	41.24%	8.70%	39.64%	7.84%	FY 1996	14.64	6.03	1.28	5.80	1.15
FY 1997	53.27%	9.76%	23.75%	20.00%	FY 1997	15.46	8.23	1.51	3.68	3.05
FY 1998	52.81%	9.41%	22.99%	13.99%	FY 1998	10.61	5.62	1.00	2.43	1.48

Table 15. Litigation Actions by Federal Prisoners (BOP Dataset) – Actions Filed with the Six Regional Offices, FY 1992-2000

Totals for Six Regions	Total Actions Filed	Total Habeas Corpus	Total FTCA	Total Bivens	Total Other	Number of Litigation Reports Filed	Total Actions Pending	Total Actions Closed	Total Hearings or Trials	Number of Settlements	Total Amount of Settlements	Number of Awards	Total Amount of Awards	Total Amount of Awards & Settlements
1Q 92	246	101	28	81	39	111	1,341	221	26	4	$92,897	0	$ -	$92,897
2Q 92	264	111	33	87	61	129	1,221	173	21	11	$1,374,671	1	$750	$1,375,421
3Q 92	355	137	28	117	72	181	1,745	176	68	8	$183,467	1	$258,460	$441,927
4Q 92	339	146	33	111	46	167	1,351	195	16	6	$3,602	1	$13	$3,615
1Q 93	343	144	30	127	35	346	1,719	473	13	8	$142,750	1	$156,000	$298,750
2Q 93	320	139	34	116	25	223	1,791	283	25	6	$138,290	3	$35,214	$173,504
3Q 93	371	139	40	147	45	196	1,844	183	37	6	$118,216	2	$627	$118,842
4Q 93	322	137	32	127	26	195	1,551	283	16	3	$390,000	1	$10,000	$400,000
1Q 94														$ -
2Q 94														$ -
3Q 94														$ -
4Q 94														$ -
1Q 95	333	118	29	105	81	296	1,645	210	10	2	$5,150	0	$ -	$ 5,150
2Q 95	393	129	46	148	70	253	1,667	209	15	5	$194,550	1	$ -	$ 194,550
3Q 95														$ -
4Q 95	347	141	47	132	27	171	2,803	305	20	12	$251,062	1	$13	$251,074
1Q 96	332	129	34	142	20	245	2,037	340	12	6	$375,620	2	$140,000	$515,620
2Q 96	376	178	35	126	28	305	2,112	233	13	7	$91,380	0	$ -	$91,380
3Q 96	403	141	35	191	24	340	2,104	196	33	11	$571,471	2	$153,466	$724,937
4Q 96	352	170	27	127	24	194	1,477	133	17	8	$533,825	2	$86,450	$620,275
1Q 97	477	244	52	123	51	183	2,111	244	28	7	$228,600	1	$173	$228,773
2Q 97	406	228	41	93	42	243	2,536	285	22	12	$339,267	2	$6,258	$345,525
3Q 97	351	202	32	89	33	190	2,521	225	32	11	$1,579,983	0	$ -	$1,579,983
4Q 97	356	214	33	63	195	202	2,754	232	37	10	$102,111	0	$ -	$102,111
1Q 98	317	189	30	70	27	213	2,854	169	27	4	$69,895	3	$10,799	$80,694
2Q 98	256	158	22	51	23	188	1,704	472	21	10	$1,029,835	0	$ -	$1,029,835
3Q 98	248	141	25	60	27	141	2,147	300	29	11	$714,150	1	$45,000	$759,150

Totals for Six Regions	Total Actions Filed	Total Habeas Corpus	Total FTCA	Total Bivens	Total Other	Number of Litigation Reports Filed	Total Actions Pending	Total Actions Closed	Total Hearings or Trials	Number of Settlements	Total Amount of Settlements	Number of Awards	Total Amount of Awards	Total Amount of Awards & Settlements
4Q 98	290	136	22	74	46	131	2,385	349	15	10	$792,063	2	$791,800	$1,583,863
1Q 99	327	172	33	88	40	185	2,385	261	29	7	$52,690	1	$316,000	$368,690
2Q 99	400	255	35	78	30	204	2,194	244	28	12	$997,450	1	$346	$997,796
3Q 99	386	243	32	75	35	287	2,029	469	39	4	$24,471	1	$10,500	$34,971
4Q 99	361	217	29	68	47	262	1,605	713	28	6	$303,000	0	$ -	$303,000
1Q 00	313	176	31	82	24	226	1,608	220	21	9	$446,500	0	$ -	$446,500
2Q 00	297	171	24	63	28	280	1,674	228	19	8	$653,700	1	$1,800,000	$2,453,700
Totals	9,881	4,806	952	2,961	1,271	6,287	56,915	8,024	717	224	$11,800,665	31	$3,821,868	$15,622,533
Average per Quarter	340.72	165.72	32.83	102.10	43.83	216.79	1,962.59	276.69	24.72	7.72	$406,919	1.07	$131,789	$538,708
Average per FY	1,362.90	662.90	131.31	408.41	175.31	867.17	7,850.34	1,106.76	98.90	30.90	$1,627,678	4.28	$527,154	$2,154,832
FY 92	1,204	495	122	396	218	588	5,658	765	131	29	$1,654,637	3	$259,223	$1,913,860
FY 93	1,356	559	136	517	131	960	6,905	1,222	91	23	$789,256	7	$201,841	$991,096
FY 96	1,463	618	131	586	96	1,084	7,730	902	75	32	$1,572,296	6	$379,916	$1,952,212
FY 97	1,590	888	158	368	321	818	9,922	986	119	40	$2,249,961	3	$6,430	$2,256,391
FY 98	1,111	624	99	255	123	673	9,090	1,290	92	35	$2,605,943	6	$847,599	$3,453,542
FY 99	1,474	887	129	309	152	938	8,213	1,687	124	29	$1,377,611	3	$326,846	$1,704,457

