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**NOT FOR CITATION**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

KAYTRENA J. FRANCIS,

No. 07-6125 JSW

Plaintiff,

**ORDER GRANTING IN PART  
AND DENYING IN PART  
MOTIONS TO DISMISS**

v.

UNITED STATES OF AMERICA, et al.

(Docket Nos. 24, 27, 28, 81 and 90)

Defendants.

**INTRODUCTION**

Now before the Court for consideration are the motions to dismiss filed by:

(1) the United States Air Force (“USAF”), and, in their official and individual capacities, Col. Edmond Keith (“Keith”), Col. Dean R. Clemons (“Clemons”), SA Brian Solecki (“Solecki”), Lt. Col. Vincent C. Smith (“Smith”), Capt. Heather A. Baker (“Baker”), Capt. Michael Yoder (“Yoder”), Capt. Joanna Astle (“Astle”), Capt. Donna E. Young (“Young”), 1<sup>st</sup> Lt. Kee-Sha D. Eskridge (“Eskridge”), MSGT Edward Shepherd (“Shepherd”), Lt. Col. Scott Farrar (“Farrar”), CMGST Vince Eubanks (“Eubanks”), MGST Brian Henderson (“Henderson”), TSGT Christopher Anglin (“Anglin”), TSGT Chad Dillon (“Dillon”), and ATC Jason Archilla (“Archilla”) (collectively “the Air Force Defendants”) (Docket Nos. 27 and 90);

(2) the United States Courts and, in their official and individual capacities, Clyde Roger Vinson (“Judge Vinson”), Miles Davis (“Magistrate Judge Davis”), W. Paul Rayborn (“Rayborn”), Jerry Marbut (“Marbut”), Andrew Elliott (“Elliott”), Bryan E. Jansen (“Jansen”), Larry Gibbs (“Gibbs”), Donna Easterling (“Easterling”), Michael Feldman (“Feldman”), Joel F. Dubina (“Judge Dubina”), Frank M. Hull (“Judge Hull”), Rosemary Barkett (“Judge

1 Barkett”), Susan H. Black (“Judge Black”), and R. Lanier Anderson (“Judge Anderson”)  
2 (collectively “the Judicial Defendants”) (Docket Nos. 24, 81); and,  
3 (3) the United States of America (Docket No. 28).

4 Having considered the parties’ papers, relevant legal authority, the record in this case,  
5 and having had the benefit of oral argument, the Court HEREBY GRANTS IN PART AND  
6 DENIES IN PART the Air Force Defendants’ motions to dismiss, GRANTS the Judicial  
7 Defendants’ motions to dismiss, and GRANTS IN PART AND DENIES IN PART the United  
8 States’ motion to dismiss.

9 **BACKGROUND<sup>1</sup>**

10 On December 10, 2004, Plaintiff Kaytrena J. Francis (“Francis”) “went to Elgin Air  
11 Force base gym to work out.” (Compl. ¶ 62.) While she was working out, Francis alleges that  
12 she was harassed by Defendant Young. (*Id.* ¶ 63.) Francis alleges that, shortly thereafter,  
13 Defendant Eskridge approached her and told Francis that Young had complained about her.  
14 Francis disputed the veracity of the complaint and alleges that she asked Eskridge to call the  
15 Security Forces so that she (Francis) could lodge a complaint with them about the treatment she  
16 had received. (*Id.* ¶¶ 66-73.) Francis claims that Eskridge falsely told the security forces “that  
17 she [Eskridge] had a belligerent gym patron that was refusing to leave the gym.” (*Id.* ¶ 74.)

18 Defendants Archilla, Dillon, and Sheppard arrived on scene. Francis alleges that they  
19 disputed her right to be on the base and that they assaulted her, while Sheppard and Eskridge  
20 watched. (*Id.* ¶¶ 75-88.) According to the allegations in the Complaint, Henderson and Anglin  
21 arrived shortly thereafter and “found Dillon sitting on Francis who was handcuffed with her  
22 hands behind her back. Henderson told Dillon to get off Francis and to let her up.” (*Id.* ¶ 89.)  
23 Francis alleges that Henderson tried to ask her what happened and that Anglin used excessive  
24 force on her by grabbing her injured arms. (*Id.* ¶¶ 90-91.)

25 According to the statement of probable cause attached to her Complaint, the officers  
26 claim that while they attempted to apprehend Francis, she “resisted, swung at my partner and  
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28 <sup>1</sup> The following is a summary of the events giving rise to the instant dispute, which are set forth in the 69 page, 802 paragraph Complaint. The Court shall refer to additional facts as necessary in the remainder of this Order.

1 attempted to bite my hand.” (*Id.*, Ex. 2.) Francis alleges that she “was going to file a  
2 congressional complaint against Elgin Air Force [B]ase for refusing to allow her to file a  
3 complaint against ... Dillon.”<sup>2</sup> According to Francis, Dillon retaliated against her by issuing two  
4 violation notices, which cited her for Disorderly Conduct and Breach of the Peace and for  
5 Resisting Arrest With Violence, pursuant to FSS §§ 877.03 and 843.03, respectively. (*Id.* ¶¶ 95,  
6 102, Ex. 3.) Eubanks allegedly edited Dillon’s report of the incident. (*Id.* ¶¶ 460-61.)

