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NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT-JOHN FOTI; JOE NEUFELD; KEN AUGUSTINE,

Plaintiffs,

v.

OFFICER McHUGH and other unknown number of unnamed officers of the U.S. Marshals Service and the Federal Protective Service; U.S. MARSHALS SERVICE; FEDERAL PROTECTIVE SERVICE,

Defendants.

No. C 04-2567 PJH

**NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

The Honorable Phyllis J. Hamilton

[NO HEARING DATE; MOTION TO BE DECIDED ON THE PAPERS]

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## NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendants hereby move pursuant to Federal Rule of Civil Procedure Rule 12(b)(1) and 12(b)(6) for dismissal of the Complaint filed by Plaintiffs Robert-John:Foti, Joe Neufeld and Ken Augustine ("Plaintiffs"). This motion is based upon the Notice of Motion and Memorandum of Points and Authorities contained herein, the Declarations of Gerald Auerbach and Carol Lazzaro, the papers and pleadings on file in this action, and any other matters that the Court may wish to consider. Pursuant to the November 10, 2004 Order of the Honorable Phyllis J. Hamilton, this motion will be decided on the papers and there will be no hearing.

## RELIEF REQUESTED

Defendants request the dismissal of Plaintiffs' First Amended Complaint in its entirety.

## ISSUES PRESENTED

1. Whether Plaintiffs' tort claims must be dismissed because Plaintiffs have failed to exhaust their mandatory administrative remedies under the Federal Tort Claims Act?

2. Whether Plaintiffs' constitutional claims for injunctive relief against the U.S. Marshals Service and the Federal Protective Service must be dismissed because Plaintiffs have failed to establish a waiver of sovereign immunity for such claims?

3. Whether Plaintiffs' *Bivens* claims against Officer Timothy McHugh and "other unknown number of unnamed officers of the U.S. Marshals Service and the Federal Protective Services" must be dismissed because the individual Defendants are entitled to qualified immunity?

4. Whether Plaintiffs' claims for "obstruction of justice" under 18 U.S.C. § 1509 must be dismissed because Plaintiffs have failed to establish a waiver of sovereign immunity for such claims?

## INTRODUCTION/STATEMENT OF FACTS[1]

Plaintiffs' claims arise out of various attempts to enter the Phillip Burton Federal Building at 450 Golden Gate Avenue in San Francisco ("Federal Building") without showing any identification, as requested by officers of the U.S. Marshals Service ("USMS") and the Federal Protective Service ("FPS"). First Amended Complaint ("FAC"), ¶¶ 5, 6, 8, 12-16. Apparently relying on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) ("*Bivens*"), 42 U.S.C. sections 1983 and 1986, and 28 U.S.C. sections 1331, 1332 and 1343, Plaintiffs purport to assert claims against Defendants for assault, battery, false arrest, false imprisonment, kidnaping and obstruction of justice (citing 18 U.S.C. § 1509), as well as constitutional claims for alleged violations of Plaintiffs' rights under the First, Fourth, Fifth, Thirteenth and Fourteenth Amendments. FAC, *e.g.*, ¶¶ 1, 2, 23, 25, 27, 29, 31, 33, 35, 39.

## ARGUMENT

### I. Plaintiffs' Tort Claims Must Be Dismissed For Failure to Exhaust Their Administrative Remedies.

This Court lacks jurisdiction over Plaintiffs' state-law tort claims for assault, battery, false arrest, false imprisonment and kidnaping because Plaintiffs have failed to comply with the prerequisites for federal court jurisdiction over these claims. It is axiomatic that, "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2674, is a limited waiver of sovereign immunity for state-law tort claims such as those asserted by Plaintiffs, but only if claimants comply with certain prerequisites: "The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113 (1993).

As a threshold matter, Plaintiffs cannot assert their state-law tort claims against the USMS and FPS, as the only proper defendant in an FTCA case is the United States, not its agencies. 28 U.S.C. §§ 1346(b) & 2679(a); *City of Whittier v. United States Dept. of Justice,* 598

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[1] Defendants accept Plaintiffs' allegations solely for purposes of this Motion to Dismiss.

F.2d 561, 562 (9th Cir. 1979) (FTCA claim against Department of Justice dismissed because "it is 'well established that federal agencies are not subject to suit Eo nomine unless so authorized by Congress in explicit language.'") (quoting *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952)).