Table 16. Litigation Actions by Federal & State Prisoners (AO Dataset) – Total Filings & Filing Rates, FY 1992-2001

	US party status total (AO and new)	non-federal parties -- all (0)	federal defendant or plaintiff -- all (1)	Total	State prisoner population - 12/31	Federal prisoner population - 12/31	State filings per 1,000 prisoners	Federal filings per 1,000 prisoners
Fiscal year of filing (Oct 1 to Sept 30)	1992	38,504	6,639	45,143	802,241	80,259	48.00	82.72
	1993	41,733	8,059	49,792	879,714	89,587	47.44	89.96
	1994	46,772	7,326	54,098	959,668	95,034	48.74	77.09
	1995	50,786	8,558	59,344	1,025,624	100,250	49.52	85.37
	1996	50,816	12,630	63,446	1,076,375	105,544	47.21	119.67
	1997	43,641	14,584	58,225	1,127,686	112,973	38.70	129.09
	1998	40,223	10,155	50,378	1,176,055	123,041	34.20	82.53
	1999	40,906	11,292	52,198	1,228,455	135,246	33.30	83.49
	2000	41,656	12,372	54,028	1,245,845	145,416	33.44	85.08
	2001	39,446	14,988	54,434	1,249,038	156,993	31.58	95.47
Total		434,483	106,603	541,086				
Average per fiscal year		43,448.30	10,660.30	54,108.60			41.21	93.05

Table 17. Civil Rights Actions by State & Federal Prisoners (AO Dataset) – Total Filings, Percent State & Federal, and Annual Percent Change, FY 1992-2001

		Inmate civil rights by fed prisoners	Inmate civil rights by state prisoners	Total	% State	Percent change in overall civil rights docket from previous year
Fiscal year of filing (Oct 1 to Sept 30)	1992	823	27,707	28,530	97%	
	1993	855	30,824	31,679	97%	11%
	1994	1,047	35,504	36,551	97%	15%
	1995	1,045	37,963	39,008	97%	7%
	1996	1,156	37,067	38,223	97%	-2%
	1997	973	25,159	26,132	96%	-32%
	1998	1,160	23,185	24,345	95%	-7%
	1999	1,139	22,566	23,705	95%	-3%
	2000	1,186	22,412	23,598	95%	0%
	2001	1,233	20,976	22,209	94%	-6%
Total		10,617	283,363	293,980	96%	

Table 18. Litigation Actions by Federal Prisoners (AO Dataset) – Total Filings & Filing Rates by Type of Action, FY 1992-2001

	Nature of suit summary	Habeas etc -- 500s (0)	Inmate civil rights -- 500 or 555 (1)	Total	Fed prisoner pop - 12/31	Habeas filings per 1,000 prisoners per year	Civil rights filings per 1,000 prisoners	Total actions per 1,000 prisoners	Percent change in civil rights docket from previous year
Fiscal year of filing (Oct 1 to Sept 30)	1992	5,816	823	6,639	80,259	72.47	10.25	82.72	
	1993	7,204	855	8,059	89,587	80.41	9.54	89.96	4%
	1994	6,279	1,047	7,326	95,034	66.07	11.02	77.09	22%
	1995	7,513	1,045	8,558	100,250	74.94	10.42	85.37	0%
	1996	11,474	1,156	12,630	105,544	108.71	10.95	119.67	11%
	1997	13,611	973	14,584	112,973	120.48	8.61	129.09	-16%
	1998	8,995	1,160	10,155	123,041	73.11	9.43	82.53	19%
	1999	10,153	1,139	11,292	135,246	75.07	8.42	83.49	-2%
	2000	11,186	1,186	12,372	145,416	76.92	8.16	85.08	4%
	2001	13,755	1,233	14,988	156,993	87.62	7.85	95.47	4%
Total		95,986	10,617	106,603					
Average per fiscal year		9,598.60	1,061.70	10,660.30		83.58	9.47	93.05	

