

**STRATEGY
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**AN ASSESSMENT OF *BIVENS*:
IS IT TIME FOR A CONGRESSIONAL FIX?**

BY

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USAWC STRATEGY RESEARCH PROJECT

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ABSTRACT

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In 1971, the U.S. Supreme Court decided the case of *Bivens v. Six Unknown Named Agents*. For the first time, the court held that federal government employees and officials may be individually sued and held personally liable for violations of U.S. constitutional rights committed while performing their official duties on behalf of Congress or the Executive Branch. In the 28 years since *Bivens*, the number of constitutional tort cases filed against individual federal employees has grown significantly. This litigation is costly and has created significant problems for both the government and the individual defendants, and has not provided a true remedy for injured plaintiffs. There are indications that the vast majority of *Bivens* lawsuits against individual federal employees are unfounded and are filed for reasons other than monetary rehabilitation. Additionally, it is open to debate whether the new substantive legal right created by the Court has served the public interest in general or in the manner intended by the Court.

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act. Its sole purpose was to protect federal employees from personal liability for state common law torts committed within the scope of their employment. This statute makes suit against the United States the exclusive remedy and substitutes the United States as the defendant for the employee. Other federal laws provide specified niches of federal employees with absolute immunity from personal liability for medical and legal malpractice. However, to date, Congress has failed to legislate a fix to the much bigger problem of constitutional torts filed under the aegis of *Bivens*. This is so even in the face of a strong hint from the Supreme Court that it would likely accept a legislative substitute for its *Bivens* decision. This paper addresses these issues and concludes that the time has come for Congress to act and pass a curative law that will: (1) provide clear protection to federal employees and officials acting within the scope of their official duties, (2) establish efficient and regularized procedures to handle constitutional tort claims, and, (3) provide a meaningful remedy for persons who suffer constitutional torts through federal government action.

Table of Contents

	<u>Page</u>
I. Introduction	3
II. Historical Background	6
A. The Law of Government Liability for the First 200 Years	6
1. In England	7
2. In America	9
a. The Colonial Period	9
b. The Civil War Era	11
c. The 20 th Century	12
(1) Judicial Rejection of Respondeat Superior as a Basis for Governmental Liability	12
(2) Congress Enacts First Significant Laws Waiving Sovereign Immunity	12
(3) Judicial Entrenchment	14
B. The Court Decides <i>Bivens</i> and Develops its <i>Bivens</i> Doctrine	17
III. Current State of the Law Regarding Constitutional Torts	19
IV. The Actual Results of <i>Bivens</i>	22
A. Growth in Constitutional Tort Suits Against Individual Federal Employees	22
B. Effectiveness of Plaintiffs' Suits	27
C. Negative Effects	28
1. Personal Costs to Individual Employees	31
2. Effects on Government Decision Making	32
a. Government Administrative Procedures Necessitated by <i>Bivens</i>	33
(1) Will They be Given Representation and be Defended by the Government?	33
(2) Will Their Case be Removed to Federal Court?	34

	<u>Page</u>
(3) Will They be Liable for Money Judgments Against them?	36
b. Effects on the Judicial and Executive Branches	36
V. The Supreme Court's Invitation to Congress To Enact Appropriate Legislation	37
VI. The Importance and Benefits of Legislation	39
A. Fair and Adequate Remedy for Injured Plaintiffs	42
B. To Retain or Remove Qualified Immunity as a Defense?	43
C. Benefits to Federal Employees and Officials	43
D. Adequate Deterrence Will Still Exist After Passage of Legislation	44
VII. Similar Legislation in Related Areas	47
VIII. Legislation Options	48
IX. Anticipated Reactions to Proposed Legislation	49
A. Judicial Reaction	49
B. The Congress	52
X. Options in the Absence of Legislation	54
A. Insurance for Individual Federal Employees	54
B. Options for the Executive Branch (Departmental)	55
XI. Conclusion	57

AN ASSESSMENT OF *BIVENS*: IS IT TIME FOR A CONGRESSIONAL FIX?

"No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits...."

-- Attorney General Jeremiah Black, 1857

"In our society, it seems like everybody's so afraid they're going to be sued that they're petrified. We can't get to the point where we're scared to do what's right." -- Whitey Herzog

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

-- Justice Oliver Wendell Holmes, Jr.¹

I. INTRODUCTION

Until the 1970s, suits against Federal employees in their personal capacity² were extremely rare, and, when filed, almost always unsuccessful. For approximately two hundred years, American courts generally followed what is called the Doctrine of Official Immunity. This doctrine recognized that the greater good is gained by letting Federal officials make decisions without fear of suit and personal liability than by having to risk litigation or financial ruin if sued as a result of a decision or action. However, in *Bivens v. Six Unknown Named Agents of the*

¹ Quoting Justice Holmes' *The Path of the Law*, 10 Harv.L.Rev. 457, 469 (1897) cited in Chief Justice Burger's dissent in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 420 (1971)(Harlan, J. concurring).

² These are lawsuits against government officials in their individual capacities; that is, lawsuits in which plaintiffs seek money damages from the personal assets of government officials for wrongs committed in the performance of governmental functions. In these cases, plaintiffs sue for money damages from the person rather than the office, and when the official is transferred or leaves government service, the lawsuit follows.

Federal Bureau of Narcotics,³ [hereinafter *Bivens*] a case decided by the Supreme Court in 1971, a new rule was established. In this case, which involved Federal law enforcement officers, the court held, for the first time, that federal government employees and officials may be sued for monetary damages and held personally liable for violations of U.S. constitutional rights,⁴ even when the acts are committed while performing their official duties on behalf of Congress or the Executive Branch.

In *Bivens*, the court first recognized what are now known as "constitutional torts," actions for damages brought directly under the Constitution; as they are not based on state common law or on federal statute. They have become known generically as "*Bivens* actions."

In January, 1988, the Supreme Court decided an important case involving the question of Federal employee personal responsibility for official actions. The case of *Westfall v. Erwin*⁵ involved a warehouse employee at Anniston Army Depot who was injured while handling toxic soda ash. In deciding for the employee who had sued the managers at the plant in their personal capacities, the Supreme Court made it clear that there were only strictly limited circumstances where Federal employees and managers could not be held personally liable for their decisions and conduct even if done as part of their official duties. Thus, Federal employees had almost no protection from lawsuits brought against them personally for money damages.

As a result of the *Westfall v. Erwin* case, there was a sizable increase in litigation against Federal employees. In a direct reaction to the problems created by the *Westfall* case, the administration strongly supported legislation that would settle the question of federal employee personal liability for common law torts that was being considered by the Congress,⁶ and, on November 18, 1988, the President signed Public Law 100-694 into law.⁷

³ 403 U.S. 388 (1971). The *Bivens* decision sprang from a seriously fractured court. The majority opinion was written by Justice Brennan. Strongly worded dissents were penned by Justices Burger, Blackmun, and Black....?? Other justices have continued to seriously question the decision's underpinnings. Nine years after *Bivens*, Justice Rehnquist characterized *Bivens* as "a decision 'by a closely divided court, unsupported by the confirmation of time,' and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on the living process of striking a balance between liberty and order as new cases come [to the Court] for adjudication." *Carlson supra* note 3, at 32.

⁴ The unlawful conduct included a warrantless arrest and search, the use of unreasonable force, and the lack of probable cause for the arrest. *Id.* at 389.

⁵ 484 U.S. 292 (1988).

⁶ See e.g., Letter from Dick Thornburgh, Attorney General, United States Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary, United States Senate (September 26, 1988) (on file with the author).

⁷ Federal Employees Liability and Tort Compensation Act of 1988, Pub. L. No. 10-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679). The heart of the *Westfall* Act is section 5, 28 U.S.C.

This Act, known as The Federal Employees Liability Reform and Tort Compensation Act of 1988, makes substantial changes in the law applicable to suits against federal employees personally. Under this legislation, an employee is now immune from some suits for injuries that may be occasioned by the exercise of government functions. The immunity extends to so-called common law torts, that is, injuries to property or persons due to acts of negligence by individual Federal employees.⁸ In such instances, claims and litigation against the individual employee are now precluded and the only proper defendant is the United States. Other federal laws, in a fashion similar to the FTCA, provide specified niches of federal employees with absolute immunity from personal liability for medical⁹ and legal malpractice.¹⁰

Procedurally, under these statutes, if a claim or suit is filed against an individual Federal employee, the employing agency will examine the circumstances surrounding the suit, in consultation with the Department of Justice, to determine if the acts upon which the suit are based come within the exercise of government functions and within the scope of the employees duties. If such is found to be the facts, the U.S. Attorney will certify that the case falls under the provisions of Act. Once certified, and upon approval of the presiding judge, the employee is dropped from the lawsuit and the United States is substituted as the defendant.

The Federal Employees Liability Reform and Tort Compensation Act does not cover every lawsuit. Federal employees are not immune from suit in three types of situations. Employees remain liable to suit if the allegations are that they committed a crime.¹¹ Employees are not immune if the allegations are that they violated a statute that specifically provides for suits against individuals.¹² Under *Bivens v. Six Unnamed Agents*, employees are not immune to

§2679(b)(1) (the exclusive remedy provision), and section 6, 28 U.S.C. §2679(d) (the certification and substitution provision). See also H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 2-3 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 5945, 5946.

⁸ This is an important substantive limitation on the Westfall Act's immunity. The Act applies only to suits against federal officials arising under state law.

⁹ 10 U.S.C. § 1089 (1995) (The "Gonzales Act") (protects certain federal health care personnel from medical malpractice claims).

¹⁰ 10 U.S.C. § 1054 (1995) (immunizes DOD legal staffs from legal malpractice claims).

¹¹ Congress expressly provided that the Act would not apply to suits against federal officials for violations of the United States Constitution, *Westfall* Act § 5, 28 U.S.C. § 2679(b)(2)(A), nor does the Act apply to suits for damages arising from a federal official's violation of federal statute. *Id.* at 28 U.S.C. § 2679(B)(2)(b). See also H.R. Rep. No. 100-700 at 6, 1988 U.S. Code Cong. & Admin. News at 5950 ("H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violated their Constitutional rights."). Consequently, federal constitutional claims (*Bivens*-based suits) must be defended without the aid of the Westfall Act.

¹² *Id.* For example, several environmental statutes, civil rights acts, and the Privacy Act contain provisions that provide for personal liability.

liability when their actions constitute violations of citizens' rights under the United States Constitution.¹³

In the 28 years since *Bivens*, the number of constitutional tort cases filed against individual federal employees has grown. This massive number of cases is costly and has created significant problems for both the government and the individual defendants. There are indications that the vast majority of *Bivens* lawsuits against individual federal employees are unfounded and are filed for reasons other than monetary rehabilitation. Additionally, it is open to debate whether the new substantive legal right created by the Court has served the public interest in general or in the manner intended by the Court.