Even assuming Plaintiffs had properly named the United States as the defendant, this Court lacks jurisdiction over Plaintiffs' state-law tort claims because they have not satisfied the specific jurisdictional prerequisites for an FTCA suit in federal court. Pursuant to 28 U.S.C. section 2675(a), the claimant must first submit an administrative tort claim to the appropriate federal agency. The federal agency then has six months to make a final determination on the claim. The claimant may file a lawsuit against the United States in the appropriate district court only after the appropriate agency makes a final determination on the claim or six months has run from the date of presentment of the claim; in other words, the district court does not have jurisdiction over FTCA claims until denial of the claim or the running of six months. *Id.*; *see also* 28 U.S.C. § 2401(b); *Jerves v. United States,* 966 F.2d 517 (9th Cir. 1992) (suit dismissed because it was prematurely filed before receipt of agency's final denial and before six months from date of submission of the claim); *Sparrow v. United States Postal Serv.*, 825 F. Supp. 252 (E.D. Cal. 1993) (filing complaint before administrative claim was finalized could not be cured through an amended complaint; new complaint must be filed).

Critically, failure to comply with the mandatory administrative requirements divests a district court of jurisdiction to hear a party's FTCA claim. *Jerves*, 966 F.2d at 519. Because this requirement is jurisdictional, it cannot be waived. *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 743 (9th Cir. 1991).

Here, Plaintiffs have not alleged that they satisfied the administrative claim requirement under 28 U.S.C. § 2675(a) before filing suit. Indeed, it is undisputed that Plaintiffs have not submitted the required administrative claims with either the USMS or FPS. *See* Declarations of Gerald Auerbach and Carol Lazzaro.[2] Accordingly, because Plaintiffs have not satisfied the

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[2] These declarations are submitted only to challenge the Court's jurisdiction under Rule 12(b)(1). Defendants request that the Court consider these matters outside the pleadings as they are relevant to the issue of this Court's subject matter jurisdiction. *Capitol Industries-EMI*

jurisdictional prerequisites of the FTCA, this Court lacks jurisdiction over their state-law claims for assault, battery, false arrest, false imprisonment and kidnaping. These claims must therefore be dismissed from the FAC.

## II. Plaintiffs' Constitutional Claims Seeking Injunctive Relief Must Be Dismissed Because Plaintiffs Have Not Sustained Their Burden Of Establishing A Waiver Of Sovereign Immunity For These Claims.

As noted above, it is well established that a plaintiff who sues the United States or its agencies "must point to an unequivocal waiver of sovereign immunity," otherwise, the court lacks subject matter jurisdiction over the suit. *Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998); *see also Lane v. Pena*, 518 U.S. 187 (1996) (waiver of sovereign immunity must be unequivocal and will not be implied). The burden is on plaintiff to point to an explicit waiver of sovereign immunity. *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995) (quotations and citations omitted). Plaintiffs' claims for injunctive relief based on alleged constitutional violations must be dismissed because the authorities cited in Plaintiffs' First Amended Complaint do not establish an unequivocal waiver of sovereign immunity for such claims.[3]

Plaintiffs request an injunction preventing the USMS and/or FPS from requiring them to show identification prior to entering the Federal Building. FAC, ¶ 115. Although Plaintiffs purport to rely on *Bivens*, 42 U.S.C. sections 1983 and 1986 and 28 U.S.C. sections 1331, 1332 and 1343, *see id.*, ¶¶ 1-2, none of these authorities helps Plaintiffs discharge their burden of pointing to an unequivocal waiver of sovereign immunity that would permit assertion of constitutional claims for injunctive relief against the USMS and FPS. *See Cato,* 70 F.3d at 1107.

The Supreme Court's decision in *Bivens* permits suits for money damages only against

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*Inc. v. Bennett*, 681 F.2d 1107, 1118 n.29 (9th Cir. 1982) (matters outside pleadings related to the issue of subject matter jurisdiction can be considered on motion to dismiss). "Where subject matter jurisdiction is lacking, dismissal, not summary judgment, is the appropriate disposition." *MacKay v. Pfiel*, 827 F.2d 540, 543 (9th Cir. 1987).

[3] In their First Amended Complaint, Plaintiffs do not appear to be seeking monetary relief from the agencies for alleged violations of their Constitutional rights. Such claims would, in any event, be subject to dismissal. *See, e.g., Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484-86 (1994) (*Bivens* remedies for damages can be imposed only on individual officers, not agencies).

individual federal officers – not claims against agencies for either damages or injunctive relief. Plaintiffs' citation to *Bivens* is therefore unavailing. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484-86 (1994).