Table 19. Litigation Actions by Federal Prisoners (AO Dataset) – Collateral Attacks and Habeas Corpus Petitions by Type of Action, FY 1992-2001

	Nature Of Suit	Vacate Sentence (510)	Habeas Corpus (530)	Habeas Corpus-Death Penalty (535)	Mandamus and Other: Prisoner (540)	Federal prisoner population - 12/31	Filings per 1,000 prisoners - Vacate Sentence (510)	Filings per 1,000 prisoners - Habeas Corpus (530)	Filings per 1,000 prisoners - Habeas Corpus-Death Penalty (535)	Filings per 1,000 prisoners - Mandamus and Other: Prisoner (540)
Fiscal year of filing (Oct 1 to Sept 30)	1992	3,850	1,389	4	573	80,259	47.97	17.31	0.05	7.14
	1993	5,151	1,377	4	672	89,587	57.50	15.37	0.04	7.50
	1994	4,473	1,352	4	450	95,034	47.07	14.23	0.04	4.74
	1995	5,792	1,252	4	465	100,250	57.78	12.49	0.04	4.64
	1996	9,456	1,599	9	410	105,544	89.59	15.15	0.09	3.88
	1997	11,327	1,884	5	395	112,973	100.26	16.68	0.04	3.50
	1998	5,991	2,621	13	370	123,041	48.69	21.30	0.11	3.01
	1999	5,462	4,071	16	604	135,246	40.39	30.10	0.12	4.47
	2000	6,164	4,354	16	652	145,416	42.39	29.94	0.11	4.48
	2001	8,443	4,729	10	573	156,993	53.78	30.12	0.06	3.65
Total		66,109	24,628	85	5,164					
Average per fiscal year		6,610.90	2,462.80	8.50	516.40		58.54	20.27	0.07	4.70

Table 20. Litigation Actions by State Prisoners (AO Dataset) – Total Filings & Filing Rates by Type of Action, FY 1992-2001

Nature of suit summary	Habeas etc – 500s (0)	Inmate civil rights – 500 or 555 (1)	Total	State prisoner pop - 12/31	Habeas filings per 1,000 prisoners	Civil rights filings per 1,000 prisoners	Total filings per 1,000 prisoners	Percent change in civil rights docket from previous year
Fiscal year of filing (Oct 1 to Sept 30)								
1992	10,797	27,707	38,504	802,241	13.46	34.54	48.00	
1993	10,909	30,824	41,733	879,714	12.40	35.04	47.44	11%
1994	11,268	35,504	46,772	959,668	11.74	37.00	48.74	15%
1995	12,823	37,963	50,786	1,025,624	12.50	37.01	49.52	7%
1996	13,749	37,067	50,816	1,076,375	12.77	34.44	47.21	-2%
1997	18,482	25,159	43,641	1,127,686	16.39	22.31	38.70	-32%
1998	17,038	23,185	40,223	1,176,055	14.49	19.71	34.20	-8%
1999	18,340	22,566	40,906	1,228,455	14.93	18.37	33.30	-3%
2000	19,244	22,412	41,656	1,245,845	15.45	17.99	33.44	-1%
2001	18,470	20,976	39,446	1,249,038	14.79	16.79	31.58	-6%
Total	151,120	283,363	434,483		13.89	27.32	41.21	
Average per fiscal year	15,112.00	28,336.30	43,448.30		13.89	27.32	41.21	

Table 21 Civil Rights Actions by Federal Prisoners (AO Dataset) – Pro Se Status of Litigants, FY 1997-2001

	Pro Se	Missing	No pro se plaintiffs or defendants	Pro se plaintiffs, no pro se defendants	Pro se defendants, no pro se plaintiffs	Both pro se plaintiffs and defendants	Total	No pro se pls or defs - excluding missing	Pro se pls, no pro se defs - excluding missing	Pro se defs, no pro se pls - excluding missing	Both pro se pls and defs - excluding missing
Fiscal year of filing (Oct 1 to Sept 30) NEW	1997	398	11	99	1	0	509	9.91%	89.19%	0.90%	0.00%
	1998	689	36	432	2	1	1,160	7.64%	91.72%	0.42%	0.21%
	1999	6	63	1,044	14	12	1,139	5.56%	92.14%	1.24%	1.06%
	2000	0	59	1,118	4	5	1,186	4.97%	94.27%	0.34%	0.42%
	2001	0	54	1,171	3	5	1,233	4.38%	94.97%	0.24%	0.41%
Total		1,093	223	3,864	24	23	5,227	5.39%	93.47%	0.58%	0.56%

Table 22. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Outcomes, FY 1997-2001