To date, Congress has failed to legislate a fix to the major problem of constitutional torts filed under the aegis of *Bivens*. This is so even in the face of a strong hint from the Supreme Court that it would likely seriously consider a legislative substitute for *Bivens*. This paper addresses these issues and concludes that the time has come for Congress to pass a law, similar to the Federal Employees Liability Reform and Tort Compensation Act, that will provide a fair and adequate remedy for injured plaintiffs while at the same time protecting Federal employees from the situation we have today, i.e., plaintiffs without an effective remedy, and thousands of Federal employees facing unwarranted, unjustified, and unnecessary *Bivens* suits.

II. HISTORICAL BACKGROUND

The current law on constitutional torts did not arise in a vacuum. For an understanding of *Bivens*, it is worthwhile to review how private remedies against the English Crown and the American federal government have historically developed. The *Bivens* constitutional tort remedy is the result of the ebb and flow of the legal currents in England and the United States over the past 750 years.

A. The Law of Government Liability for the First 200 Years

Private remedies against the English Crown began to develop prior to the American Revolution, with further refinements during the constitutional period and in recent times.¹⁴ The

¹³ *Id.*

1. In England

Private remedies against the English Crown began to develop prior to the American Revolution, with further refinements during the constitutional period and in recent times.¹⁵

In the 1400's, Henry de Bracton reported that the accepted corpus of English law of his time was that the Crown is immune from liability for its acts.¹⁶ In his *Commentaries on the Law of England*, William Blackstone pronounced the law of the land in his famous maxim "The King can do no wrong."¹⁷ Judicial process could not be brought against the crown without its consent.¹⁸ This concept has strongly influenced generations of American lawyers and judges, and, until relatively recently, reflected the dominant conception of sovereignty.

Consent manifested itself in private petitions to the Crown, followed by petitions to Parliament. Beginning in the 1200s, the victim of a wrong committed by the Crown could petition the king to grant non-monetary relief. The king could grant the relief or refer the petition to his chancellor or council for decision. In the 1300s, petition procedures were regularized. Petitions could also be presented to Parliament, and if approved by both Houses and the Crown, emerge as laws granting relief.¹⁹ Thus, from an early period, these petitions remedied many, but not all, of the government-inflicted injuries that are today considered public

¹⁴ For a detailed history of the evolution of American tort remedies. See generally the notable book by Peter H. Schuck, *Suing Government*, New Haven: Yale University Press 29-53 (1983). For much of the historical overview which follows I acknowledge a special indebtedness to the researches of Professor Peter Schuck.

¹⁵ For a detailed history of the evolution of American tort remedies, see generally Schuck, *supra* note 14. For much of the historical overview which follows I acknowledge a special indebtedness to the researches of Peter Schuck.

¹⁶ Henry de Bracton, 2 *Bracton de Legibus et Consuetudinibus Angliae* [2 Bracton on the Laws and Customs of England], ed. George Woodbine, trans. Samuel Thorne (1968) at 33 "Rex non habet parem" [The king has no equal] "Since no writ runs against him [the king] there will [only] be opportunity for a petition [to the king], that he correct and amend his act; if he does not, it is punishment enough for him that he await God's vengeance. No person may presume to question his acts, much less contravene them." *Id.*

¹⁷ WILLIAM BLACKSTONE, 1 *COMMENTARIES ON THE LAWS OF ENGLAND*, Chapt. 7 "Of the King's Prerogative," "as to cases of ordinary public operations...the king himself can do no wrong," *Id.* at 237, "the law also gives to the king, in his political capacity, absolute perfection. The king can do no wrong." *Id.* at 238.

¹⁸ BLACKSTONE, *supra* note 17, at 235 ("no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him"); *Id.* at 236 ("as to private injuries; if any person has...a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion."); *Id.* Ludwik Ehrlich, *Proceedings Against the Crown* (1216-1377), in Vinogradoff, ed., 6 *Oxford Studies in Social Legal History* (1921). Cf. A few medieval authors asserted that the king was amenable to judicial process. See e.g., Y.B. 33-35 Edw. I (R.S.) 470; Schuck *supra* note 14, at 31.

¹⁹ See Ludwik Ehrlich, *Proceedings Against the Crown*, 1216-1377, in Vinogradoff, ed. 6 *Oxford Studies in Social and legal History* (1921); W.S. Holdsworth, 9 *A History of English Law* 14 (1944).

torts²⁰ and remained the most important avenue of relief for subjects injured by official conduct.²¹ These petitions have been compared to today's "private bills."²²

The development of the petition system then served to significantly ameliorate the harsh effects of the Blackstonian maxim "The King can do no wrong."²³ Petitions were the most important avenue for remedies for subjects injured by official conduct.²⁴

In 1688, the Court of Exchequer, the royal organ that adjudicated claims concerning the Crown's revenues, decided the Pawlett case. The court decided that it could, as an equitable remedy, order the Crown to redeem a landowner's mortgage held by the Crown. The court rejected the Attorney General's argument that the plaintiff's sole remedy was to petition the king to permit redemption as a matter of grace.²⁵ The Banker's case, decided by the Court of Exchequer, acknowledged a remedy against the Crown in contract for the Crown's default on a secured loan, either through a petition to the crown or a special writ. This imposed liability on the crown for contractual obligations similar to the contractual obligations of private parties.

The doctrine of respondeat superior has been traced to the ancient law liability of a master for the wrongs of his slaves. According to various scholars, the first English law reference to "respondeat superior" is in the 1285 Statute of Westminster. For centuries, private law limited respondeat superior to situations where the master commanded, authorized, or ratified the wrong of a subordinate servant. In the last decade of the 17th century, Sir John Holt, Lord Chief Justice of King's Bench, made the doctrine of respondeat superior a mainstream remedy. In a series of private tort cases, Holt ignored traditional grounds for decisions and relied upon broad legal and policy reasons to justify his opinions. In America, Holt's pronouncements were quickly and completely accepted.²⁶ While Chief Justice Holt's efforts to expand private business liability were accepted with enthusiasm, his attempts to judicially expand the liability of public officials

²⁰ Schuck, *supra* note 14, at 31-2.

²¹ *Id.* at 32.

²² For a discussion of the practice with private bills in the U.S. Congress. See Peter H. Schuck, *The Judiciary Committees*, 242-65 (1975).

²³ See Schuck, *supra* note 14, at 32 and 215 n.22 (The precise extent to which the Crown remedied official torts is uncertain. Even though petitions were "a matter of grace" not of "compulsion," it appears they were "given as of course.").

²⁴ *Id.* at 32

²⁵ *Pawlett v. Attorney-General*, Hardes 465 (1668) cited in Schuck, *supra* note 13, at 32 (The court reasoned that "because the King is the fountain and head of justice and equity...it shall not be presumed that he will be defective in either. And it would derogate the King's honour to imagine that what is equity against a common person, should not be equity against him.")

for the negligence of their subordinate employees was as enthusiastically rejected by other justices.²⁷

At about the same time the English courts were affirming government immunity, they were affirming the principle that public officials were personally responsible for torts they committed.²⁸

2. In America

a. The Colonial Period

Little is known about the treatment of governmental liability and immunity issues in America's colonial courts.²⁹ The Constitutional Convention did not explicitly debate the issue.³⁰ The Constitution does not mention governmental liability or immunity.³¹ Article III, relating to federal judicial power, does not clarify the issue.³² It is worth noting that the doctrine of respondeat superior, the notion that employers are legally responsible for torts committed by

²⁶ Schuck, *supra* note 14, at 34; Thomas Baty, *Vicarious Liability* 29-32 (1916); *Philadelphia & Reading R.R. v. Derby*, 55 U.S. 468, 485-86 (1852).

²⁷ Why the courts enthusiastically embraced the principle of enterprise liability for the acts of employees and as clearly rejected government liability for the acts of officials is open to speculation. Peter Schuck speculates that judges may have been intimidated by the notion of sovereign immunity; or were guided by notions that governmental activity was, in unarticulated ways, unique; or that in 1701, the Crown's activities were limited in ways that caused few injuries to subjects and when many government functionaries, such as tax collectors and jailers were actually independent contractors rather than Crown employees. Schuck, *supra* note 13, at 34.

²⁸ See, e.g., *Lane v. Coton*, 1 Ld. Raym. 646, 652-53 (1701); Schuck, *supra* note 13, at 34.

²⁹ Schuck, *supra* note 14, at 36.

³⁰ *Id.* at 36.

³¹ U.S. Const.

³² U.S. Const. art. III, § 2. See also, Schuck, *supra* note 13, at 36. While Article III extended the jurisdiction of the federal courts to "Controversies to which the United States shall be a Party", records of the Convention shed no light on whether "party" was meant to include party-defendant as well as party-plaintiff, and if it did, whether the duality applied only in those cases in which the United States *consented* to be sued.

their employees,³³ has never taken root in American public law.³⁴ In contrast, the doctrine has been an accepted doctrine for establishing tort liability in private enterprise.³⁵

The Doctrine of Official Immunity

Chief Justice Jay addressed the question in *Chisolm v. Georgia*.³⁶ In dictum, the Chief Justice found federal immunity existed.³⁷ Twenty-eight years later, in *Cohens v. Virginia*,³⁸ Justice Jay's conclusion that the United States has constitutional immunity was reaffirmed in dictum by Chief Justice Marshall,³⁹ and in the 1846 decision of *United States v. McLemore*,⁴⁰ the first case to directly deal with the point.

³³ See Schuck, *supra* note 14, at 33. Oliver Holmes has traced the law of *respondeat superior* to ancient law where a slave owner was absolutely liable for the wrongs of his slave. The doctrine had mostly disappeared by the twelfth century. Its first appearance in English law was in 1285 in the Statute of Westminster. It was not a principle of strict liability of a master for his servant's wrongs. For centuries following enactment of the statute, *respondeat superior* was narrowly limited to situations in which the master had commanded, authorized, or ratified his servant's wrong. In 1691, Sir John Holt, Lord Chief Justice of the King's Bench, in a series of private tort cases, transformed the doctrine of *respondeat superior* into a broad remedy. Holt ignored traditional grounds for his decisions and relied on sweeping formulations of diverse legal and policy justifications; among them implied consent, superior deterrent ability of the business, and plaintiff's detrimental reliance on the servant's apparent authority.

³⁴ See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 453 (1981). For a good historical overview of vicarious liability, see Thomas Baty, *Vicarious Liability* (1916) (The author concludes that vicarious liability, under the theory of *respondeat superior*, is not supportable morally or historically in situations where the master or employer has not authored, authorized or ratified).

³⁵ See Schuck *supra* note 14, at 214 n.5 (noting the disparity between the growth of the doctrine of *respondeat superior* in the private and public sectors is remarkable in view of the rather recent and striking convergences between public and private tort law, to include the rapid expansion of substantive liability and the transformation of private tort law from a system for adjudicating private disputes into a self-conscious instrument of public policy. The author supports the convergence argument by citing the widespread adoption of strict liability for defective products. See Restatement (Second) Torts §402A (1965) for certain categories of injurious activities, e.g., *Spano v. Perini Corp.*, 25 N.Y. 2d 11, 250 N.E. 2d 31 (1969); substitution of comparative for contributory negligence, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226 (1975); the narrowing of defenses to liability, e.g., *Williamson v. Smith* 83 N.M. 336, 491 P.2d 1147 (1971); the abrogation of common law immunities, e.g., *Muskopf v. Corning Hosp. Dist.* 55 Cal. 2d 211, 359 P.2d 457 (1961) the expansion of old torts, e.g., *Diullon v. Legg*, 68 Cal. 2d 728, 44 P.2d 912 (1968); the recognition of new ones, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); the broadening of vicarious liability, e.g., *Rogers v. Kemper Constr. Co.*, 50 Cal. App. 3d 608 (Ct. App. 1975); the proliferation of new categories of compensable damages, e.g., *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E. 2d 690 (1980); and the facilitation of plaintiffs' proofs, e.g., *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977).