Nor does reliance on 42 U.S.C. sections 1983 and 1986 aid Plaintiffs. Section 1983 applies to suits where the official is alleged to have acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . . ." 42 U.S.C. § 1983. As noted by the Supreme Court in *District of Columbia v. Carter*, 409 U.S. 418, 424-35 (1973), the federal government and its officers are generally "exempt from [section 1983's] proscriptions." *See also Gerritsen v. Consulado General de Mexico,* 989 F.2d 340, 342-43 (9th Cir. 1993) (constitutional and section 1983 claims against FBI held properly dismissed because federal courts "lack jurisdiction over suits against a federal agency absent express statutory authorization"). Section 1986 is likewise of no help to Plaintiffs in attempting to establish a waiver of sovereign immunity. *See Vincent v. Dept. of Health and Human Servs.*, 600 F. Supp. 110, 111-12 (D.Nev. 1984) ("Vincent also asserts 42 U.S.C. §§ 1986 and 1988. Again, the United States did not waive her sovereign immunity in these sections. Neither of these sections provides a cause of action against a federal official or agency acting under color of federal law.") (citations omitted), *aff'd* 792 F.2d 683 (Table) (9th Cir. 1986).

Similarly, 28 U.S.C. sections 1331, 1332 and 1343 do not constitute express waivers of sovereign immunity for Plaintiffs' constitutional claims seeking injunctive relief against the federal government. Those statutes are nothing more than statutes relating to district courts' jurisdiction *generally*, and do not in any way speak to whether the federal government has waived its sovereign immunity for the specific type of claims asserted by Plaintiffs against the agencies here. *See, e.g., Hughes v. United States,* 953 F.2d 531, 538 n.5 (9th Cir. 1991) (citations omitted) (noting that general jurisdiction statutes such as 28 U.S.C. § 1331 "cannot, however, waive the government's sovereign immunity.").

Accordingly, Plaintiffs have failed to sustain their burden of establishing an unequivocal waiver of sovereign immunity for their constitutional claims seeking injunctive relief from the

USMS and FPS. *See Cato,* 70 F.3d at 1107.[4] This Court should therefore dismiss those claims.

## III. Plaintiffs' *Bivens* Claims Against Officer McHugh and the Unnamed Officers Must be Dismissed Because The Officers Are Entitled to Qualified Immunity.

Relying on *Bivens,* Plaintiffs also claim that they are entitled to damages from FPS Officer Timothy McHugh and the unnamed officers whom they have encountered when attempting to enter the Federal Building after refusing to present identification. Plaintiffs' *Bivens* claims must be dismissed because the individual Defendants are entitled to qualified immunity, as there is no clearly established law prohibiting federal officials from requesting identification at a security checkpoint in a federal courthouse.

*Bivens* defendants are entitled to qualified immunity unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In *Saucier v. Katz,* 533 U.S. 194 (2001), the Supreme Court established a two-part analysis for determining whether qualified immunity is appropriate in a suit against an officer for an alleged violation of a constitutional right. "Under *Saucier,* courts 'must examine first whether the [officers] violated [the plaintiff's] constitutional rights on the facts alleged and, second, if there was a violation, whether the constitutional rights were clearly established.'" *Desyllas v. Bernstine,* 351 F.3d 934, 939 (9th Cir. 2003) (quoting *Saucier,* 533 U.S. at 201) (bracketed material in original). "As to the second inquiry, the Supreme Court has held that '[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.'" *Boyd v. Benton County,* 374 F.3d 773, 778 (9th Cir. 2004) (quoting *Saucier,* 533 U.S. at 202).

The Supreme Court has long held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Thus, if "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Id.*

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[4] Should Plaintiffs present on opposition a new basis for a waiver of sovereign immunity for their constitutional claims against the USMS and FPS, or should the Court permit these claims to go forward, Defendants reserve the right to address the merits (or lack thereof) of Plaintiffs' constitutional claims in subsequent briefing.