	Outcome summary 2	Nonjudgment disposition (0)	Pretrial dismissal (1)	Voluntary dismissal (2)	Settled (3)	Trial (4)	Total	Nonjudgment disposition (0)	Pretrial dismissal (1)	Voluntary dismissal (2)	Settled (3)	Trial (4)
Pro Se	Missing	119	946	51	19	3	1,149	10.36%	82.33%	4.44%	1.65%	0.26%
	Neither	71	124	20	15	4	243	29.22%	51.03%	8.23%	6.17%	1.65%
	Pls only	1,079	2,777	166	76	13	4,145	26.03%	67.00%	4.00%	1.83%	0.31%
	Defs only	2	19	1	1	0	25	8.00%	76.00%	4.00%	4.00%	0.00%
	Both	10	9	3	2	0	25	40.00%	36.00%	12.00%	8.00%	0.00%
Total		1,281	3,875	241	113	20	5,587	22.93%	69.36%	4.31%	2.02%	0.36%

Table 23. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Judgment For, FY 1997-2001

	Judgment-for summary (1979-)	Plaintiff or both (1)	Defendant (2)	Unknown (or not applicable) (4)	Total	Plaintiff or both (1)	Defendant (2)
Pro Se	Missing	6	309	834	1,149	1.90%	98.10%
	Neither	10	54	179	243	15.63%	84.38%
	Pls only	16	857	3,272	4,145	1.83%	98.17%
	Defs only	1	14	10	25	6.67%	93.33%
	Both	1	7	17	25	12.50%	87.50%
Total		34	1,241	4,312	5,587	2.67%	97.33%

Table 24. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Nature of Judgment, FY 1997-2001

	Nature of judgment summary	No award coded (0)	Money award (1)	Injunction (3)	Costs w & w/o atty fees (5)	Total	No award coded (0)	Money award (1)	Injunction (3)	Costs w & w/o atty fees (5)
Pro Se	Missing	1,102	1	0	8	1,149	99.19%	0.09%	0.00%	0.72%
	Neither	191	1	1	2	243	97.95%	0.51%	0.51%	1.03%
	Pls only	3,279	3	0	27	4,145	99.09%	0.09%	0.00%	0.82%
	Defs only	22	0	0	1	25	95.65%	0.00%	0.00%	4.35%
	Both	19	0	0	0	25	100.00%	0.00%	0.00%	0.00%
Total		4,613	5	1	38	5,587	99.06%	0.11%	0.02%	0.82%

Table 25. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Nature of Trials, FY 1997-2001

	Nature of trial summary	No trial (0)	Jury trial (1)	Bench trial (2)	Total	No trial (0)	Jury trial (1)	Bench trial (2)
Pro Se	Missing	1,146	0	3	1,149	99.74%	0.00%	0.26%
	Neither	239	2	2	243	98.35%	0.82%	0.82%
	Pls only	4,132	10	3	4,145	99.69%	0.24%	0.07%
	Defs only	25	0	0	25	100.00%	0.00%	0.00%
	Both	25	0	0	25	100.00%	0.00%	0.00%
Total		5,567	12	8	5,587	99.64%	0.21%	0.14%

Table 26. Civil Rights Actions by Federal Prisoners (AO Dataset) – Correlation Between Pro Se Status and Trial Outcomes, FY 1997-2001

	Trial outcomes	Defendant victory (1)	Plaintiff victory (2)	Total	Defendant victory (1)	Plaintiff victory (2)
Pro Se	Missing	3	0	3	100%	0%
	Neither	3	1	4	75%	25%
	Pls only	11	2	13	85%	15%
Total		17	3	20	85%	15%

Table 27A. Civil Rights Actions by Federal Prisoners (AO Dataset) – Outcomes by Fiscal Year of Termination, FY 1992-2001

	Outcome summary (1979-) (NEW)	Non-judgment disposition (0)	pretrial dismissal (defense victory) (1)	pretrial plaintiffs victory (2)	voluntary dismissal (6)	Settled (7)	jury verdict for defendant (8)	jury verdict for plaintiff (9)	directed verdict for plaintiff (11)	directed verdict for defendant (13)	bench verdict for defendant (14)	bench verdict for plaintiff (15)	Total	Plaintiff success rate	Plaintiff success rate with voluntary dismissals
fiscal year of termination (Oct 1 - Sept 30)	1992	14	180	3	15	6	1	0	0	0	1	0	222	4.05%	10.81%
	1993	8	185	3	10	7	0	0	0	0	0	0	217	4.61%	9.22%
	1994	6	166	3	5	10	1	0	0	0	0	0	195	6.67%	9.23%
	1995	12	236	0	14	7	1	0	0	0	1	0	273	2.56%	7.69%
	1996	9	240	1	13	7	1	0	0	0	0	0	275	2.91%	7.64%
	1997	9	227	4	12	7	0	1	0	0	1	0	264	4.55%	9.09%
	1998	25	224	2	12	5	1	0	0	0	0	0	271	2.58%	7.01%
	1999	18	234	0	15	6	0	0	0	0	1	0	275	2.18%	7.64%
	2000	21	238	3	14	6	2	0	0	0	0	0	286	3.15%	8.04%
	2001	22	228	2	10	6	2	1	0	0	0	0	273	3.30%	6.96%
Total		144	2,158	21	120	67	9	2	0	0	4	0	2,551	3.53%	8.23%
Percent		5.64%	84.59%	0.82%	4.70%	2.63%	0.35%	0.08%	0.00%	0.00%	0.16%	0.00%	100.00%	4.05%	10.81%