³⁶ 2 U.S. (Dall.) 419 (1793).

³⁷ *Id.* at 476-77.

³⁸ 6 Wheat. 264 (1821).

³⁹ *Id.* at 411-12.

⁴⁰ 4 How. 286 (1846).

b. The Civil War Era

During the civil war and immediate post-civil war periods, the tort immunity of the United States was an accepted fact. Relief from government torts was seen to be available only in private bills to Congress,⁴¹ and, for contract claims, in the new Congressionally established Court of Claims.⁴²

The immediate post-civil war period saw Congressional enactment of three statutes that brought a sea of change to the law concerning the personal liability of state officials by specifically authorizing state officials to be personally sued for violating a person's constitutional rights.⁴³ These three statutes, enacted as part of the Civil Rights Acts of 1866 and 1871, provide bases for money damages claims against public officials for racially-based discrimination,⁴⁴ for committing constitutional violations under color of state law,⁴⁵ and for conspiring to violate a person's civil rights.⁴⁶ Congress specifically empowered the federal courts with jurisdiction to hear cases under these statutes.⁴⁷

⁴¹ See Schuck, *supra* note 14, at 37 ("Congress had indeed enacted many private bills to relieve victims of federal torts, the earliest of which was passed in 1792 (one year prior to the *Chisholm* decision), compensating a school damaged by American troops during the Revolution. Private legislation was apparently burdensome and subject to political abuses.").

⁴² The Tucker Act, 24 Stat. 5051 (1887) (codified in 28 U.S.C. § 1356(a)(2), 1491 (1994) (jurisdiction was limited to contract claims; tort claims were specifically barred).

⁴³ E.g., 42 U.S.C. §§ 1981, 1983, 1985(3).

⁴⁴ *Id.* § 1981. Section 1981 was first enacted as part of the Civil Rights Act of 1866 primarily to protect the rights of freed slaves. Developments in the Law: Section 1981, 15 Harv. C.R.C.L.L. Rev. 29 (1980) (footnotes omitted). Originally passed under the aegis of the thirteenth amendment, Congress reenacted the statute in 1870 under the fourteenth amendment to remove any doubts about its constitutionality. *Id.* at 44. Initially, the Court limited section 1981 to racial discrimination under color of state law. *Hodges v. United States*, 203 U.S. 1 (1906). However, in 1988 the Court held that private actions not dependent upon state action could be brought under section 1981. *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968).

⁴⁵ *Id.* § 1983. Section 1983 was part of the Civil Rights act of 1871, that Congress enacted in response to lawlessness in the South during Reconstruction. The act was aimed at the Ku Klux Klan and the abdication of law enforcement by Southern officials, particularly their unwillingness to protect newly-freed slaves. See *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. R. 1133, 1153-56 (1977).

⁴⁶ *Id.* § 1985(3). This section was part of the Civil Rights Act of 1871. It applies to wholly private conspiracies to deprive persons of their civil rights and conspiracies to violate civil rights under color of state law. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Some courts have held that 1983(3) does not reach conspiracies involving federal officials. E.g., *Seibert v. Baptist*, 594 F.2d 423, 429 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); *Savage v. United States*, 450 F.2d 449, 451 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); *Betha v. Reid*, 445 F.2d 1163, 1164 (3d Cir.), *cert. denied*, 404 U.S. 1061 (1971). But see *The Judge Advocate General's School, United States Army, Defensive Federal Litigation*, Pub. JA 200, 9-21 (1996) ("The better view... is that if section 1985(3) can reach private conspiracies, it can reach conspiracies involving federal officials."). See e.g., *Hobson v. Wilson*, 737 F.2d 1, 19-20 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Alvarez v. Wilson*, 600 F. Supp. 706, 710-11 (N.D. Ill. 1985).

⁴⁷ 28 U.S.C. § 1343.

c. The 20th Century

(1) Judicial Rejection of *Respondeat Superior* as a Basis for Governmental Liability

By the 20th century, the immunity of the United States and its officials was almost absolute. On its face, the harsh results of near absolute liability seemed ameliorated by the court's view that misconduct by a federal official stripped that federal official of the cloak of his authority and therefore made him liable as if he were any other citizen. However, the court's three main exceptions to the official liability rule nearly swallowed it. In short order the court rejected respondeat superior as a basis of liability for the torts committed by an official's subordinates;⁴⁸ ruled that federal officials could be liable for "ministerial" but not "discretionary" acts;⁴⁹ and held that intentional misconduct by federal officials was not a basis for liability if the acts committed were matters generally committed by law to the official's control.⁵⁰ These exceptions continue to influence litigation to this day.

(2) Congress Enacts First Significant Laws Waiving Sovereign Immunity

The first half of the twentieth century saw a continuation of governmental immunity from suit by the federal courts at the same time Congress was legislating significant waivers of governmental immunity. As previously noted, the Congress enacted legislation in 1910 that permitted suits against the United States in the Court of Claims for patent infringement.⁵¹ In 1920, it waived immunity from maritime torts involving government-owned merchant vessels⁵² and, in 1925, passed the comprehensive Suits in Admiralty Act⁵³ authorizing suits against the United States in Federal District Courts for damage caused by and salvage service rendered to public vessels of the United States. In 1922, a statute was enacted that authorized administrative settlement by executive departments of claims under \$1,000 for "damage to or loss of privately-owned property caused by the negligence of any officer or employee of the Government acting within the scope of his employment."⁵⁴

⁴⁸ *Robertson v. Sichel*, 127 U.S. 507, 515 (1888); *Keenan v. Southworth*, 110 Mass. 474 (1872).

⁴⁹ *Kendall v. Stokes*, 44 U.S. 87, 98 (1845).

⁵⁰ *Spaulding v. Vilas*, 161 U.S. 483, 498 (1896).

⁵¹ Act of June 25, 1910, 36 Stat. 851 (1910), amended by 40 Stat. 705 (1918); See 28 U.S.C. § 1498.

⁵² See W. Wright, *The Federal Tort Claims Act*, 4-5 (1957).

⁵³ 43 Stat. 1112.

⁵⁴ 42 Stat. 1066 (1922). This power was limited to claims for negligent damage to property and did not extend to claims for personal injury.

Edwin Borchard, a professor at Yale University Law School, can be credited with instigating wide-spread academic and official interest in government liability. Between 1924 and 1928, Professor Borchard published eight scholarly, in-depth articles in which he examined the history and theory of governmental responsibility in tort.⁵⁵ He concluded that the rules of governmental immunity created by the American courts were unwarranted, and were based on "misunderstood historical maxims"⁵⁶ and "practical conservative reasons."⁵⁷

The Federal Tort Claims Act of 1946

Borchard's work inspired great interest among other scholars and led to a spate of articles that examined almost every conceivable aspect of municipal, state, and federal immunity from suit.⁵⁸ After several fits and starts,⁵⁹ this interest led, ultimately, to the passage of the Federal

⁵⁵ Edwin M. Borchard, *Governmental Responsibility in Tort*, 34 Yale L.J. 1, 129, 229 (1924-25); 36 Yale L.J. 1, 757, 1039 (1926-27); 28 Colum. L. Rev. 577, 734 (1928).

⁵⁶ See Borchard, *supra* note 65; 36 Yale L.J., at 1100. For example, Borchard concluded that the axiom "the king can do no wrong" has been misapplied by American courts because they have misconceived of the origin of the dictum. He found no solid footing in either English common law or historical legal writings for the proposition that this maxim meant that a sovereign must consent before individuals may seek redress against it. For a detailed discussion of this issue see *id.* at 17-41.

⁵⁷ Borchard, *supra* note 55, at 1100.

⁵⁸ According to one author, between 1924 and 1942, over 200 writings concerned the issue of municipal tort liability alone. Schuck, *Suing Government*, p. 217, fn. 71, citing Repko, "American Legal Commentary on the Doctrines of Municipal Liability" 9 Law & Contemp. Probs. 214 (1942).

⁵⁹ E.g., in 1929, a bill passed both the House of Representatives and the Senate but was pocket vetoed by president Coolidge probably because of an objection by the Attorney General. Borchard, Edwin M. See *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1, 2 (1933). In 1933, Borchard reported that after nearly ten years of effort, the Committee on Claims of the two houses of Congress, with the co-operation of the law officers of the several executive departments finally have worked out a bill." *Id.* Known as the Howell-Collins bill, it provided for payment of claims up to \$50,000 caused by the negligence of any officer or employee of the Government within the scope of his office or employment, and not out of contract. A \$7,500 limit applied to personal injury or death. Claims first had to be made to the Comptroller General within 30 days of the occurrence of the event, followed within a year by a formal claim under oath. The General Accounting Office could subpoena witnesses and gather evidence, and was authorized to settle and adjust the claims. Unsatisfied claimants could file suit in the Court of Claims within a year of a denied claim or within six months of a claim being filed. Fourteen types of tort claims were excepted from the bill. If the injured person or property was insured, the Comptroller General and the Court of Claims were directed to deduct the amount on insurance from any award or judgment; and yet, the subrogated insurance company had no standing to prosecute its own claim against the Government. If an officer acted willfully, the government would be empowered to recoup its payments under the Act from the wrongdoing officer. In an effort to prevent the Act from becoming a lawyers' bonanza, soliciting claims was to be made a criminal offense and attorney's fees for an award or judgment were to be fixed. Howell-Collins Bill, 72d Cong., 1st Sess., S. 4567, Calendar No. 697, Senate Report 658; Borchard, Edwin M. "The Federal Tort Claims Bill," 1 U. Chi. L. Rev. 1, 2-4 (1933). In 1938, the administration sponsored unsuccessful legislation. Report of the Attorney General at 10 (1938).

Tort Claims Act of 1946,⁶⁰ [hereinafter FTCA] a singularly important statute waiving significant portions of governmental (sovereign) immunity.

The FTCA mandates that the remedy against the United States for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employees whose act or omission gave rise to the claim or against the employee or the employee's estate is precluded without regard to when the act or omission occurred.⁶¹ Under the FTCA, a claimant may not have a jury trial and may not claim punitive damages against the government.⁶² More importantly, the FTCA specifically excludes from its coverage civil actions for constitutional torts.⁶³

(3) Judicial Entrenchment

At the time the Congress was moving strongly to remove obstacles to suing the government, the federal courts were moving, with equal strength, in the opposite direction.