7       Thereafter, Francis received a Notice to Appear directing her to appear at the United  
8 States District Court for the Northern District of Florida on March 16, 2005. (*Id.*, Ex. 4.) On  
9 March 11, 2005, Miller filed an information against Francis, in which she was charged with one  
10 count of forcibly assaulting, resisting, opposing, impeding, intimidating, and interfering with  
11 Defendants Dillon and Archilla, while they were engaged in their official duties, in violation of  
12 18 U.S.C. § 111 and with one count of engaging in conduct that constituted a breach of the  
13 peace or disorderly conduct, in violation of Florida Statute § 877.03 and 18 U.S.C. §§ 7, 13.  
14 (*Id.*, Ex. 7.) Yoder, Astle and Baker represented the Government in those proceedings. (*See*,  
15 *e.g. id.* ¶¶ 104-105, 116-117, Exs. 13-14, 25.) Magistrate Judge Davis initially was assigned to  
16 the case but when Francis, through her attorney requested a jury trial before a District Court  
17 judge, it was assigned to Judge Vinson. (Compl., Ex. 25 (Docket Sheet, Entries 2, 4).)

18       A jury found Francis guilty on Count One of the information, on the basis that she  
19 resisted, opposed, impeded and interfered with the officers. The jury also found her guilty on  
20 Count Two. (*See* Compl. ¶ 139, Ex. 25 (Docket Sheet, Entry 29); *see also* Docket No. 62  
21 (Declaration of Alexis Haller (“Haller Decl.”) ¶ 3, Ex. B (Jury Verdict).) Jansen prepared a  
22 Presentence Investigation Report. (Compl. ¶ 142.) Francis was sentenced by Judge Vinson to  
23 two years probation on August 23, 2005. (Compl., Ex. 22.) After sentencing, Francis filed an  
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26       <sup>2</sup> It appears from the record that Francis did submit complaints to various  
27 members of Congress, and she alleges that Defendant Smith falsified responses to inquiries  
28 from members of congress by falsely representing that Francis had been convicted “of  
resisting arrest with violence,” and “assault.” (Compl. ¶¶ 123, 141, 144, Exs. 37, 39.) Farrar  
is alleged to have sent “a letter to Francis’ active duty military spouse commander [*sic*] ...  
concerning the congressional complaint,” and allegedly told a civil rights mediator that he  
would push Francis’s arrest as far as he could. (*Id.* ¶¶ 130, 450.)

1 appeal to the United States Court of Appeals for the Eleventh (“the Court of Appeals”).<sup>3</sup> Judges  
2 Dubina, Hull, Barkett, Black and Anderson are judges sitting on the Court of Appeals. (*See*,  
3 *e.g.*, Compl. ¶¶ 49-53.) According to the record, Francis did not challenge the underlying  
4 conviction. Rather, the issues raised on appeal related to her sentence and conditions of  
5 probation. The Court of Appeals affirmed the sentence on September 14, 2006. (*See* Docket  
6 No. 29 (Declaration of Neill T. Tseng (“Tseng Decl.”) ¶ 4, Ex. C).)

7 Following her conviction, Francis alleges that various Defendants falsely claimed that  
8 she violated the conditions of her probation. Easterling prepared a petition in November 2005,  
9 setting forth the alleged probation violations. (*See, e.g.*, Compl. ¶¶ 161-168, Exs. 30-31.) On  
10 November 29, 2005, Judge Vinson ordered that Francis be continued to be supervised on  
11 probation, but imposed as an additional condition of probation that Francis participate in  
12 “mental health and anger management counseling,” and ordered a term of imprisonment of 48  
13 hours. (*Id.* ¶ 165, Ex. 31.) Francis further alleges that Easterling conspired with Astle to send  
14 her harassing letters to force her to obtain “unwarranted mental health treatment.” (*Id.* ¶¶ 167-  
15 168.) Francis alleges that Feldman threatened to imprison her if she did not accept certain  
16 mental health treatment. (*Id.* ¶¶ 175-176.)<sup>4</sup>

17 In January 2006, Francis moved from Florida to San Francisco, where she currently  
18 resides. (Compl. ¶ 179.)<sup>5</sup> After she relocated, a petition for an arrest warrant was issued based  
19 on alleged additional violations of conditions of her probation, which resulted in the instigation  
20 of court proceedings in the Northern District of California, as well as further proceedings in  
21 Florida. Easterling again signed the petition for an arrest warrant. Marbut, as a deputy clerk,  
22 signed the actual warrant. (*See* Compl., Ex. 42.) On June 28, 2006, Judge Vinson revoked  
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24 <sup>3</sup> Rayborn, a court reporter, is alleged to be a member of the alleged conspiracy  
25 because he allegedly “falsified, tampered, and altered the court transcripts,” by making it  
26 appear as if Yoder and Astle were members of the DOJ, rather than military staff judge  
advocates. (Compl. ¶¶ 40, 159, Ex. 40.)

27 <sup>4</sup> Elliott and Gibbs also are probation officers. (Compl. ¶¶ 41, 43.)

28 <sup>5</sup> According to one of the exhibits to the Complaint, Solecki was asked to try  
and locate Francis’ spouse, because U.S. Marshals in Florida were trying to locate her in  
connection with an investigation. (Compl., Ex. 45.)

1 Francis’s probation and sentenced her to 90 days imprisonment. Judgment was entered on June  
2 29, 2006. (*See* Docket No. 29 (Declaration of Neil T. Tseng (“Tseng Decl.”), Ex. D.)