Table 27B. Civil Rights Actions by Federal Prisoners (AO Dataset) – Outcomes by Fiscal Year of Filing, FY 1992-2001

	Outcome summary (1979-) (NEW)	Non-judgment disposition (0)	pretrial dismissal (defense victory) (1)	pretrial plaintiffs victory (2)	voluntary dismissal (6)	Settled (7)	jury verdict for defendant (8)	jury verdict for plaintiff (9)	directed verdict for plaintiff (11)	directed verdict for defendant (13)	bench verdict for defendant (14)	bench verdict for plaintiff (15)	Total	Plaintiff success rate	Plaintiff success rate with voluntary dismissals
fiscal year of termination (Oct 1 - Sept 30)	1992	10	177	0	8	8	1	0	0	0	0	0	206	4.05%	10.81%
	1993	9	186	0	10	8	0	0	0	0	1	0	218	4.61%	9.22%
	1994	9	197	0	13	11	0	1	0	0	0	0	234	6.67%	9.23%
	1995	9	231	0	15	3	1	0	0	0	0	0	262	2.56%	7.69%
	1996	10	259	2	10	4	0	0	0	0	0	0	288	2.91%	7.64%
	1997	13	202	0	18	8	1	0	0	0	1	0	245	4.55%	9.09%
	1998	22	231	1	9	5	1	0	0	0	0	0	272	2.58%	7.01%
	1999	19	208	0	10	3	1	0	0	0	0	0	241	2.18%	7.64%
	2000	23	224	0	12	3	0	0	0	0	0	0	263	3.15%	8.04%
	2001	8	48	0	1	2	0	0	0	0	0	0	60	3.30%	6.96%
Total		132	1,963	3	106	55	5	1	0	0	2	0	2,289	3.53%	8.23%
Percent		5.77%	85.76%	0.13%	4.63%	2.40%	0.22%	0.04%	0.00%	0.00%	0.09%	0.00%	100.00%	4.05%	10.81%

Table 28. Civil Rights Actions by Federal Prisoners (AO Dataset) – Nature of Trial, FY 1992-2001

	Nature of trial summary (NEW)	No trial (0)	Jury trial (1)	Bench trial (2)	Total	No trial (0)	Jury trial (1)	Bench trial (2)
fiscal year of termination (Oct 1 - Sept 30) (NEW)	1992	220	1	1	222	99.10%	0.45%	0.45%
	1993	217	0	0	217	100.00%	0.00%	0.00%
	1994	194	1	0	195	99.49%	0.51%	0.00%
	1995	271	1	1	273	99.27%	0.37%	0.37%
	1996	274	1	0	275	99.64%	0.36%	0.00%
	1997	262	1	1	264	99.24%	0.38%	0.38%
	1998	270	1	0	271	99.63%	0.37%	0.00%
	1999	274	0	1	275	99.64%	0.00%	0.36%
	2000	284	2	0	286	99.30%	0.70%	0.00%
	2001	270	3	0	273	98.90%	1.10%	0.00%
Total		2,536	11	4	2,551	99.41%	0.43%	0.16%

Table 29. Civil Rights Actions by Federal Prisoners (AO Dataset) – Trial Outcomes, FY 1992-2001

	Trial outcomes	Unknown victory (-9)	Defendant victory (1)	Plaintiff victory (2)	Total	Defendant victory (1)	Plaintiff victory (2)
fiscal year of termination (Oct 1 - Sept 30) (NEW)	1992	0	2	0	2	100.00%	0.00%
	1994	0	1	0	1	100.00%	0.00%
	1995	0	2	0	2	100.00%	0.00%
	1996	0	1	0	1	100.00%	0.00%
	1997	0	1	1	2	50.00%	50.00%
	1998	0	1	0	1	100.00%	0.00%
	1999	0	1	0	1	100.00%	0.00%
	2000	0	2	0	2	100.00%	0.00%
	2001	0	2	1	3	66.67%	33.33%
Total		0	13	2	15	86.67%	13.33%

Table 30. Civil Rights Actions by Federal Prisoners (AO Dataset) – Judgments For, FY 1992-2001