⁶⁰ The Federal Tort Claims Act [hereinafter FTCA] was passed as part of the Legislative Reorganization Act, Pub. L. No. 79-601, 60 Stat. 42 (1946) (codified at 28 U.S.C. §§ 1346(b), 2671-2680). Section 1346(b) of the Act gives federal courts jurisdiction to hear tort suits against the United States: "(b) Subject to the provisions of chapter 171 of this title, the district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945 for injury 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." The Act places two jurisdictional requirements on plaintiffs. First, they must present a claim in writing for a specified sum of money to the appropriate federal agency within two years of accrual of the cause of action. 28 U.S.C. §§ 2401(b), 2675. Failure to file a claim within the two year window deprives a district court of jurisdiction to hear the claim. See, e.g., *Magruder v. Smithsonian Inst.*, 758 F.2d 591, 593 (11th Cir. 1985) (two-year statute of limitations); *Avila v. INS*, 731 F.2d 616, 618 (9th Cir. 1984) (administrative claim requirement). Second, they must file suit in federal district court within six months of a denial of the claim by the agency or the claim is jurisdictionally barred. 28 U.S.C. § 2401(b). See, e.g., *McNeil v. United States*, 964 F.2d 647 (7th Cir. 1992), *aff'd*, 113 S. Ct. 1980 (1993).

⁶¹ The coverage of the original act was qualified with numerous exceptions including most intentional torts, and all discretionary functions. Some jurists concluded that it was "hedged with protections for the United States." *Carlson v. Green*, *supra* note 3, 14, 28n.1. In 1974, Congress amended the FTCA to cover assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution by officials empowered to make searches, seizures, or arrests. 88 Stat. 50, amending 28 U.S.C. § 2680(h).

⁶² 18 U.S.C. § 2674.

⁶³ 28 U.S.C. § 2679(b)(2)(A) (Section 1346(b) "does not extend or apply to a civil action against an employee of the Government—(A) which is brought for a violation of the Constitution of the United States"). The FTCA does not provide an independent cause of action or substantive rights, but only confers jurisdiction in district courts and waives sovereign immunity to hear existing state-created tort claims against the federal government. 28 U.S.C. § 1346(b); *Graham v. Henegar*, 640 F.2d 732 (5th Cir. 1981); *Reynolds v. United States*, 643 F.2d 707 (10th Cir. 1981), *cert. denied*, 454 U.S. 817 (1981). Because the FTCA's limitations do not apply to *Bivens*-type suits, jury trials and punitive damages are available to plaintiffs who sue federal employees personally under *Bivens*.

Between 1927 and 1950, the courts continued to strengthen the doctrine of government employee immunity from suit. In a string of cases, the Supreme court held employees in wide-ranging types of positions and levels of authority absolutely immune from suit, including prosecutors,⁶⁴ Department Secretaries,⁶⁵ Commissioners of the Securities and Exchange Commission,⁶⁶ a bankruptcy commissioner,⁶⁷ an agent of the Federal Bureau of Investigation,⁶⁸ and others.⁶⁹

The 1946 decision in *Bell v. Hood*⁷⁰ was the first lawsuit for damages under the Constitution to reach the Supreme Court.⁷¹ The plaintiffs alleged that FBI agents had unlawfully entered their homes, seized their papers, and imprisoned them without a warrant.⁷² They sought damages of over \$3,000 from the agents for violating their Fourth and Fifth Amendment rights to the Constitution. The Supreme Court found that the plaintiffs' complaint did arise under the

⁶⁴ *Yaselli v. Goff*, (C.C.A.) 12 F.2d 396 404, *aff'd* 275 U.S. 503 (1927) (a prosecuting attorney is not liable in an action for a prosecution instituted with malice and without probable cause).

⁶⁵ *Class v. Ickes*, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941); *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557, 559 (D.C. Cir. 1934) (concerning the erroneous construction of a statute by the Secretary of the Treasury, the court stated: "The case is governed by the rule that the head of an executive department of the United States government cannot be held in damages for acts committed by law to his control or supervision."), *cert. denied*, 293 U.S. 605 (1934). The Postmaster General had been given absolute immunity 38 years earlier. *Spaulding v. Vilas*, 161 U.S. 483 (1896).

⁶⁶ *Jones v. Kennedy*, 121 F.2d 40 (D.C. Cir. 1941), *cert. denied*, 314 U.S. 665 (1941) (allegations against Commissioners in their individual capacities for acts allegedly malicious and outside the scope of their official duties did not state a claim on which relief could be granted).

⁶⁷ *Adair v. Bank of America Nat. Trust & Savings Assn.*, 303 U.S. 350 (1938) (errors of conciliation commissioner in bankruptcy matter do not subject him to personal liability).

⁶⁸ *Cooper v. O'Connor*, 99 F.2d 135, 140 (D.C. Cir. 1938) ("as applied to some officers [FBI agents] even the absence of probable cause and the presence of malice or other bad motive are not sufficient to impose [personal] liability upon such an officer who acts within the general scope of his authority").

⁶⁹ *See, e.g., Lang v. Wood*, 67 App.D.C. 287, 92 F.2d 211 (1937) (members of the United States Parole Board, the Warden of a Federal Penitentiary, and the Director of the Bureau of Prisons); *Brown v. Rudolph*, 58 App.D.C. 116, 25 F.2d 540, *cert. denied*, 277 U.S. 605 (1928) (Commissioners of the District of Columbia); *Smith v. O'Brien*, 66 App.D.C. 387, 88 F.2d 769 (1937) (Chairman of the Tariff Commissions); *White v. Brinkman*, 23 Cal.App.2d 307, 73 P.2d 254 (1937) (a building inspector); *Farr v. Valentine*, 38 App.D.C. 413, Ann.Cas. 1913C, 821 (1912) (the United States Commissioner of Indian Affairs); *DeArnaud v. Ainsworth*, 24 App. D.C. 167, 5 L.R.A.N.S. 163 (1904) (Chief of Record and Pension Office of the War Department).

⁷⁰ 327 U.S. 678 (1946).

⁷¹ In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court created the first truly effective constitutional tort remedy by revitalizing section 1983 of the Civil Rights Acts of 1866 and 1871. Codified at 42 U.S.C., section 1983 provides a substantive basis for money damages against public officials who violate a plaintiff's federal constitutional or statutory rights under color of state law. While section 1983 is now the most widely litigated, and perhaps the most important of the post-Civil War civil rights statutes, the provision remained dormant for almost the first century of its existence. Monroe "resurrected section 1983 from ninety years of obscurity." The Judge Advocate General's School, United States Army, Pub. JA 200, *Defensive Federal Litigation*, 9-15 (1996) *citing* *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1154 (1977). However, *federal* officials were left unscathed by Monroe because it did not reach the unconstitutional actions of *federal* officers since section 1983 provides redress only against officials acting under color of state law. *See e.g., District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973); *Chatman v. Hernandez*, 805 F.2d 453, 455 (1st Cir. 1986).

⁷² *Bell*, *supra* note 51, at 679 n.1.

Constitution, which was sufficient for federal question jurisdiction.⁷³ The Court remanded the case to the district court on the question of whether the plaintiffs had in fact stated a claim upon which relief could be granted. On remand, the district court dismissed the plaintiffs' suit for failure to state a claim upon which relief could be granted.⁷⁴ The district court held that, since there is no federal common law, absent a constitutional or statutory provision giving a person the right to recover damages for violations of civil rights, no cognizable claim existed.⁷⁵ Thereafter, lower federal courts generally accepted the district court's opinion as dispositive of the issue.⁷⁶

No case better than *Gregoire v. Biddle*⁷⁷ epitomizes the courts' rationale for absolute immunity. The plaintiff, who had been imprisoned for four years as an enemy alien, alleged a U.S. Justice Department conspiracy to deprive him of liberty. He sued the Attorney General and other Department of Justice officials for damages. Justice Learned Hand, writing for the Second Circuit, held that these government officials had absolute immunity, even assuming, *arguendo*, that the defendants were motivated solely by spite and knew that the plaintiff was being wrongfully held.

If it were possible to confine . . . the complaints to the guilty, it would be monstrous to deny recovery. The justification is . . . that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial . . . would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.⁷⁸

As we now know, Judge Hand's prescience about subjecting all officials, the innocent as well as the guilty, to unnecessary litigation⁷⁹ was all too accurate.

The Supreme Court's 1959 decision in *Barr v. Matteo*⁸⁰ clearly reaffirmed historic absolute immunity of federal officials from common law torts. Barr stated that government officials

⁷³ *Id.* at 682-3.

⁷⁴ *Id.* at 684.

⁷⁵ *Id.* at 817, 820-21.

⁷⁶ See e.g., *Katz v. United States*, 389 U.S. 347, 373 (1967) ("A citizen abused by federal officers will find that the Constitution, which once protected only against federal and not state action, now only protects against state and not against federal action.")

⁷⁷ 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

⁷⁸ *Id.* at 580.

acting within the "outer perimeters" of their official duties were absolutely immune from suit.⁸¹ Barr has been called the high water mark of absolute immunity.⁸² The opinion contains the rationale for making immunity absolute rather than contingent upon a showing of good faith. The Court noted that official immunity is not to protect an erring official, but instead to insulate the decision making process from the harassment of prospective litigation. The provision rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits. For thirty years following *Barr*, most courts attached absolute immunity to conduct found to be within the "outer perimeter" of the official's duties. It was the recognized law and was almost universally adopted.⁸³

B. THE COURT DECIDES *BIVENS* AND DEVELOPS THE *BIVENS* DOCTRINE

In 1971, the Supreme Court decided *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.⁸⁴ Federal narcotics agents had made a warrantless search of Webster Biven's New York apartment. Mr. Webster Bivens could not sue the United States under the FTCA because it excludes from its coverage intentional torts by federal officers. Instead, he sued under the theory that the U. S. Constitution's Fourth Amendment proscription against warrantless searches gave him a private cause of action against the individual agents. The facts in *Bivens* forced the court to confront two conflicting legal principles: first, for every right there is a remedy; and, second, that the federal government is protected from monetary damage awards, at least in the absence of a congressional waiver, a concept often expressed in the maxim "the king can do no wrong."⁸⁵ Writing for the majority, Justice Brennan quoted Chief Justice Marshall's statement in *Marbury*

⁷⁹ For all of the thousands of government employees that have been sued personally for their official acts, only a miniscule number have been found civilly liable. However, that fact alone doesn't take into account the significant amount of time, and personal, financial, judicial and decision making costs it takes to get to this number.

⁸⁰ 360 U.S. 564 (1959).

⁸¹ *Id.* at 575.

⁸² Schuck, *supra* note 13, at 41.

⁸³ In *Westfall v. Erwin*, 484 U.S. 292, 297 (1988), the Court asserted that it had, in *Doe V. McMillan*, 412 U.S. 306 (1973), explicitly rejected the suggestion that official immunity attaches solely because conduct is within the outer perimeter of an official's duties. *Id.* at 297. However, the Court recognized that the plurality opinion in *Barr v. Matteo* contained language that led some courts to believe that conduct within the outer perimeter of an official's duties is automatically immune from suit. *Id.* at 298, n.4.

⁸⁴ 403 U.S. 388 (1971).