3 On December 4, 2007, Francis filed the Complaint in this matter. The gravamen of her  
4 Complaint is that the Defendants initially filed false charges against her in retaliation for her  
5 filing a Congressional complaint about the December 10, 2004 incident and that, thereafter,  
6 they have engaged in a conspiracy to violate any number of her constitutional rights to prevent  
7 her from filing claims against them. Francis also asserts a number of tort claims, pursuant to the  
8 Federal Tort Claims Act (“FTCA”). (*See generally* Compl. ¶¶ 62-802.) In addition to monetary  
9 damages, Francis seeks to void all judgments issued as a result of the criminal trial and the  
10 subsequent appellate proceedings and seeks to have her arrest records expunged. (*Id.* ¶¶ 69-70.)

### 11 ANALYSIS

12 Each of Defendants named above has moved to dismiss Francis’s claims on a number of  
13 grounds including, but not limited to, lack of subject matter jurisdiction, lack of personal  
14 jurisdiction, and failure to state a claim.<sup>6</sup>

#### 15 A. Applicable Legal Standards.

##### 16 1. Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Rule 17 12(b)(1).

18 When a defendant moves to dismiss a complaint or claim for lack of subject matter  
19 jurisdiction, the plaintiff bears the burden of proving that the court has jurisdiction to decide the  
20 claim. *Thornhill Publ’n Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9<sup>th</sup> Cir. 1979).  
21 Federal courts can only adjudicate cases authorized by the Constitution or Congress. *Kokkenen*  
22 *v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Such cases include those where  
23 diversity of citizenship exists, a federal question is at issue, or the United States is a party. *Id.*  
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26 <sup>6</sup> The Air Force Defendants and the Judicial Defendants who have been sued in  
27 their individual capacity also raise issues with respect to service of process. Because the  
28 Court concludes that there are other meritorious reasons for dismissing the claims against the  
Defendants covered in this motion, the Court does not decide the motions on that basis.  
However, the Court notes that it does not appear that Francis properly effected service on  
many of the Defendants within the time frame required by Federal Rule of Civil Procedure  
4(m). (*See, e.g.*, Docket Nos. 121-123.)

1 A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may be  
2 “facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2004). A  
3 facial attack on jurisdiction occurs when factual allegations of the complaint are taken as true.  
4 *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9<sup>th</sup> Cir. 1996). The  
5 plaintiff is then entitled to have those facts construed in the light most favorable to him or her.  
6 *Id.* A factual attack on subject matter jurisdiction occurs when defendants challenge the actual  
7 lack of jurisdiction with affidavits or other evidence. *Thornhill*, 594 F.2d at 733. In a factual  
8 attack, plaintiff is not entitled to any presumptions or truthfulness with respect to the allegations  
9 in the complaint, and instead must present evidence to establish subject matter jurisdiction. *Id.*

10 **2. Motion to Dismiss for Lack of Personal Jurisdiction Under Rule 12(b)(2).**

11 Francis bears the burden of establishing personal jurisdiction over each of the  
12 Defendants. *Menken v. Emm*, 503 F.3d 1050, 1056 (9<sup>th</sup> Cir. 2007). Where the facts are not  
13 directly controverted, a court takes the plaintiff’s version of the facts as true. *AT&T v.*  
14 *Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9<sup>th</sup> Cir. 1996). Likewise, ““conflicts between  
15 the facts contained in the parties’ affidavits must be resolved in [Francis’s] favor for purposes of  
16 deciding whether a *prima facie* case for personal jurisdiction exists.”” *Id.* (quoting *WNS, Inc. v.*  
17 *Farrow*, 884 F.2d 200, 203 (5<sup>th</sup> Cir. 1989)).

18 **3. Motion to Dismiss for Failure to State A Claim Under Rule 12(b)(6).**

19 A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a  
20 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6)  
21 motion, the complaint is construed in the light most favorable to the non-moving party and all  
22 material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478,  
23 481 (9<sup>th</sup> Cir. 1986). The court, however, is not required to accept legal conclusions cast in the  
24 form of factual allegations if those conclusions cannot reasonably be drawn from the facts  
25 alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9<sup>th</sup> Cir. 1994) (citing *Papasan*  
26 *v. Allain*, 478 U.S. 265, 286 (1986)).

27 While, as a general rule, “a district court may not consider any material beyond the  
28 pleadings in ruling on a Rule 12(b)(6) motion,” the Court may consider documents attached to

1 the complaint, documents relied upon but not attached to the complaint when the authenticity of  
2 those documents is not questioned, and other matters of which the Court can take judicial  
3 notice. *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds*,  
4 *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted); *see also*  
5 *Hal Roach Studios, Inc. v. Richmond & Feiner Co., Inc.*, 806 F.2d 1542, 1555 n.19 (9th Cir.  
6 1989). The declarations filed by the Defendants in this case in connection with the pending  
7 motions, and the court documents submitted as exhibits to those declarations, are matters of  
8 which this Court can take judicial notice. *See Robinson Rancheria Citizens Council v. Borneo,*  
9 *Inc.*, 971 F.2d 244, 244 (9<sup>th</sup> Cir. 1992) (courts ““may take judicial notice of proceedings in other  
10 courts, both within and without the federal judicial system, if those proceedings have a direct  
11 relation to matters at issue””) (quoting *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169,  
12 1172 (10<sup>th</sup> Cir. 1979)).