	Judgment-for summary (1979-)	Plaintiff or both (1)	Defendant (2)	Unknown (or not applicable) (4)	Total	Plaintiff or both - excluding unknown or not applicable	Defendant - excluding unknown or not applicable
fiscal year of terminatio n (Oct 1 - Sept 30)	1992	0	85	134	219	0.00%	100.00%
	1993	1	101	113	215	0.98%	99.02%
	1994	0	87	105	192	0.00%	100.00%
	1995	0	109	164	273	0.00%	100.00%
	1996	0	116	158	274	0.00%	100.00%
	1997	2	91	168	261	2.15%	97.85%
	1998	1	77	192	270	1.28%	98.72%
	1999	1	72	202	275	1.37%	98.63%
	2000	0	85	198	283	0.00%	100.00%
	2001	1	65	205	271	1.52%	98.48%
Total		6	888	1,639	2,533	0.67%	99.33%

Table 31. Civil Rights Actions by Federal Prisoners (AO Dataset) – Nature of Judgments, FY 1992-2001

	Nature of judgment summary (NEW)	No award coded (0)	Money award (1)	Injunction (3)	Forfeiture etc (4)	Costs w & w/o atty fees (5)	Total
fiscal year of terminatio n (Oct 1 - Sept 30) (NEW)	1992	218	0		1	0	219
	1993	212	2		0	1	215
	1994	192	0		0	0	192
	1995	272	0		0	1	273
	1996	271	0		0	3	274
	1997	254	2		0	5	261
	1998	267	1		0	2	270
	1999	274	1		0	0	275
	2000	280	0		0	3	283
	2001	270	1		0	0	271
Total		2,510	7		1	15	2,533
Percent		99.09%	0.28%	0.00%	0.04%	0.59%	100.00%

Table 32. Civil Rights Actions by Federal Prisoners (AO Dataset) – Awards (in Thousands of Dollars), FY 1992-2001

fiscal year of termination (Oct 1 - Sept 30) (NEW)	Number	Mean	Median	Minimum	Maximum	Sum
1993	2	$1,562.50	$1,562.50	$25.00	$3,100.00	$3,125.00
1997	3	$1,000.67	$1.00	$1.00	$3,000.00	$3,002.00
1998	3	$667.33	$1.00	$1.00	$2,000.00	$2,002.00
1999	2	$5.50	$5.50	$1.00	$10.00	$11.00
2000	1	$1.00	$1.00	$1.00	$1.00	$1.00
2001	2	$ 5.50	$5.50	$1.00	$10.00	$11.00
Total	13	$627.08	$1.00	$1.00	$3,100.00	$8,152.00

Table 33. Civil Rights Actions by State Prisoners (AO Dataset) – Pro Se Status of Litigants, FY 1997-2001

	Pro Se	Missing	No pro se plaintiffs or defendants	Pro se plaintiffs, no pro se defendants	Pro se defendants, no pro se plaintiffs	Both pro se plaintiffs and defendants	Total	No pro se pls or defs - excluding missing	Pro se pls, no pro se defs - excluding missing	Pro se defs, no pro se pls - excluding missing	Both pro se pls and defs - excluding missing
Fiscal year of filing (Oct 1 to Sept 30) NEW	1997	8,426	236	2,524	5	47	11,238	8.39%	89.76%	0.18%	1.67%
	1998	14,705	495	7,848	22	115	23,185	5.84%	92.55%	0.26%	1.36%
	1999	242	732	21,352	119	121	22,566	3.28%	95.65%	0.53%	0.54%
	2000	0	540	21,551	58	263	22,412	2.41%	96.16%	0.26%	1.17%
	2001	0	618	19,985	10	363	20,976	2.95%	95.28%	0.05%	1.73%
Total		23,373	2,621	73,260	214	909	100,377	3.40%	95.14%	0.28%	1.18%

Table 34. Civil Rights Actions by State Prisoners (AO Dataset) – Outcomes, FY 1992-2001