⁸⁵ See discussion *infra* part II.B.

*v. Madison*⁸⁶ that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury."⁸⁷ A severely fragmented Court agreed,⁸⁸ holding that federal courts had the power to create affirmative remedies to vindicate violations of constitutional rights. It accepted the doctrine of sovereign immunity and found a monetary damage remedy could not lie against the government but it could lie against individual federal employees in their personal capacities.⁸⁹ In short, *Bivens* fundamentally changed the status quo that had, for the most part, been the law for 200 years. What specific Constitutional rights may be vindicated by *Bivens*-type suits was unanswered by the Court and remains an area of confusion to this day.⁹⁰

In developing its *Bivens* doctrine, the Court has established two bases for defeating suits brought against individual federal employees. First, when the individual federal employee can demonstrate "special factors counseling hesitation in the absence of affirmative action by Congress."⁹¹ Second, when a defendant employee can show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.⁹²

Over the next ten years, the Court so expanded its doctrine so that by 1980 it had effectively become the functional equivalent of a judicially-legislated section 1983⁹³ action against federal officials. Three Supreme Court cases form what is often referred to as the "*Bivens* trilogy: *Bivens*, *Davis v. Passman*,⁹⁴ and *Carlson v. Green*.⁹⁵ These cases expanded the *Bivens* doctrine. In *Davis v. Passman*,⁹⁶ the Court construed it to permit a Fifth Amendment equal protection claim against a Congressman for alleged sex discrimination to be inferred from

⁸⁶ 5 U.S. (1 Cranch) 137 (1803).

⁸⁷ *Bivens*, *supra* note 1, at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

⁸⁸ Justice Harlan concurred in the judgment, with Justices Burger, Black, and Blackmun dissenting.

⁸⁹ *Bivens*, *supra* note 1, at 395.

⁹⁰ While cases have held that *Bivens* provides a remedy for violations of not only the Fourth Amendment, but also the First, Fifth, and Eighth Amendments, in practice, when a Constitutional violation exists has often been unclear. See discussion *infra* note 112. See also *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8 (D.C.Cir. 1993)(en banc), vacated on other grounds, 515 U.S. 321 (1995) (First Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment).

⁹¹ *Carlson* *supra* note 3, at 19, citing *Bivens*, *supra* note 1, at 396. See also *Davis v. Passman*, 442 U.S. 228, 245 (1979).

⁹² *Bivens*, *supra* note 1, at 397. See also *Davis v. Passman*, 442 U.S. 228 at 245-247 (1979).

⁹³ Section 1983 of the Civil Rights Act of 1871.

⁹⁴ 442 U.S. 228 (1979).

⁹⁵ *Supra* note 3, at 14.

⁹⁶ *David*, *supra* note 92.

the due process clause of the Fifth Amendment. In *Carlson v. Green*, it permitted the administrators of the estates of deceased prisoners to sue individual prison officials for alleged violations of the Eighth Amendment's proscription against "cruel and unusual punishment."⁹⁷

In addition to expanding the coverage of *Bivens*, the Court also curtailed immunities available to federal officials when sued under its *Bivens* doctrine. In *Butz v. Economou*,⁹⁸ the Court adopted a rule of qualified immunity for most federal officials in constitutional tort cases.⁹⁹ Up to that time, under the Court's decision in *Barr v. Matteo*,¹⁰⁰ federal officials had reasonably assumed that they had absolute personal immunity, at least for constitutional violations.

III. CURRENT STATE OF THE LAW REGARDING CONSTITUTIONAL TORTS

In *Bivens* the Supreme Court decided that individual federal employees may be held liable for violating the constitutional rights of others, even if they are acting within the scope of their federal employment.¹⁰¹

As a general rule, only qualified immunity is available as a defense to individually sued federal employees,¹⁰² and only where they are performing discretionary functions. Absolute immunity is available as a defense in only a very few extraordinary circumstances. For example, for judges exercising judicial functions,¹⁰³ prosecuting attorneys acting within the scope of their prosecutorial functions, and administrative personnel performing similar functions.¹⁰⁴

⁹⁷ *Carlson*, *supra* note 3. *Carlson* is all the more remarkable because the plaintiff could have sued the government under the FTCA. However, the Court deemed the remedy under the FTCA not as effective to the one available under *Bivens* because under its *Bivens* remedy plaintiffs may recover punitive damages not available in an FTCA suit, under *Bivens* a plaintiff may opt for a jury, and under the FTCA suit may be brought only when the state law in which the misconduct occurred would permit the cause of action. *Id.* at 20-24.

⁹⁸ 438 U.S. 478 (1978).

⁹⁹ For a more recent manifestation of the Court's view of official liability, see *Harlow and Butterfield v. Fitzgerald*, 102 S.Ct 2727 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (The President has absolute immunity from damage actions but his close personal aides have only a "good faith" immunity.)

¹⁰⁰ 360 U.S. 564 (1959).

¹⁰¹ See *Bivens*, *supra* note 13.

¹⁰² *Butz v. Economou*, 438 U.S. 478 (1978).

¹⁰³ See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978).

¹⁰⁴ E.g., *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986) (members of parole boards who deny or revoke parole); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (The President of the United States' unique position under the constitution warrants absolute immunity from damages for his official acts. See also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (The court refused to extend absolute immunity to close presidential aides), and *Butz v. Economou*, 438 U.S. 478 (1978) (The court refused to grant absolute immunity to cabinet level officers). As a special case, military officials have been protected from suit by service members for constitutional wrongs, under two separate bases: (1)

As developed by the Supreme Court, qualified immunity is a doctrine of judicial forgiveness for officials' mistakes.¹⁰⁵ It has been characterized as an "accommodation for reasonable error. . . ."¹⁰⁶ The doctrine gives public officials the benefit of legal doubt. The intent of qualified immunity is to give public officials "ample room for mistaken judgments"¹⁰⁷ and to protect government officials except for those who are "plainly incompetent or those who knowingly violate the law."¹⁰⁸

Under *Harlow v. Fitzgerald*,¹⁰⁹ Courts apply an objective test to determine whether qualified immunity is available to a federal employee in a particular case. An employee is not liable for a constitutional tort if he did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹¹⁰ Under *Harlow*, "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known."¹¹¹ Application of the *Harlow* analysis is very

the Court's traditional "Feres doctrine," and (2) because suits by servicemembers against their superiors would undermine discipline, there are special factors counseling hesitation against permitting such suits. See *Feres v. United States*, 340 U.S. 135 (1950), and *Chappell v. Wallace*, 462 U.S. 296 (1983).

¹⁰⁵ Fed.R.Civ.P. 12(b)(6) (qualified immunity can be asserted as a defense on a motion to dismiss in the answer to a complaint); Fed.R.Civ.P. 56 (qualified immunity can be asserted at the summary judgment stage); *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991) (the court permitted qualified immunity may be asserted at trial).

¹⁰⁶ *Hunter v. Bryant*, 502 U.S. 224, 112 (1991). The Supreme Court intends that qualified immunity be raised during the early stages of litigation in order to protect public officials from not only ultimate liability, but from discovery and involvement in the distractions associated with litigation. See *Seigert v. Gilley*, 500 U.S. 226, 232-33 (1991); *Anderson v. Creighton*, 483 U.S. 635, 646 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald* 457 U.S. 800, 818 (1982).

¹⁰⁷ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

¹⁰⁸ *Id.* at 341.

¹⁰⁹ 457 U.S. 800 (1982) n.12, at 910. See also *Bogard v. Cook*, 586 F.2d 399, 411 (5th Cir.), *cert. denied*, 444 U.S. 883 (1979).

¹¹⁰ *Id.* Prior to the 1982 *Harlow* decision, the test for qualified immunity had two parts: one subjective and one objective. See e.g., *Wood v. Strickland*, 420 U.S. 308 (1975); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975). The subjective element focused on the questions of motive and intent. As motive and intent are invariably factual issues not amenable to resolution by summary judgment, the court found the subjective test incompatible with its policy that insubstantial lawsuits against public officials should be dismissed early in the proceedings, preferably at summary judgment.

¹¹¹ *Id.* at 818. Courts typically apply the rule using a two-step analysis: (1) Was the law clearly established at the time [of the alleged violation]? If not, the official is immune. (2) If yes, then the immunity defense is not available unless the official can prove that he neither knew nor should have known that his conduct violated a statutory or constitutional right. See e.g., *Batiste v. Burke*, 746 F.2d 257, 260, n.3 (5th Cir. 1984); *Hobson v. Wilson*, 737 F.2d 1, 25 (D.C. Cir. 1984, *cert. denied*, 470 U.S. 1084 (1985)).

problematic because the court has provided ambiguous guidance in defining what is meant by a "clearly established" statutory or constitutional right.¹¹²

In 1988, in the case of *Westfall v. Erwin*,¹¹³ the Supreme Court laid out a substantially new test to be used to determine if federal officials would be granted absolute immunity by the courts. Justice Marshall, speaking for the Court, held that whether or not an official had absolute immunity depended on whether or not the official was performing a discretionary function. Whether a discretionary function defense would be available was determined by four considerations: (1) was the government official's conduct within the scope of his duties, (2) was the conduct discretionary in nature (3), did the conduct involve more than minimal discretion, and (4) would granting the immunity "contribute to effective government" and "outweigh the potential harm to individual citizens?"¹¹⁴ Unfortunately, the Court did not provide sufficient guidance on what sort of conduct satisfied the discretion criteria.¹¹⁵

Congress reacted almost immediately to the *Westfall* decision. The ambiguities created by that decision, the uncertain nature of the discretion required for official immunity, and the resulting prospect of largely increased liability and litigation costs for federal officials prompted Congress to statutorily immunize federal officials from common law tort liability by mandating

¹¹² One problem is the type of judicial pronouncement necessary to clearly establish a constitutional right is unclear. See, e.g., *Davis v. Scherer*, 468 U.S. 183 (1984) (mere violation of a state statute does not vitiate an official's immunity.); *Hawkins v. Steingut*, 829 F.2d 317, 321 (2nd Cir. 1987) ("a district court decision does not clearly establish the law even in its own circuit...."). A second and an even more difficult problem is the extent to which courts will require a match between the facts of 'establishing' cases and the facts of the case under consideration. Some courts require a strict factual relationship. See, e.g., *Danenberger v. Johnson*, 821 F.2d 361 363 (7th Cir. 1987), quoting *Benson v. Alphin*, 786 F.2d 268, 278 (7th Cir. 1986) ("the facts of the existing case must closely correspond to the contested action before the defendant official is subject to liability"). Other courts compare the facts of the case before them with more general "analogous factual settings." See, e.g., *People of Three Mile Island v. NRC*, 747 F.2d 139, 144 (3d Cir. 1984); *Hall v. Ochs*, 817 F.2d 920, 924-25, (1st Cir. 1987). A third problem area concerns how broadly or narrowly a plaintiff is allowed to describe a defendant federal official's alleged constitutional violation. Constitutional rights described in broad terms make it easier to establish that the constitutional right is clearly established. Narrowly prescribed rights make it significantly more difficult for plaintiffs to establish that a particular constitutional right has been clearly established. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) ("Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."); and *Colaizzi v. Walker*, 812 F.2d 304, 30 (7th Cir. 1987), quoting *Azeez v. Fairmen*, 795 F.2d 1296, 1301 (7th Cir. 1986) ("[t]he right must be sufficiently particularized to put the potential defendants on notice that their conduct is probably unlawful.").