13 **B. The Motions filed by the Air Force Defendants Are Granted in Part and Denied in**  
14 **Part.**

15 **1. All claims, with the exception of Claims 2 and 3, that are asserted against**  
16 **the Air Force Defendants, in their official capacity, are dismissed.**

17 The claims against the Air Force Defendants in their official capacity are premised upon  
18 the FTCA. However, the United States is the only proper defendant in an FTCA claim.  
19 *Kennedy v. United States Postal Service*, 143 F.3d 1077, 1078 (9<sup>th</sup> Cir. 1998). Rather than parse  
20 which of the FTCA claims are asserted against the specific defendants, the Court’s analysis  
21 focuses on which of the FTCA claims are viable. To the best of the Court’s understanding of  
22 the Complaint, Francis asserts the following claims for relief against the Air Force Defendants:  
23 **(1) False Arrest (Claim 1); (2) Assault (Claim 2); (3) Battery (Claim 3); (4) Malicious Abuse of**  
24 **Process (Claims 4-6, 8); (5) Malicious Prosecution (Claim 7), (6) False Imprisonment (Claims**  
25 **11-12); (7) Conspiracy (Claim 13); (8) Invasion of Privacy (Claim 14); (9) Libel (Claim 15);**  
26 **(10) Misrepresentation, Fraud or Deceit (Claim 16); (11) Tortious Interference With**  
27 **Contractual Right (Claim 17); (12) Breach of Fiduciary Duty (Claim 18); and (13) Intentional**  
28 **Infliction of Emotional Distress (Claim 19).**

1                   a.       **The Court lacks jurisdiction over Claims 4, 5, 6, 8, 11, 12, 15, 16 and**  
2                   **17.**

3                   The United States, as a sovereign, is immune from suit unless it has waived  
4                   its immunity. ... A court lacks subject matter jurisdiction over a claim against  
5                   the United States if it has not consented to be sued on that claim. ... “When  
6                   the United States consents to be sued, the terms of its waiver of sovereign  
7                   immunity define the extent of the court’s jurisdiction.” ... In sovereign  
8                   immunity analysis, any lawsuit against an agency of the United States or  
9                   against an officer of the United States in his or her official capacity is  
10                  considered an action against the United States.

11                  *Balser v. Dep’t of Justice*, 327 F.3d 903, 907 (9<sup>th</sup> Cir. 2003) (citations omitted).

12                  “The FTCA grants a limited waiver of sovereign immunity by making the United States  
13                  liable to the same extent as a private person for certain torts of federal employees acting within  
14                  the scope of their employment.” *Id.*; *see also* 28 U.S.C. §§ 1346(b)(1), 2674. The FTCA,  
15                  however, does not apply to

16                  [a]ny claim arising out of assault, battery, false imprisonment, false arrest,  
17                  malicious prosecution, abuse of process, libel, slander, misrepresentation,  
18                  deceit, or interference with contract rights:

19                  *Provided, That*, with regard to acts or omissions of investigative or law  
20                  enforcement officers of the United States Government, the provisions of this  
21                  chapter and section 1346(b) of this title shall apply to any claim arising, on  
22                  or after the date of the enactment of this proviso, out of assault, battery, false  
23                  imprisonment, false arrest, abuse of process, or malicious prosecution. For  
24                  the purpose of this subsection, “investigative or law enforcement  
25                  officer” means any officer of the United States who is empowered by law to  
26                  execute searches, to seize evidence, or to make arrests for violations of  
27                  Federal law.

28                  28 U.S.C. § 2680(h).<sup>7</sup> Claims 1-8, 11-12, and 15-17, each fall “within a statutory exception to  
the FTCA’s waiver of sovereign immunity, [and] the [C]ourt is without subject matter  
jurisdiction” to hear those claims, unless they have been asserted against an “investigative or  
law enforcement officer.”

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31                  <sup>7</sup> To the extent Francis intended to assert constitutional claims against any of  
32                  the Air Force Defendants or the Judicial Defendants, the Court concludes leave to amend to  
33                  specifically name in them in such claims would be futile. The FTCA “provides a waiver of  
34                  sovereign immunity for tortious acts of an agency’s employees only if such torts committed  
35                  in the employ of a private person would have given rise to liability under *state law*.” *Pereira*  
36                  *v. United States Postal Serv.*, 964 F.2d 873, 876 (9<sup>th</sup> Cir. 1992). However, “[c]onstitutional  
37                  torts are, by definition, founded on federal, not state law. Therefore, federal district courts  
38                  have no jurisdiction over the United States where claims allege constitutional torts.” *Id.*



1 Francis, however, names Defendants Dillon, Archilla, Young, Eskridge, Sheppard, and  
2 Farrar in Claims 1-3 and 7, and names Defendants Clemons and Solecki in claims 11 and 12. It  
3 is not evident from the record whether or not these defendants would be “law enforcement  
4 officers,” as defined in Section 2680(h). Thus, the Court may have jurisdiction over those  
5 claims. The Court, however, lacks jurisdiction over Claims 4, 5, 6, 8, 15, 16, and 17, and those  
6 claims shall be dismissed, to the extent they are asserted against the Air Force Defendants. The  
7 Court also finds that leave to amend these claims against the Air Force Defendants would be  
8 futile and, therefore, shall not grant Francis leave to amend these claims. *Mundy v. United*  
9 *States*, 983 F.2d 950, 952 (9<sup>th</sup> Cir. 1993).

10 **b. Claims 1, 7, 11, 12, 13, 14, and 19 are barred.**

11 Francis’s claims of false arrest (Claims 1, 11), malicious prosecution (Claim 7), false  
12 imprisonment (Claim 12), conspiracy (Claim 13), invasion of privacy (Claim 14), and  
13 intentional infliction of emotional distress (Claim 19) are premised upon allegations that her  
14 conviction was invalid. (*See generally* Compl., ¶¶ 193-201, 246-265, 300-347, 407-416.)