	Outcome summary (1979-) (NEW)	non-judgment disposition (0)	pretrial dismissal (defense victory) (1)	pretrial plaintiffs victory (2)	voluntary dismissal (6)	Settled (7)	jury verdict for defendant (8)	jury verdict for plaintiff (9)	directed verdict for plaintiff (11)	directed verdict for defendant (13)	bench verdict for defendant (14)	bench verdict for plaintiff (15)	Total	Plaintiff success rate	Plaintiff success rate with voluntary dismissals
fiscal year of termination (Oct 1 - Sept 30) (NEW)	1992	335	4,621	59	426	456	55	6	1	11	122	22	6,122	8.45%	15.44%
	1993	356	5,358	66	488	502	62	9	0	9	118	13	6,983	7.90%	15.81%
	1994	384	5,628	76	592	482	93	10	0	10	125	24	7,489	7.45%	13.73%
	1995	435	7,105	63	565	582	64	18	0	4	110	8	9,004	5.86%	11.15%
	1996	430	7,795	44	506	486	78	17	0	12	151	14	9,566	5.29%	11.88%
	1997	317	6,924	41	560	390	93	10	0	3	119	9	8,501	5.34%	11.61%
	1998	277	5,626	37	434	321	94	7	0	6	77	4	6,914	5.59%	10.95%
	1999	208	4,822	17	313	292	64	14	0	10	63	3	5,837	4.54%	10.34%
	2000	332	4,238	23	307	201	66	11	0	12	42	5	5,289	4.61%	9.62%
	2001	304	4,181	16	257	203	58	12	0	4	51	5	5,123	6.46%	12.74%
Total		3,378	56,298	442	4,448	3,915	727	114	1	81	978	107	70,828	8.45%	15.44%
Percent		4.77%	79.49%	0.62%	6.28%	5.53%	1.03%	0.16%	0.00%	0.11%	1.38%	0.15%	100.00%		

Table 35. Civil Rights Actions by State Prisoners (AO Dataset) – Judgments For, FY 1992-2001

		Judgment-for summary (1979-)(NEW)	Plaintiff or both (1)	Defendant (2)	Unknown (or not applicable) (4)	Total	Plaintiff or both - excluding unknown or not applicable	Defendant - excluding unknown or not applicable
Inmate civil rights -- 500 or 555 (1)	fiscal year of termination (Oct 1 - Sept 30) (NEW)	1992	42	2320	3707	6,069	1.78%	98.22%
		1993	39	2339	4548	6,926	1.64%	98.36%
		1994	52	2600	4769	7,421	1.96%	98.04%
		1995	34	2927	5978	8,939	1.15%	98.85%
		1996	36	3299	6185	9,520	1.08%	98.92%
		1997	20	2680	5758	8,458	0.74%	99.26%
		1998	17	1691	5174	6,882	1.00%	99.00%
		1999	19	1507	4293	5,819	1.25%	98.75%
		2000	21	1194	4054	5,270	1.73%	98.19%
		2001	12	1183	3907	5,102	1.00%	99.00%
	Total		292	21,740	48,373	70,406	1.33%	98.67%

Table 36. Civil Rights Actions by State Prisoners (AO Dataset) – Nature of Judgments, FY 1992-2001

	Nature of judgment summary (NEW)	No award coded (0)	Money award (1)	Injunction (3)	Forfeiture etc (4)	Costs w & w/o atty fees (5)	Total
fiscal year of terminatio n (Oct 1 - Sept 30) (NEW)	1992	5937	33	6	4	89	6,069
	1993	6763	36	3	2	122	6,926
	1994	7177	55	3	3	183	7,421
	1995	8643	30	5	5	256	8,939
	1996	9347	32	2	1	138	9,520
	1997	8366	18	0	2	72	8,458
	1998	6813	16	1	0	52	6,882
	1999	5764	16	0	1	38	5,819
	2000	5215	20	1	0	33	5,270
	2001	5054	13	0	0	35	5,102
Total		69,079	269	21	18	1,018	70,406
Percent		98.12%	0.38%	0.03%	0.03%	1.45%	100.00%

Table 37. Civil Rights Actions by State Prisoners (AO Dataset) – Nature of Trial, FY 1992-2001

	Nature of trial summary (NEW)	No trial (0)	Jury trial (1)	Bench trial (2)	Total	No trial (0)	Jury trial (1)	Bench trial (2)
fiscal year of terminati on (Oct 1 - Sept 30) (NEW)	1992	5,905	73	144	6,122	96.46%	1.19%	2.35%
	1993	6,772	80	131	6,983	96.98%	1.15%	1.88%
	1994	7,227	113	149	7,489	96.50%	1.51%	1.99%
	1995	8,800	86	118	9,004	97.73%	0.96%	1.31%
	1996	9,294	107	165	9,566	97.16%	1.12%	1.72%
	1997	8,267	106	128	8,501	97.25%	1.25%	1.51%
	1998	6,726	107	81	6,914	97.28%	1.55%	1.17%
	1999	5,683	88	66	5,837	97.36%	1.51%	1.13%
	2000	5,153	89	47	5,289	97.43%	1.68%	0.89%
	2001	4,993	74	56	5,123	97.46%	1.44%	1.09%
Total		68,820	923	1,085	70,828	97.16%	1.30%	1.53%

Table 38. Civil Rights Actions by State Prisoners (AO Dataset) – Trial Outcomes, FY 1992-2001