¹¹³ 484 U.S. 292 (1988). Immunity is a question of law often resolved by the district judge on a motion for summary judgment. See, e.g., *Hewitt v. Grabicki*, 794 F.2d 1373 (9th Cir. 1986).

¹¹⁴ *Id.* at 299.

¹¹⁵ Noting that the case was before the Court on summary judgment, and that the relevant factual background was undeveloped, the Court asserted that it was "not called on to define the precise boundaries of official immunity or to determine the level of discretion required before immunity may attach." *Id.* at 299. Such opinions are of little help in guiding the day-to-day actions of federal officials.

that the United States government be substituted for the employee as the defendant for whenever an employee is sued for a tort committed in the scope of his employment.¹¹⁶ By automatically substituting the government for the individual federal employee, all of the benefits of the FTCA, such as its administrative claim settling procedures, apply to the litigation.¹¹⁷ Unfortunately, Congress missed an opportunity to include *Bivens*-type constitutional tort suits against government officials within its amendments to the FTCA.¹¹⁸

IV. THE ACTUAL RESULTS OF *BIVENS*

A. Growth in Constitutional Tort Suits Against Individual Federal Employees

Since the 1971 Supreme Court decision in *Bivens*, liability for official acts has been an area of significant litigation for Federal employees.¹¹⁹ The increase in *Bivens*-styled personal constitutional suits against individual federal employees parallels the massive growth in civil

¹¹⁶ See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679). See H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 2-3. This legislation is often referred to as the "Westfall Act."

¹¹⁷ For example, by substituting the United States as the defendant in an FTCA suit, the government can raise all defenses available to the government under the FTCA and any defense previously available to the employee. See, e.g., *United States v. Smith*, 499 U.S. 169 (1991). Assuming the Attorney General determines that the employee was acting within the scope of employment, the employee will no longer be the defendant in the case and the United States, not the individual employee, will be liable for any award of monetary damages.

¹¹⁸ For unspecified reasons, the issue of constitutional torts was considered off limits during the hearings on legislation to amend the FTCA following the *Westfall* decision. The desire for an immediate fix to the *Westfall* decision, and the belief that the issue of constitutional tort legislation was controversial enough that raising it would delay *Westfall* curative legislation, may have been reasons for avoiding the *Bivens* constitutional issue. See e.g., *Legislation to Amend the Federal Tort Claims Act: Hearings on H.R. 4358, H.R. 3872, and H.R. 3038 Before the Subcomm. On Administrative Law and Governmental Relations, 100th Cong., 2nd Sess. 40 (1988)* (statement of Congressman Frank R. Wolf, 10th District, Va.). In discussing his support of *Westfall* curative legislation, Congressman Wolf stated, "There is a separate and much more controversial issue, it seems to me, about the whole issue of constitutional torts....It is my intention to see that we get legislation here which does not impinge on that controversy. And I think all sides agree that we do not want to do anything on this [constitutional tort] issue. We want to preserve the rights of the Federal employees, and I think it is possible for us to do it in a way that will not impinge one way or the other in that [constitutional tort] issue." *Id.*; see also testimony of Robert L. Willmore, Deputy Assistant Attorney General, Civil Division ("[W]e, of course, agree completely with Chairman Frank that we [Department of Justice] want to avoid the constitutional torts issue. . . ."). *Id.* at 58.

¹¹⁹ See Civil Division pamphlet, U.S. Department of Justice, p. 11 (n.d. but probably 1997) (discussing the functions of the Constitutional and Specialized Torts Litigation Section of the Civil Division's Torts Branch).

suits of all types being brought against the federal government.¹²⁰ Today, at any given time, there are over 5,000 personal Constitutional tort suits pending against federal employees.¹²¹

While there are no specific statistics available on the exact numbers of constitutional tort suits filed against individual federal employees, it is estimated that there have been over 30,000.¹²² In 1981, roughly one out of every 300 officials was personally named in a pending *Bivens* action.¹²³ Looking at the number of pending *Bivens* suits at just one government agency gives us some idea of just how big a problem *Bivens*-type suits against individual employees has become. On March 8, 2000 the Department of the Treasury reported to the Office of Federal Financial Management that it currently had 59 of its employees named as individual defendants in ongoing *Bivens* suits, with plaintiffs and their attorneys claiming a total of \$ 3.664 billion in damages against them personally.¹²⁴

Once filed, *Bivens*-type suits often hang over the heads of federal employees for years. Even when there is no evidence of wrongdoing by an employee, it can take the courts years to make this determination and dismiss the suit. The recent case of *Andrade v. Chojnacki*, is illustrative. In April 1993, Lon Horiuchi, was a member of the FBI Rescue Team employed as a sniper in Waco, Texas during the actions at the Branch Davidian compound known as Mount Carmel. On April 19, 1993, eighty persons died in a fire that consumed the compound. On April 12, 1996, surviving Branch Davidians and family members of those who died filed several lawsuits against the United States in Federal District Court for the Western District of Texas. They also filed personal *Bivens*-based civil damage suits against several federal employees, including FBI Special Agent Lou Horiuchi. The plaintiffs sought an unspecified amount of damages from Agent Horiuchi, alleging, through their lawyers, that he was personally liable for violating their constitutional rights by acts that led to the deaths of persons in the compound. The *Bivens* suit proceeded at a snail's pace for seven years, only to be dismissed with prejudice

¹²⁰ In 1993, the Institute for Civil Justice estimated that there had been over 31, 000 Federal civil suits filed for torts.

¹²¹ Interview with John Euler, Deputy Director, Constitutional and Specialized Torts Litigation, Civil Division, U.S. Dept. of Justice, in Washington, D.C. (February 16, 2000).

¹²² Donald M. Remy, Remarks at the Department of Justice Annual Constitutional Torts Issues Seminar (November 3, 1998) (on file with author).

¹²³ Schuck, *supra* note 13, at 43 and App. 1. See also U.S. Congress, Senate Judiciary Committee, Subcommittee on Agency Administration, Federal Tort Claims Act: Hearings on S. 1775, 97th Congress., 2d Sess., March 31, 1982 (Statement of Donald J. Devine, Director, U.S. Office of Personnel Management).

¹²⁴ Memorandum from William Pugh, Deputy Assistant Inspector General for Audit (Financial Management), U.S. Dept. of the Treasury to Sheila Conley, (Acting) Deputy Comptroller, Ofc. of Federal Financial Management, U.S. Dept. of the Treasury (March 8, 2000).

by the court on March 28, 2000, on the basis that there is no credible evidence to support the plaintiffs' claims against Agent Horiuchi.¹²⁵

It is a testament to the creativity of the plaintiffs' bar¹²⁶ that a constitutional tort can be articulated for almost any day-to-day function federal employees engage in as part of their official duties.¹²⁷ There are any number of examples of the kinds of activities that resulted in personal liability lawsuits being filed against federal employees. A recent manifestation of this can be seen in suits in which plaintiffs' attorneys add wholly innocent (legally and factually) spouses of federal employees as named defendants in *Bivens* suits.¹²⁸ The end result is that as a

¹²⁵ See *Andrade v. Chojnacki*, No. 96-CV-139 (W.D. Tx. filed Apr. 12, 1996). The *Bivens* suit against Agent Horiuchi was dismissed with prejudice by the federal district court on a motion filed by the plaintiff's attorney. Special Agent Horiuchi was the last individual defendant remaining in the Waco matter. However, this may not be the end of the litigation for some of the other agents at Waco. The plaintiffs' lawyers have pending before the court a motion to reinstate their previously dismissed *Bivens* claim for damages against several of the FBI's agents who were commanders at the site. See Memorandum from David Ogden, Acting Assistant Attorney General, Civil Division, U.S. Dep't of Justice to the Attorney General, subject: Weekly Report for the Week of March 20, 2000 (March 21, 2000) (on file with the author). See also Lee Hancock, *Waco Re-Examined*, The Dallas Morning News, March 14, 2000; Jerry Seper, *FBI Sniper Dropped from Davidian Wrongful-Death Suit*, The Wash. Times, April 1, 2000, A2.

¹²⁶ See *Awad v. United States*, cite n.a. (N.D. Miss. date n.a.), is a typical example of this creativity. The plaintiff was assigned a terrorist mission by a Palestinian terrorist organization. He entered Switzerland with a bomb to be used to blow up a hotel thought to be owned by Jews. Rather than carry out his mission, and after being turned away by the Saudi Embassy, he turned himself in to the American Embassy. He agreed to come to the United States to assist in the prosecution of his former terrorist associates, who had placed a bomb aboard a Pan Am flight en route from Tokyo to Honolulu. The plaintiff, feeling that promises of a reward were not kept, and that he was not being supported in the style he expected, sued, personally, the former United States attorney for the District of Hawaii, four FBI Special Agents and a Deputy United States Marshal.

¹²⁷ The urge to sue federal employees for perceived constitutional violations must overwhelm plaintiffs and their attorneys because a rational evaluation of *Bivens*-type suits leads to only one conclusion: plaintiffs almost never win. Given the extreme unlikelihood of prevailing, it can only be speculated as to why plaintiffs and their legal representatives continue to file large numbers of *Bivens*-type lawsuits. Professor Cornelia T. L. Pillard has identified several possible reasons for the continuing large numbers of these suits, despite the odds: *Bivens* creates an "illusion" that a remedy exists, the unclear nature of the defense of qualified immunity instills false hope that the defense will not prevail, plaintiffs such as prisoners and others that are uncounseled or poorly counseled about almost nonexistent chance of success, a desire to air allegations publicly, lack of knowledge about the true chances of prevailing, and "reap[ing] psychic benefits from invoking the federal legal system against their captors...[to] make them squirm [even] if they cannot ultimately make them pay." See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 Georgetown Law Journal 65, 96-97, 96 n.136 (Nov. 1999); See also *Amendments to the Federal Tort Claims Act: Hearings Before the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure*, 98th Cong. (1983) (statement of J. Paul McGrath, Assistant Attorney General, United States Department of Justice) ("It appears that [*Bivens*] suits are often prompted by reasons other than money damages: personal revenge or harassment upon a public official, an attempt to influence governmental action or as a means of collateral attack upon an otherwise legitimate criminal or civil enforcement effort."). *Id.*