15 The Supreme Court has held that:

16 in order to recover damages for allegedly unconstitutional conviction or  
17 imprisonment, or for other harm caused by actions whose unlawfulness  
18 would render a conviction or sentence invalid, a § 1983 plaintiff must prove  
19 that the conviction or sentence has been reversed on direct appeal, expunged  
20 by executive order, declared invalid by a state tribunal authorized to make  
21 such determination, or called into question by a federal court’s issuance of  
22 a writ of habeas corpus.

23 *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). The principle enunciated in *Heck* has been  
24 applied to claims brought pursuant to the FTCA if, in order to prevail, a plaintiff would have to  
25 prove the invalidity of the underlying conviction. *See Erlin v. United States*, 364 F.3d 1127,  
26 1132 (9<sup>th</sup> Cir. 2004); *Parris v. United States*, 45 F.3d 383, 384-85 (10<sup>th</sup> Cir. 1995) (granting  
27 summary judgment for defendant where plaintiff’s claim, although “couched in terms of  
28 negligence,” actually sought review of basis for his conviction).

Although Francis, like the plaintiff in *Parris*, has crafted her claims to allege a number  
of torts, in order to prove her claims against the named Air Force Defendants, Francis would be

1 required to prove the invalidity of the underlying conviction.<sup>8</sup> That conviction has not been  
2 reversed or otherwise called into question. *Heck*, 512 U.S. at 486-87. Accordingly, the Court  
3 concludes that Claims 1, 7, 11-14, and 19 must be dismissed, to the extent they are asserted  
4 against the Air Force Defendants. The Court also concludes that amendment would, in this  
5 case, be a futile act.

6 **c. Francis fails to state a claim for breach of fiduciary duty.**

7 Francis also asserts a claim against “all Federal Employees” for breach of fiduciary  
8 duty, and alleges that the Defendants defrauded her “out of her intangible property to honest  
9 government services.” (Compl. ¶¶ 385-406.) However, based on the allegations in the  
10 Complaint, the Court concludes that Francis cannot establish, as a matter of law, that any of the  
11 Air Force Defendants stood in a fiduciary relationship with her. Accordingly, she cannot  
12 establish an essential element of this claim. The Court also concludes that leave to amend this  
13 claim would be futile act.

14 **2. The claims against the Air Force Defendants, in their individual capacities,  
15 are dismissed without leave to amend.**

16 Francis also asserts the following claims for relief against the Air Force Defendants in  
17 their individual capacities: (1) *Bivens* claims for alleged violations of various constitutional  
18 rights (Claims 21, 22, 23, 24); (2) claims for violations of 18 U.S.C. § 241 (Claims 29, 33, 36,  
19 37, Claim 39); (3) a claim for violation of 42 U.S.C. § 1986 (Claim 43); and (4) a Civil RICO  
20 claim (Claim 45).<sup>9</sup>

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23 <sup>8</sup> A recurring theme in the Complaint and in Francis’s opposition briefs to the  
24 pending motions to dismiss is that she was convicted of a felony offense without having been  
25 indicted by a grand jury. However, a violation of 18 U.S.C. § 111 premised upon simple  
assault is a misdemeanor offense. *See Boyd v. United States*, 214 F.3d 1052, 1055 (9<sup>th</sup> Cir.  
2000); 18 U.S.C. § 111(a)(1); 18 U.S.C. § 3559(a)(6).

26 <sup>9</sup> 18 U.S.C. § 241 does not provide for a private right of action. *Aldabe v.*  
27 *Aldabe*, 616 F.2d 1089, 1092 (9<sup>th</sup> Cir. 1980). Francis urges the Court to construe the claims  
28 under 18 U.S.C. § 241 as claims for relief under Section 1985. The Court has reviewed the  
allegations and concludes that the allegations in those claims for relief, liberally construed,  
do not state a claim under Section 1985. Moreover, based on her representations at the  
hearing that all of the facts in support of the alleged conspiracy are in the Complaint, the  
Court concludes that leave to amend would be futile.

1 Each of the Air Force Defendants have moved to dismiss these claims for lack of  
2 personal jurisdiction. (*See* Docket 90 (Mot. at 7:26-9:11).)<sup>10</sup> The Court concludes that Francis  
3 has failed to meet her burden to show that the Court has jurisdiction over the Air Force  
4 Defendants, in their individual capacities, and decides the motion on that basis.

5 Specific jurisdiction over a defendant exists where: (1) the non-resident defendant has  
6 purposefully directed his or her activities at the forum state or at residents of the forum state or  
7 has performed an act by which he or she purposefully avails himself or herself of the privilege  
8 of conducting activities in the forum; (2) the plaintiff’s claim arises out of or relates to those  
9 activities; and (3) the assertion of personal jurisdiction is reasonable and fair.<sup>11</sup> *Schwarzenegger*  
10 *v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9<sup>th</sup> Cir. 2004). “The plaintiff bears the burden of  
11 satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs,  
12 personal jurisdiction is not established in the forum state.” *Schwarzenegger*, 374 F.3d at 802  
13 (internal citation omitted). “On the other hand, if the plaintiff succeeds in satisfying both of the  
14 first two prongs, the burden then shifts to the defendant to present a compelling case that the  
15 exercise of jurisdiction would not be reasonable.” *Menken*, 503 F.3d at 1057 (quoting  
16 *Schwarzenegger*, 374 F.3d at 802, in turn quoting *Burger King*, 417 U.S. at 476-78) (internal  
17 quotations omitted).