In this case, even assuming *arguendo* that Plaintiffs could convince this Court that their Complaint satisfies the first prong of the *Saucier* inquiry (*i.e.*, that their constitutional rights had been violated), the individual Defendants are nonetheless entitled to qualified immunity because there is no "clearly established" law informing the officers that it was unconstitutional to request identification from a person seeking entry into a federal building – particularly in the wake of the Oklahoma City bombing and the events of September 11, 2001. *Harlow*, 457 U.S. at 818. Indeed, research has revealed not a single case holding it to be "clearly unlawful" for federal officers to request for identification at a federal courthouse security checkpoint. *Saucier*, 533 U.S. at 202. Thus, because there was no law clearly establishing that the request for Plaintiffs' identification was unconstitutional, the individual Defendants are entitled to qualified immunity. *Cf. Meredith v. Erath*, 342 F.3d 1057, 1063-64 (9th Cir. 2003) (holding defendant entitled to qualified immunity notwithstanding his violation of plaintiff's constitutional rights because "until the filing of this opinion, it had not been clearly established" that the conduct was unconstitutional).

Furthermore, although there appears to be no case addressing these factual circumstances, the law of which a reasonable officer would have known strongly indicates that the individual Defendants' request for Plaintiffs' identification prior to permitting entry into the federal courthouse was lawful. The Constitution itself provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." U.S. Const., Art. IV, sec. 3. Congress has authorized the USMS to "provide for the security . . . of the United States District Courts," and to "provide for the personal protection of federal jurists, court officers, witnesses and other[s] . . . ." 28 U.S.C. § 566(a), (e)(1)(A). Similarly, Congress has authorized the Department of Homeland Security (of which FPS is a component agency) to "prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property" in consultation with General Services Administration ("GSA"). 40 U.S.C. § 1315(c)(1); *see also* 41 C.F.R. Part 102-74, Subpart C (regulations governing conduct on and admission to federal property).

Included in such regulations is the requirement that the agencies must "[e]nsure, when property or *a portion thereof* is closed to the public, that admission to the property, or the affected portion, is restricted to authorized persons who must register upon entry to the property and *must, when requested, display Government or other identifying credentials to Federal police officers* or other authorized individuals when entering, leaving or while on the property." 41 C.F.R. § 102.74-375(c) (emphases added).[5] Thus, Officer McHugh and the unnamed officers reasonably – and correctly – believed they were acting in accordance with Constitutional, statutory and regulatory authority when they requested identification from Plaintiffs at the security checkpoint at the Federal Building's entrance.

Moreover, in addition to these statutory and regulatory authorities, it has long been recognized that an individual does not have an unfettered right of access to government property. In *Adderley v. Florida*, 385 U.S. 39, 47 (1966), the Supreme Court held that the government, "no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." The Court further stated that there was "no merit to petitioners' argument that they had a constitutional right to stay on the [jailhouse] property" despite the objections of the state government. *Id.* In affirming petitioners' convictions, the Court squarely rejected petitioners' position that they had a constitutional right to access government property for their own purposes "whenever and however and wherever they please." *Id.* at 47-48. The Court held: "The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 47-48.

The argument rejected by the Supreme Court in *Adderley* is precisely the argument that Plaintiffs advance here. FAC, ¶ 7. Contrary to Plaintiffs' conclusory assertions and assumptions, there is nothing in the Constitution and no case law supporting Plaintiffs' assertion that they have a right to enter federal property on whatever terms *they personally* deem acceptable. There is likewise nothing in the Constitution and no case law prohibiting federal

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[5] Defendants request that the Court take judicial notice of the fact that several portions of the Federal Building – including, *e.g.*, the FBI offices and the Judges' chambers – are closed to the public. Fed. R. Evid. 201.

officials from requesting identification at a security checkpoint as a means to control access to federal courtrooms and property.

Plaintiffs' citations to *Florida v. Royer*, 460 U.S. 491 (1983), and *Carey v. Nevada Gaming Auth.*, 279 F.3d 873 (9th Cir. 2002), are unavailing. FAC, ¶ 9, n.12. First, neither case involves access to a federal courthouse, property that the government unquestionably has the duty and right to control. *See* 28 U.S.C. § 566(a); *cf. Adderley*, 385 U.S. at 47. Furthermore, the plurality in *Royer* made clear that "[a]sking for and examining Royer's [airplane] ticket *and driver's license were no doubt permissible in themselves.*" *Royer*, 460 U.S. at 501 (emphasis added); *see also INS v. Delgado*, 466 U.S. 210 (1984) (notwithstanding lack of specific and articulable suspicion of illegal activity or illegal alien status, no Fourth Amendment seizure occurred when INS agents were stationed at factory exits and roaming about factory, asking workers to produce identification papers). Asking for identification is exactly what Plaintiffs allege the federal agents did here. The constitutional violation in *Royer* occurred because the officers retained Royer's airplane ticket and license, then took him to a "large storage closet" where he was detained and interrogated for fifteen minutes before being placed under arrest. *Royer*, 460 U.S. at 494-96, 501. Here, by contrast, Plaintiffs were not deprived of their property, taken away to a storage closet and subsequently placed under arrest; they were simply instructed to leave the building. FAC, ¶ 9.