¹²⁸ See e.g., *Carter v. U.S. Dep't of Transportation*, No. 99-1332 (W.D. WA) filed August 19, 1999. (In addition to the U.S. Coast Guard, the Secretary of Transportation and six Coast Guard facilities engineer maintenance employees, the plaintiff and her counsel have sued, as *individuals*, the six spouses of the maintenance workers for on-the-job discrimination and harassment on the basis of race and gender. In his complaint, the plaintiff has asserted "that each defendant [including the spouses] was in some manner intentionally and/or negligently and

result of *Bivens* every Federal employee must be concerned about the real possibility of being sued personally for engaging in his or her daily responsibilities. In the words of a Department of Justice official: "Our federal employees – our public servants – are asked to go out and do their sometimes difficult jobs; calm unrest; serve an arrest warrant on a suspected criminal; engage in military training; discipline an employee; assist in environmental cleanup; investigate or argue a case; or even make a judicial decision....These people do these things to the best of their abilities and in accordance with their responsibilities, only to find themselves on the defendant side of a complaint action."¹²⁹

The subject matter of the suits varies widely. Defendants include all levels of federal officials from cabinet officers to employees with the most routine of tasks.¹³⁰ Donald Remy, Deputy Assistant Attorney General, Tort Litigation, Civil Division, United States Department of Justice, in his welcoming remarks to the Department of Justice Annual Constitutional Torts Issues seminar spoke about the ever expanding range of constitutional tort suits:

These cases challenge the acts of individuals at the highest levels of government service to those at the lowest levels, and include many varied areas such as department or agency policy, personnel practices, law enforcement, tax enforcement, environmental enforcement, regulatory decisions, contract implementation, military action, immigration enforcement, inspector general investigations, congressional inquiries, and, yes, independent counsel investigations. One day, even you [Department of Justice attorneys] could be sued personally. . . for simply doing your job.¹³¹

legally responsible for the events and happenings alleged in this Complaint and for plaintiff's injuries and damages." (Plaintiff's Complaint at 3, *Carter*, (No. 99-1332)). A cursory reading of the Complaint indicates that there is no legal or factual basis for suing the spouses individually for either intentional or negligent harm. One can only surmise that the plaintiff's reason for suing the innocent spouses is a tactical measure intended to place additional pressure on the government and the named government employees and to gain access to marital property. In cases where the government employee's conduct was within the scope of his or her employment and it is in the interests of the U.S. government to represent them, fundamental fairness dictates that the employee's individually sued spouse also be provided government paid for representation by counsel. (Memorandum from Director, Federal Programs Branch, Civil Division, to Deputy Asst. Atty. General, Civil Division, Subject: Request for Representation in *Carter, et al. v. United States Dep't of Transportation*, No. 99-1332 (W.D. WA.) (Oct. 28, 1999) (copy on file with the author). According to the Civil Chief, U.S. Attorney's Ofc., WDWA, plaintiffs in his district have increasingly added innocent spouses as individual defendants. *Id.*

¹²⁹ Donald M. Remy, Remarks at the Department of Justice Annual Constitutional Torts Issues Seminar (November 3, 1998) (on file with author).

¹³⁰ *Id.*

¹³¹ *Id.*

Even when plaintiffs can proceed directly against the United States under the Federal Tort Claims Act or other statute, many choose to sue individual officials instead (or as well).¹³² This may be because the Federal Tort Claims Act exceptions do not apply in suits against officials. Additionally, plaintiffs may recover from officials without establishing that they acted within the scope of their duties, a necessary element of proof in claims under the FTCA. As neither jury trials nor punitive damages are available under the FTCA, these may be additional motivations.¹³³ One author has stated that the statutory limitation on the fee a plaintiff's attorney may charge may abridge a potential FTCA plaintiff's access to a competent attorney.¹³⁴ Plaintiffs may also perceive that federal officials who are individually sued but not represented by free government-provided counsel may be more anxious to settle than they would in an FTCA case, in which the United States is always represented by salaried agency or Department of Justice attorneys, or both.¹³⁵ Lastly, one can not discount the possibility that some suits against individual federal officials may be motivated by the plaintiff's desire to harass or obtain retribution from individual government officials, as part of a publicity campaign, or because *Bivens*-type suits are perceived as a good means for advancing a political agenda or a particular issue.¹³⁶

Most suits brought against federal employees in the immediate post-*Bivens* period involved police-type functions such as agents of the Federal Bureau of Investigation. However, over the past several decades, plaintiffs have increasingly sued all levels of officials and employees, in an ever expanding number of activities. Thus, in addition to the traditional suits against law enforcement personnel, we are now seeing more *Bivens* constitutional tort suits filed personally

¹³² A plaintiff may bring a claim against the United States under the FTCA as well as a *Bivens* suit against the individual federal employee for constitutional violations arising from the same facts. See *Carlson* *supra* note 89, at 20. For example, an arrest without probable cause might give rise to a false arrest claim under the FTCA and a personal *Bivens* suit against the arresting officer for a Fourth Amendment violation. In general, resolution of the FTCA claim in favor of the plaintiff bars any subsequent *Bivens* judgment against the federal employee. See 28 U.S.C. § 2676. See also Schuck, *supra* note 13, at 43.

¹³³ Schuck, *supra* note 13, at 43; 28 U.S.C. §§ 2402, 2674.

¹³⁴ 28 U.S.C. § 2678.

¹³⁵ Even in the more typical case in which officials are represented by government counsel, their interests and those of the government may diverge in ways that the plaintiffs can use for tactical advantage. Schuck, *supra* note 13, at 43. The existence of conflicts between an individually sued government official and the government's interest in a case may necessitate the hiring of private counsel to represent the official. However, under the Justice Department's current rules, private counsel will be provided only if the Justice Department determines that the employee's conduct was (1) within the scope of his or her employment, and (2) the Attorney General or her designee determines that it is in the interest of the United States to provide representation to the employee. See 28 C.F.R. § 50.15-16.

¹³⁶ See *supra* notes 124-26 and accompanying text.

against federal employees involved in activities such as running prisons,¹³⁷ enforcement of Federal Aviation Administration regulations,¹³⁸ federal railroad inspections,¹³⁹ the promulgation and enforcement of regulations governing the appearance of witnesses on behalf of the parties other than the United States,¹⁴⁰ operators of a nuclear power plants,¹⁴¹ Drug Enforcement Administrations officials,¹⁴² and repossession actions,¹⁴³ to name but a few. A convincing case can be made that the most frequent targets of *Bivens* suits are the everyday public servants who operate at the level that deals directly with the public.¹⁴⁴ Any changes in the law would therefore most benefit federal employees at the street level, not high level officials.

B. Effectiveness of Plaintiffs' Suits

It is estimated that out of the tens of thousands of *Bivens*-type constitutional tort suits brought against federal employees between 1971 and 1999, there have been only about 60 adverse verdicts.¹⁴⁵ Among these, an estimated 20 verdicts have survived appellate review.¹⁴⁶ The number of judgments actually paid by government employees is about ten.¹⁴⁷ Government statistics, kept between 1971, the year *Bivens* was decided, and 1985, show that plaintiffs filed about 12,000 *Bivens* suits but were ultimately successful in only four cases.¹⁴⁸ Detailed statistics

¹³⁷ See e.g., *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (*Bivens* suit by former prison physician against prison administrators for terminating his employment).

¹³⁸ See *Central Airlines, Inc. v. U.S.*, 138 F.3d 333 (8th Cir. 1998) (*Bivens* suit against individual FAA employees initiated civil penalty based upon incorrect interpretation of FAA regulations).

¹³⁹ *V-1 Oil Co. v. Smith*, 114 F.3d 854 (9th Cir. 1997) (*Bivens* suit against federal railroad inspector for seizing railroad tank car that was allegedly improperly marked in violation of hazardous waste and safety regulations).

¹⁴⁰ *Schutterle v. U.S.*, 74 F.3d 846 (8th Cir. 1996).

¹⁴¹ *Mathis v. Pacific Gas and Elec. Co.* (9th Cir. 1996) (employee filed *Bivens* suit for barring him from a nuclear plant after investigation linked employee to conversations at the plant regarding off-site drug transaction).

¹⁴² See e.g., *Erickson v. U.S.*, 976 F.2d 1299 (9th Cir. 1992) (plaintiff's *Bivens* suit alleged he was sent to Mexico on a drug investigation by DEA and Customs officials without adequate protection resulting in his arrest, imprisonment, and torture); *Piechowicz v. U.S.*, 885 F.2d 1207 (4th Cir. 1989) (*Bivens* suit brought against U.S. Attorney and DEA officials alleging they could have taken more action to protect a person murdered by a contract killer after threat was received).

¹⁴³ *Arcoren v. Peters*, 829 F.2d 671, (8th Cir. 1987) (*Bivens* suit brought against two Farmers Home Administration officials for allegedly violating plaintiff borrower's due process rights to notice and hearing before repossession of cattle).

¹⁴⁴ See Peter H. Schuck, *Suing Our Servants*, Supreme Court Law Review, University of Chicago 281 (1980 ed.).

¹⁴⁵ Interview with John Euhler, Deputy Director, Constitutional and Specialized Torts Litigation, Civil Division, U.S. Dept. of Justice, in Washington, D.C. (Mr. Euler estimates that, at any given time, there are about 5,000 suits pending against federal employees, with approximately 80% of these involving, on average, 4 to 5 multiple defendants.). See also Pillard, *supra* note, n.6.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Federal Tort Claims: Hearings on H.R. 595 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong. 15-17 (1983) (statement of Paul McGrath, Asst.

on *Bivens*-type cases have not been kept by the Justice Department since 1985, but the office that handles these cases for the Department estimates that plaintiffs are successful in obtaining judgments in less than one percent of the their *Bivens* suits.¹⁴⁹

Ironically, the *Bivens* decision is not helpful to persons who have had their constitutional rights seriously violated by a federal employee and who deserves compensation as a result. As has already been emphasized, the real fallout of *Bivens* has been its impact to greatly increase the caseload, and raise the level of apprehension among employees, with no real improvement in the opportunity to obtain damages.¹⁵⁰

While *Bivens* would appear to provide a remedy for injured plaintiffs, such suits almost never lead to a monetary recovery for the plaintiff. Given the incredibly low success rate of plaintiffs' *Bivens* suits, as a source of money damages they are, essentially, a waste of the plaintiff's time.

C. Negative Effects

The *Bivens* suit is the remedy fashioned by the courts to control misconduct by federal government officials. They have done this unaided by Congress. Congress' abandonment of this field of constitutional remedies to the courts has left the field to the judiciary, a group poorly equipped to reform them.¹⁵¹ This has left its marks.¹⁵² The American citizen is not being well served by the current state of the law. The system for redress is not functioning and conscientious federal employees face the threat or reality of suit, which can lead to inappropriate inaction. Handling constitutional torts under the Court's *Bivens* doctrine promotes chronic and wasteful litigation, costing taxpayers more than it should.

Often the main tactics of the parties is to attempt to wear down the opposing party with procedural mechanism, delay and expenses. Under *Bivens*, injured parties must resort to

Attorney General, Civil Division, U.S. Dept. of Justice) (twelve years after *Bivens* was decided, thousands of suits had been filed but only 16 had resulted in a judgment against a federal employee, and only 6 of those were ultimately paid).

¹⁴⁹ See Pillard *supra* note 127, n.6 (citing telephone interview with Helene Goldberg, Director, Torts Branch, U.S. Department of Justice (Aug. 30, 1999) and Brief of the United States as Amicus Curiae at 3 n.2, *Kimberlin v. Quinlan*, 515 U.S. 321 (1995) (No. 93-2068).