18 The Ninth Circuit has noted that purposeful availment, “[d]espite its label... includes  
19 both purposeful availment *and* purposeful direction. It may be satisfied by purposeful  
20 availment of the privilege of doing business in the forum; by purposeful direction of activities at  
21 the forum; or by some combination thereof.” *Yahoo! Inc. v. La Ligue Contre Le Racisme et*  
22 *l’Antisemitisme*, 433 F.3d 1199, 1206 (9<sup>th</sup> Cir. 2006). In *Yahoo!*, the Ninth Circuit also noted

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24 <sup>10</sup> Baker, Yoder, and Astle move to dismiss the claims, *inter alia*, on the basis  
25 that they are absolutely immune from suit. The remaining Air Force Defendants move to  
26 dismiss on the basis of qualified immunity. (*Id.* (Mot. at 4:10-7:24).) Each of the  
27 Defendants also moves to dismiss on the basis that Francis has failed to state a claim against  
28 them.

<sup>11</sup> Francis has not alleged any facts in her Complaint and has not submitted any  
evidence to establish general jurisdiction over any of the Defendants, which would require a  
showing of “substantial” or “continuous and systematic” contacts with California. *Bancroft*  
& *Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9<sup>th</sup> Cir. 2000).

1 that, generally, it has treated the issue of purposeful availment differently in contract and tort  
2 cases. *Id.*

3 In tort cases, a court “typically inquire[s] whether a defendant ‘purposefully direct[s] his  
4 activities’ at the forum state, applying an ‘effects’ test that focuses on the forum in which the  
5 defendant’s actions were felt, whether or not the actions themselves occurred within the forum.”  
6 *Id.* (citing *Schwarzenegger*, 374 F.3d at 803). Under that “effects” test, a defendant  
7 purposefully directs his or her activity at a forum state where: (1) he or she commits an  
8 intentional act; (2) the act is expressly aimed at the forum state; and (3) the act causes harm that  
9 the defendant knows is likely to be suffered in the forum state. *Schwarzenegger*, 374 F.3d at  
10 803 (citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)); *cf. Bancroft & Masters*, 233 F.3d at  
11 1087 (framing last issue as the act causes harm “the brunt of which is suffered and which the  
12 defendant knows is likely to be suffered in the forum state”).

13 It is evident from Francis’s opposition brief that she relies on the effects test to establish  
14 jurisdiction over the individual Air Force Defendants. (*See* Docket No. 98 (Opp. Br. at 12-13).)  
15 Most of the allegations against these Defendants pertain to actions taken before Francis moved  
16 to California. (Compl. ¶¶ 425-493, 532-538, 565-587, 609-646, 707-717.) Thus, those actions  
17 were not aimed at a California resident and cannot provide a basis for asserting jurisdiction  
18 under the effects test.

19 Francis relies heavily on the alleged conspiracy among the Defendants in an effort to  
20 establish jurisdiction over the Air Force Defendants under the effects test. (*See* Docket 98  
21 (Opp. Br. at 13 ¶ 8).) The Court concludes the allegations of the alleged conspiracy are too  
22 vague and conclusory to establish jurisdiction over the Air Force Defendants pursuant to the  
23 effects test. Moreover, based on Francis’s representations at the hearing that all facts  
24 supporting the alleged conspiracy are set forth in her Complaint, the Court finds that leave to  
25 amend would be futile.

26 Accordingly, the Court concludes that Francis has failed to meet her burden to establish that the  
27 Court has jurisdiction over the Air Force Defendants in their individual capacity.  
28

1 For the foregoing reasons, the motions to dismiss filed by the Air Force Defendants are  
2 GRANTED IN PART AND DENIED IN PART.

3 **C. The Motions filed by the Judicial Defendants Are Granted.**

4 **1. All claims that are asserted against the Judicial Defendants, in their official**  
5 **capacity, are dismissed.**

6 To the best of the Court’s understanding of the Complaint, Francis asserts the following  
7 claims for relief against the Judicial Defendants: **(1)** Malicious Abuse of Process (Claims 6, 8);  
8 **(2)** Malicious Prosecution (Claim 7); **(3)** False Arrest or Imprisonment (Claims 9-12); **(4)**  
9 Conspiracy (Claim 13); **(5)** Invasion of Privacy (Claim 14); **(6)** Libel (Claim 15); **(7)**  
10 Misrepresentation, Fraud or Deceit (Claim 16); **(8)** Tortious Interference With Contractual  
11 Right (Claim 17); **(9)** Breach of Fiduciary Duty (Claim 18); and **(10)** Intentional Infliction of  
12 Emotional Distress (Claim 19).<sup>12</sup>

13 **a. The Court lacks jurisdiction over Claims 6, 7, 9, 15, 16, and 17.**

14 As set forth above in Section B.1.a, the FTCA does not apply to “[a]ny claim arising out  
15 of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process,  
16 libel, slander, misrepresentation, deceit, or interference with contract rights,” unless such claims  
17 have been brought against a law enforcement officer. Magistrate Judge Davis, Judge Vinson,  
18 Judge Dubina, Judge Hull, Judge Barkett, Judge Anderson, Judge Black, Marbut and Rayborn  
19 are not “law enforcement officers” within the meaning of Section 2680(h). However, it is not  
20 clear from the record that Easterling, Jansen, Elliott, Gibbs, and Feldman would not qualify as  
21 “law enforcement officers.” *See* 18 U.S.C. § 3606.