	Trial outcomes	Unknown victory (-9)	Defendant victory (1)	Plaintiff victory (2)	Total	Defendant victory (1)	Plaintiff victory (2)
fiscal year of terminati on (Oct 1 - Sept 30) (NEW)	1992	0	188	29	217	86.64%	13.36%
	1993	0	189	22	211	89.57%	10.43%
	1994	0	228	34	262	87.02%	12.98%
	1995	0	178	26	204	87.25%	12.75%
	1996	0	241	31	272	88.60%	11.40%
	1997	0	215	19	234	91.88%	8.12%
	1998	0	177	11	188	94.15%	5.85%
	1999	0	137	17	154	88.96%	11.04%
	2000	0	120	16	136	88.24%	11.76%
	2001	0	113	17	130	86.92%	13.08%
Total		0	1,786	222	2,008	88.94%	11.06%

Table 39. Civil Rights Actions by Federal Prisoners (AO Dataset) – Awards (in Thousands of Dollars), FY 1992-2001

fiscal year of termination (Oct 1 - Sept 30) (NEW)	Number	Mean	Median	Minimum	Maximum	Sum
1992	35	$542.94	$30.00	$1.00	$3,000.00	$19,003.00
1993	34	$202.06	$1.50	$1.00	$3,000.00	$6,870.00
1994	55	$211.24	$1.00	$1.00	$3,500.00	$11,618.00
1995	31	$78.29	$3.00	$1.00	$1,500.00	$2,427.00
1996	33	$93.33	$5.00	$1.00	$2,000.00	$3,080.00
1997	30	$260.37	$1.00	$1.00	$5,000.00	$7,811.00
1998	48	$1,030.46	$1,500.00	$1.00	$2,000.00	$49,462.00
1999	23	$159.22	$2.00	$1.00	$3,000.00	$3,662.00
2000	24	$ 511.38	$5.50	$1.00	$7,500.00	$12,273.00
2001	17	$22.71	$3.00	$1.00	$125.00	$386.00
Total	330	$353.31	$3.50	$1.00	$7,500.00	$116,592.00

Table 40. Prisoner Population Figures – Federal & State, FY 1977-2001

Federal Population Figures	30-Jun	30-Sep	31-Dec		State Population Figures	31-Dec
1977			32,088		1977	267,936
1978			29,803		1978	277,473
1979			26,371		1979	288,086
1980			24,363		1980	305,458
1981			28,133		1981	341,797
1982			29,673		1982	384,133
1983			31,926		1983	404,929
1984			34,263		1984	427,739
1985			40,223		1985	462,284
1986			44,408		1986	500,564
1987			48,300		1987	536,784
1988			49,928		1988	577,672
1989			59,171		1989	653,193
1990			65,526		1990	708,393
1991			71,608		1991	753,951
1992			80,259		1992	802,241
1993			89,587		1993	879,714
1994			95,034		1994	959,668
1995	99,466	100,958	100,250		1995	1,025,624
1996	103,722	105,432	105,544		1996	1,076,375
1997	110,160	112,289	112,973		1997	1,127,686
1998	118,908	122,316	123,041		1998	1,176,055
1999	130,378	133,689	135,246		1999	1,228,455
2000	142,530	145,125	145,416		2000	1,245,845
2001	152,788	156,572	156,993		2001	1,249,038

Table 41. Federal Prisoner Population Figures by the Quarter (Estimated),[1] FY 1992-2001

Quarter	Estimated Population		Quarter	Estimated Population
1Q - 12/30/91	71,608		1Q - 12/30/96	105,544
2Q - 3/30/92	73,771		2Q - 3/30/97	107,852
3Q - 6/30/92	75,934		3Q - 6/30/97	110,160
4Q - 9/30/92	78,096		4Q - 9/30/97	112,289
1Q - 12/30/92	80,259		1Q - 12/30/97	112,973
2Q - 3/30/93	82,591		2Q - 3/30/98	115,941
3Q - 6/30/93	84,923		3Q - 6/30/98	118,908
4Q - 9/30/93	87,255		4Q - 9/30/98	122,316
1Q - 12/30/93	89,587		1Q - 12/30/98	123,041
2Q - 3/30/94	90,949		2Q - 3/30/99	126,710
3Q - 6/30/94	92,311		3Q - 6/30/99	130,378
4Q - 9/30/94	93,672		4Q - 9/30/99	133,689
1Q - 12/30/94	95,034		1Q - 12/30/99	135,246
2Q - 3/30/95	97,250		2Q - 3/30/00	138,888
3Q - 6/30/95	99,466		3Q - 6/30/00	142,530
4Q - 9/30/95	100,958		4Q - 9/30/00	145,125
1Q - 12/30/95	100,250		1Q - 12/30/00	145,416
2Q - 3/30/96	101,986		2Q - 3/30/01	149,102
3Q - 6/30/96	103,722		3Q - 6/30/01	152,788
4Q - 9/30/96	105,432		4Q - 9/30/01	156,572

[1] Shaded yellow boxes were estimated using linear interpolation. *See supra,* Data Appendix, Part I.C.