Nor does *Carey* aid Plaintiffs' case. There, the Ninth Circuit held unconstitutional Nevada statutes under which officers arrested Carey and put him in jail overnight for refusing to identify himself. 279 F.3d at 880-81. *Carey* is thus irrelevant because not only does it not involve access to government property, Plaintiffs were never placed in jail by the individual Defendants; indeed, they specifically allege that they were *not* charged with any crime and were escorted out of the Federal Building. FAC, ¶ 9.

Moreover, *Carey* has since been effectively overruled by *Hiibel v. Sixth Judicial Dist. Court of Nevada*, __ U.S. __, 124 S.Ct. 2451 (2004). In that case, the Supreme Court reviewed the same Nevada "stop and identify" statute at issue in *Carey* and held that arresting Hiibel for refusing to comply with the state requirement that he identify himself when asked by a police

officer "did not contravene the guarantees" of the Fourth or Fifth Amendments. *Id.* at 2459-61. In the course of rejecting Hiibel's constitutional challenges, the Court reiterated its prior holdings that, "[i]n the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. Interrogation relating to one's identity or a request for identification by the police, without more, does not constitute a Fourth Amendment seizure." *Id.* at 2458 (internal quotations and citations omitted). Thus, contrary to Plaintiffs' claims, *Royer* and *Carey* in no way deprive the individual Defendants of qualified immunity.

Accordingly, because there was no clearly established law holding that the individual Defendants' request for identification at the Federal Building security checkpoint was unlawful, Plaintiffs' *Bivens* claims must be dismissed. *Saucier*, 533 U.S. at 202.

## IV. Plaintiffs' "Obstruction Of Justice" Claims Must Be Dismissed.

In their First Amended Complaint, Plaintiffs add the allegation that Officer McHugh and other federal officials engaged in obstruction of justice under 18 U.S.C. § 1509 by requesting identification and then requiring them to leave the building after they refused. FAC, *e.g.*, ¶¶ 39, 53. Like Plaintiffs' constitutional claims against the USMS and FPS, these claims must be dismissed because Plaintiffs have failed to discharge their burden of pointing to a waiver of sovereign immunity for these claims. *See Cato,* 70 F.3d at 1107.

18 U.S.C. section 1509 is a *criminal* statute imposing a fine or imprisonment on anyone who "by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States. . . ." Obviously, Plaintiffs are not Assistant U.S. Attorneys vested with authority to prosecute others under this statute. Plaintiffs instead purport to assert a civil action for obstruction of justice against federal officials.

This claim fails, however, because Plaintiffs have not satisfied the requirement of establishing an explicit waiver of sovereign immunity for such a claim.[6] Indeed, recent case law

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[6] The fact that these claims are brought against federal officials rather than federal agencies or the United States is irrelevant to the question of sovereign immunity. *See Gilbert v.*

makes clear that "[t]he United States has not waived its immunity under the federal obstruction of justice statute." *Scherer v. United States*, 241 F. Supp. 2d 1270, 1280 (D. Kan. 2003) (dismissing obstruction of justice claim asserted against Department of Education officials under related obstruction of justice statute, 18 U.S.C. § 1503). Accordingly, this Court should dismiss Plaintiffs' obstruction of justice claims as well.

**CONCLUSION**

This Court lacks jurisdiction over Plaintiffs' FTCA claims because Plaintiffs have failed to comply with the mandatory administrative exhaustion requirements. Plaintiffs' claims against the USMS and FPS should likewise be dismissed because they have failed to establish a waiver of sovereign immunity for injunctive relief claims against the agencies. This Court should dismiss Plaintiffs' *Bivens* claims against Officer McHugh and the other unnamed officers because those individual Defendants are entitled to qualified immunity. Finally, Plaintiffs' new obstruction of justice claims against the individual Defendants fail because there has been no waiver of sovereign immunity for such claims.

Accordingly, and because a Second Amended Complaint would not cure these defects, Defendants respectfully request that this action be dismissed with prejudice.

DATED: November 24, 2004

Respectfully submitted,

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*DaGrossa*, 756 F.2d 1455 (9th Cir. 1985) ("Naming the three appellees as defendants does not keep this action from being a suit against the United States. It has long been the rule that the bar of sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants") (citations omitted).