22 Accordingly, because the United States has not waived sovereign immunity as to Claims  
23 6, 7, 9, and 15-17, the Court lacks jurisdiction over those claims. The Court also finds that  
24 leave to amend these claims against the Judicial Defendants would be futile and, therefore, shall  
25 not grant Francis leave to amend these claims. *Mundy*, 983 F.2d at 952.

26 \_\_\_\_\_  
27 <sup>12</sup> As is the case with the claims against the Air Force Defendants, the claims  
28 against the Judicial Defendants in their official capacity are premised upon the FTCA.  
Because, the United States is the only proper defendant in an FTCA claim, the Court again  
focuses on which of the FTCA claims are viable.

**United States District Court**  
For the Northern District of California

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**b. Claims 8, 11, 12, 13, 14, and 19 are barred by *Heck*.**

Francis’s claims of malicious abuse of process (Claim 8), false arrest and/or false imprisonment (Claims 11, 12), conspiracy (Claim 13), invasion of privacy (Claim 14), and intentional infliction of emotional distress (Claim 19) are premised upon allegations that her conviction was invalid. (*See generally* Compl., ¶¶ 266-276, 288-347, 407-416.) To prevail on each of these claims, Francis would be required to prove the invalidity of her underlying conviction, which has not been reversed or otherwise called into question. *Heck*, 512 U.S. at 486-87. Accordingly, for the reasons set forth above in Section B1.b, Claims 8, 11-14, and 19 must be dismissed to the extent they are asserted against the Judicial Defendants. The Court also concludes that amendment would, in this case, be a futile act.

**c. Francis fails to state a claim for breach of fiduciary duty.**

Francis also asserts a claim against “all Federal Employees” for breach of fiduciary duty, and alleges that the Defendants defrauded her “out of her intangible property to honest government services.” (Compl. ¶¶ 385-406.) However, based on the allegations in the Complaint, the Court concludes that Francis cannot establish, as a matter of law, that any of the Judicial Defendants stood in a fiduciary relationship with her. Accordingly, she cannot establish an essential element of this claim. The Court also concludes that granting Francis leave to amend this claim would be a futile act.

**2. The claims against the Judicial Defendants, in their individual capacity, are dismissed, without leave to amend.**

Francis also asserts the following claims for relief against the Judicial Defendants in their individual capacities: (1) *Bivens* claims for alleged violations of various constitutional rights (Claims 24-28, 30-32, 34-35, 41); (2) claims for violations of 18 U.S.C. § 241 (Claims 33, 36, 37, 39); (3) a claim for violation of 42 U.S.C. § 1986 (Claim 43); and (4) a Civil RICO claim (Claim 45).<sup>13</sup> The Judicial Defendants sued in their individual capacity move to dismiss

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<sup>13</sup> See note 9, *supra*.

1 these claims on the basis that they are immune from suit, that the Court lacks personal  
2 jurisdiction over them, and that Francis fails to state a claim against them.<sup>14</sup>

3 **a. Magistrate Judge Davis and Judges Vinson, Dubina, Hull, Barkett,  
4 Anderson, Lanier, and Black are immune from suit.**

5 “[J]udicial immunity is an immunity from suit, not just from ultimate assessment of  
6 damages.” *Mireless v. Waco*, 502 U.S. 9, 11 (1991); *see also Stump v. Sparkman*, 435 U.S. 349,  
7 356-57 (1978). An act is considered “judicial” when it is a function normally performed by a  
8 judge and the parties dealt with the judge in his judicial capacity. *See Stump*, 435 U.S. at 362.  
9 Allegations of conspiracy do not defeat such immunity. *Ashelman v. Pope*, 793 F.2d 1072,  
10 1078 (9th Cir. 1986) (en banc). “Judicial immunity applies ‘however erroneous the act may  
11 have been, and however injurious in its consequences it may have proved to the plaintiff.’” *Id.*  
12 (quoting *Cleavinger v. Saxner*, 474 U.S. 193 (1985)). A judge lacks immunity only when he or  
13 she acts “in the clear absence of all jurisdiction ... or performs an act that is not ‘judicial’ in  
14 nature.” *Id.* (internal citation omitted).

15 To determine if an individual acted in an official judicial capacity, a court must analyze  
16 whether: “(1) the precise act is a normal judicial function; (2) the events occurred in the judge’s  
17 chambers; (3) the controversy centered around a case then pending before the judge; and (4) the  
18 events at issue arose directly and immediately out of a confrontation with the judge in his or her  
19 official capacity.” *Id.* (citation omitted). Having carefully reviewed the allegations in Francis’s  
20 Complaint, the Court concludes that each of the four factors set forth above demonstrates that  
21 the allegations in Francis’s Complaint arise from judicial acts, such as arraignments, presiding  
22 over her criminal trial, sentencing, deciding motions, and deciding her appeal. (*See, e.g.*,  
23 Compl. ¶¶ 478-531 (allegations arising out of arraignment on March 16, 2005), 539-608, 631-  
24 646 (describing proceedings before Judge Vinson, including jury selection, sentencing and  
25 probation revocation proceedings).) Accordingly, the claims against Magistrate Judge Davis,  
26 Judge Vinson, Judge Dubina, Judge Hull, Judge Barkett, Judge Black and Judge Anderson are

27  
28 <sup>14</sup> Judge Vinson and Marbut do not move to dismiss for lack of personal jurisdiction. (*See* Docket No. 81 (Mot. at 11:26-27).)



1 dismissed. Further, notwithstanding Francis’s conclusory allegation that these defendants acted  
2 in excess of all jurisdiction, the Court concludes that leave to amend would be futile.

3 **b. Marbut is immune from suit.**

4 The Ninth Circuit has held that clerks of court have absolute immunity when performing  
5 quasi-judicial functions in damages actions. *Mullis v. United States Bankruptcy Court for the*  
6 *District of Nevada*, 828 F.2d 1385, 1390 (9<sup>th</sup> Cir. 1996). Quasi-judicial functions include those  
7 activities coordinated with a judge and court proceedings. *Id.* The Court has reviewed the  
8 claims against Marbut and concludes that the allegations all stem from orders that he took from  
9 the Court. Those actions, therefore, are “quasi-judicial,” and Marbut is immune from suit.  
10 (*See, e.g.*, Compl. ¶¶ 285, 289, 297, 634-635, 767, 769, 781, 783.)

11 **c. The Court lacks personal jurisdiction over the remaining Judicial**  
12 **Defendants.**

13 Francis again relies on the effects test to establish personal jurisdiction over the Judicial  
14 Defendants. (Docket No. 99 (Opp. Br. at 14, ¶ 3).) Once again, however, most of the factual  
15 allegations relating to the Judicial Defendants relate to events that took place before Francis  
16 moved to California. Those actions, therefore, were not targeted at a California resident and  
17 cannot support a finding of jurisdiction under the effects test. Furthermore, for the reasons  
18 previously stated, the Court concludes that Francis’s allegations of conspiracy are insufficient to  
19 establish a finding of personal jurisdiction under the effects test. Because Francis represented at  
20 the hearing that all facts supporting the alleged conspiracy were set forth in her motion, the  
21 Court concludes that leave to amend would be futile.

22 For the foregoing reasons, the motions to dismiss filed by the Judicial Defendants are  
23 GRANTED, without leave to amend.

24 **D. The United States’ Motion to Dismiss is Granted in Part and Denied in Part.**

25 The United States has moved to dismiss each of Francis’s FTCA claims on the bases set  
26 forth in the motions filed by the Air Force Defendants, the Judicial Defendants, the Bureau of  
27 Prisons and Broadnax, the Department of Justice and Preisser, Miller, and Wilson, and  
28 Guadagnoli and Cato. For the reasons set forth above and for the reasons set forth in this

1 Court's Order dated September 16, 2008, the United States' motion to dismiss is granted in part  
2 and denied in part. Each of the FTCA claims, with the exception of the claim for assault (Claim  
3 2) and battery (Claim 3) are dismissed without leave to amend.

4 **CONCLUSION**

5 For the foregoing reasons, the motions to dismiss filed by the Defendants set forth in the  
6 introduction to this Order are GRANTED IN PART AND DENIED IN PART.

7 Although the Court has concluded that Francis's claims for assault and battery can  
8 proceed against the United States, the events that give rise to those claims took place in Florida.  
9 Accordingly, the Court HEREBY ORDERS the parties to show cause why this case should not  
10 be transferred to the United States District Court for the Northern District of Florida pursuant to  
11 28 U.S.C. § 1404(a). Francis's response shall be due to the Court by October 31, 2008.

12 Because the Court is familiar with the facts underlying Francis's assault and battery claims, she  
13 need not repeat them in her response to the Order to Show Cause. Furthermore, Francis's  
14 response to the Order to Show Cause shall not exceed twelve (12) pages. Defendant's response  
15 shall be due on November 14, 2008, and it shall not exceed twelve (12) pages. Francis may file  
16 a reply brief by no later than November 21, 2008, which shall not exceed seven (7) pages. The  
17 Court shall take the matter under submission and shall notify the parties if it believes a hearing  
18 is necessary.

19 Finally, by this Order and by its Order dated September 16, 2008, the Court has resolved  
20 all pending motions to dismiss and, as a result, has dismissed the majority of Francis's claims  
21 against most of the named defendants. The Court concludes there is no just reason for delay  
22 and, accordingly, shall direct the entry of final judgment on those claims that have been  
23 dismissed. *See* Fed. R. Civ. P. 54(b) ("When an action presents more than one claim for relief  
24 ... or when multiple parties are involved, the court may direct the entry of final judgment as to  
25 one or more, but fewer than all, claims or parties only if the court expressly determines there is

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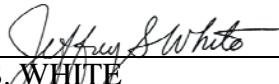
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no just reason for delay.”).

**IT IS SO ORDERED.**

Dated: September 30, 2008

  
\_\_\_\_\_  
JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4

5 Case Number: CV07-06125 JSW  
6 **CERTIFICATE OF SERVICE**

7 KAYTRENA J FRANCIS,  
8 Plaintiff,

9 v.


10 UNITED STATES OF AMERICA et al,  
11 Defendant.

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
13 District Court, Northern District of California.

14 That on September 30, 2008, I SERVED a true and correct copy(ies) of the attached, by  
15 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter  
16 listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an  
17 inter-office delivery receptacle located in the Clerk's office.

18 Kaytrena J. Francis  
19 1467 7th Avenue  
20 # 105  
21 San Francisco, CA 94122

22 Dated: September 30, 2008

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24 Richard W. Wieking, Clerk  
25 By: Jennifer Ottolini, Deputy Clerk  
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