¹⁵⁰ See *infra* part IV.B.

¹⁵¹ Schuck, *supra* note 13, at 53.

¹⁵² *Id.*

litigation as it is the only available remedy. In litigation there is often an almost limitless number of facts that can be examined and witnesses who can be interviewed or deposed.¹⁵³

A lot of what is said about litigation in general applies with equal force to litigation in *Bivens* suits:

“The mere threat of litigation can be used for leverage. A person can file a complaint and set the litigation machinery in motion even without specific information of wrongdoing. It often is not difficult to find some minimal ground on which to base a complaint or defense. . . . A trumped-up lawsuit. . . is a powerful tool for. . . seeking leverage. . . [and] provides a powerful tool for economic extortion on matters having nothing to do with the purported subject matter of the litigation.”¹⁵⁴

The emphasis on litigation has broader social consequences. It encourages people to quickly resort to claims and litigation if they are injured or think that some right, or possible right, has been violated. The ordinary slights and frustrations of life too quickly become the grist for litigation.”¹⁵⁵

There is no question that the constitutional tort resolution scheme existing under *Bivens* is a wasteful failure. During a Senate hearing, a prior head of the Civil Division at the U.S. Department of Justice opined that “. . . most [*Bivens*] lawsuits are wholly without merit and may be eventually disposed of on motion. Many of the cases will proceed to resolution at a snail’s pace at large monetary and emotional expense to all parties. Thus, from the perspective of an objective observer, the current scheme of civil tort liability, particularly in the area of federal constitutional rights, is a failure.”¹⁵⁶

There are significant differences between suits filed against federal officials or employees in their official and individual capacities. The defenses available to individual defendants and the manner in which their lawsuits are defended differ significantly from the defenses and manner of defense of lawsuits against the government itself. For example, individually sued federal employees must request legal representation from the government. Employees sued in their official capacities are automatically represented. Similarly, the Department of Justice must

¹⁵³ See generally *Breaking the Litigation Habit: Economic Incentives for Legal Reform*, Statement of the Committee for Economic Development (2000).

¹⁵⁴ *Id.* at 6.

¹⁵⁵ *Id.* at 13.

expressly approve the legal representation of officials personally sued.¹⁵⁷ The decision to extend representation is within the complete discretion of the Department of Justice. DOJ approval is not required when the lawsuit is against officials in their representative or official capacities. Individually-sued officials have only 20 days to answer a complaint, as opposed to the 60 days available to the government. Personal defenses of government officials personally sued, such as immunity, must be timely raised or they may be waived. Most significantly, federal officials sued in their individual capacity are personally responsible for any monetary judgments rendered against them. However, because a federal employee can have a *Bivens*-type judgment rendered against him or her and still have acted within the scope of his or her authority, most public servants will be eligible, under government regulations, to request indemnification to satisfy a verdict, judgment, or other monetary award entered against them.¹⁵⁸

Professor Pillard has good insight into how *Bivens* has been turned on its head and fails in its intended promise to deliver an effective remedy for constitutional torts.¹⁵⁹ As she articulates it, the Court erroneously continues to believe that its *Bivens* doctrine actually subjects federal employees to individual liability. This is not true because the Court has crafted several related doctrines to minimize the effects of that decision: qualified immunity,¹⁶⁰ a requirement for

¹⁵⁶ See *Amendments to the Federal Tort Claims Act: Hearings Before the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure*, 98th Cong. (1983) (statement of J. Paul McGrath, Assistant Attorney General, United States Department of Justice).

¹⁵⁷ The authority to represent government officials and employees in their individual capacities flows from a liberal reading of 28 U.S.C. 517, which states that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district...to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States (emphasis added).

¹⁵⁸ See e.g., 28 C.F.R. § 50.15(c)(1)-(5) wherein the Attorney General has published regulations permitting Department of Justice employees to request indemnification to satisfy a verdict, judgment, or other monetary award entered against them, provided the Attorney General determines that the conduct giving rise to the verdict, judgment, or award was taken within the employee's scope of employment, that indemnification is determined to be in the interests of the United States, and subject to the availability of Congressionally appropriated funds. In addition to Justice, many other federal agencies have promulgated regulations that permit them to indemnify their employees in the very rare circumstances where they are determined to be personally liable in a *Bivens* suit settlement or damage award. See Pillard, *supra* note 127, at n.54 (lists numerous federal agencies that have reimbursement regulations with citations to their corresponding regulations, and discussing the fiscal law aspects of reimbursement). As a last resort, the Congressional private relief bill always remains an option.

¹⁵⁹ Most of the elements of this discussion of the ineffectiveness of *Bivens* were drawn from a paper entitled *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, by Professor Cornelia Pillard, 88 Georgetown Law Journal 65 (Nov. 1999).

¹⁶⁰ *Id.* at 79-82. (Qualified immunity is the most significant bar to constitutional tort actions. The availability of the qualified immunity defense depends on the status of the defendant as an individual official; when government entities are sued, they are not entitled to assert qualified immunity.) See *Harlow v. Fitzgerald*, 457 U.S. 800 (1981).

specific precedent,¹⁶¹ permitting interlocutory appeals,¹⁶² and establishing heightened pleading requirements.¹⁶³ None of these doctrines apply when suit is against the government itself.¹⁶⁴ These plaintiff hurdles are some of the main reasons for the miniscule success rate of plaintiffs' *Bivens* suits. While the doctrines are intended to benefit individual employee defendants because the government defends and reimburses these suits, these "defendant-protective doctrines in fact rebound to the government's benefit, virtually immunizing it from liability for constitutional torts. Doctrines ostensibly designed [by the Court] for and justified as protection of individuals, therefore, actually operate to shield the government fisc."¹⁶⁵ Other students of *Bivens* have come to the same conclusion.¹⁶⁶

1. Personal Costs to Individual Employees

Litigation is inherently bitter, highly intrusive, expensive, and complex. Federal Officials can be forced to defend personal lawsuits arising from performance of their governmental duties and held to pay judgments entered against them.

The current situation presents a problem of personal liability exposure for the entire federal workforce. Even though civil servants are carrying out the official duties of their agencies, they face the possibility of being required to defend themselves in lawsuits in which their personal savings, homes, and credit histories are at stake. At any given moment, several thousand civil servants and officials are named defendants in *Bivens*-type suits.

It is a poor situation when government employees are expected to carry out their official duties on behalf of their agencies when there is no way of knowing when and if they will be

¹⁶¹ *Id.* at 82-85. (In cases involving fact-intensive constitutional standards, the approach taken by the Court in *Anderson v. Creighton*, 483 U.S. 635 (1987) ("the very action in question" need not have "previously been held unlawful") while sensible in the abstract, has, in practice, barred suits for conduct that would otherwise seem quite clearly unconstitutional.)

¹⁶² *Id.* at 85-86. (The Court has allowed individual defendants in *Bivens* suits to assert qualified immunity repeatedly at different procedural stages of a case and to take an interlocutory appeal from any order denying such immunity. Government entities are, in contrast, bound by the final-judgment rule, that generally bars interlocutory appeals. By allowing repeated opportunities to seek qualified immunity from different judges, and by creating the potential for lengthy delays, poses substantial obstacles to plaintiffs in *Bivens* suits.)

¹⁶³ *Id.* at 86-91. (Heightened pleading rules have proven to be a significant barrier to *Bivens* suits alleging constitutional violations that have a state-of-mind element. Evidence of state of mind is usually in the hand of the defendant, and specifics are difficult to plead before discovery is made.)

¹⁶⁴ *Id.* at 79.

¹⁶⁵ *Id.* at 79-80.

¹⁶⁶ See e.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 293-94 (1995) ("Less than twenty-five years later [after *Bivens*], in the wake of cases like *United States v. Stanley* [483 U.S. 669 (1987)] and *Schweiker v. Chilicky* [487 U.S. 412 (1988)], there is little left of the *Bivens* principle.").

subject to personal constitutional tort suit. Some of the government's most critical employees, such as law enforcement, immigration, and investigative personnel, are the ones most likely to be sued.

The mere threat of a personal legal suit against a federal employee has to have an intimidating effect on all but the most resolute. To say that being sued "comes with the turf" or "is part of the job" is unfair and unacceptable.

Under Supreme and appellate court precedents, federal employees do not have clear guidance on when they may be committing a constitutional violation. It is often after the fact that their conduct is found to have stepped over a judicially defined constitutional line, and this decision is usually made only after several years of litigation in the federal courts. Under the confused state of the law, federal employees are uncertain which official actions may leave them open to personal suits for damages. This confusion certainly hinders the effective functioning of government.

2. Effects on Government Decision Making

The great expansion of *Bivens* actions against federal officials and employees is of great concern to the agencies that employ them and the Department of Justice, which defends most of them.¹⁶⁷ Both Congress and the courts recognize that if government officials are sued and held personally liable for every decision made in the course of public administration, officials might become reluctant to make decisions or might act to avoid litigation rather than to serve the public interest. The threat of *Bivens*-type suits forces public officials to expend their time and energy in litigation and not performing their governmental duties.

Federal officials face increasingly complex challenges that carry serious personal legal risks. The real threat of personal lawsuits can be a huge disincentive to federal employees and create the attitude that it is much smarter to avoid risk, and controversial or difficult decisions than it is to be sued for doing one's job.

It is a well-known fact that one of the biggest concerns of federal supervisors, managers, and officials is that they can be personally sued and held liable for doing their just doing their jobs.¹⁶⁸ The threat of suit can deter wrongdoing, but the real threat of unjustified suits also has

¹⁶⁷ Schuck, *supra*. note 13, at 43.

¹⁶⁸ See, e.g., G. Jerry Shaw and William L. Bransford, *The Federal Manager's Guide to Liability* 10 (2d ed. 1999).

the opposite effect, "it prevents the public servants from doing anything, including what is right."¹⁶⁹ "The deterrence we have is that of deterring federal employees from doing their duty."¹⁷⁰ The courts have not provided guidance good enough to fairly apprise federal employees as to when they may be committing a constitutional tort. This causes ineffective government.

The *Bivens* decision undermines the functions and morale of federal employees, particularly the thousand who are personally named defendants in constitutional tort suits. The constant threat of personal lawsuits is intimidating.

a. Government Administrative Procedures Necessitated by *Bivens*

Immunity is intended not only to protect public employees from liability, but to protect the employees and the government from litigation itself. Tremendous social costs are associated with litigation against public officials. It diverts official energy from pressing public issues, deters capable citizens from accepting public office and inhibits the fearless and vigorous administration of government.¹⁷¹

(1) Will they be Given Representation and be Defended by the Government?

As already noted, the Department of Justice must expressly approve the legal representation of federal employees sued in their individual capacity.¹⁷² The decision to extend representation is within the complete discretion of the Department of Justice.¹⁷³ Department of Justice regulations provide that both current and former government employees may request representation for state criminal proceedings and in civil and Congressional proceedings in which they may be sued or subpoenaed. Historically, representation in connection with a federal criminal matter has been precluded. Recently, however, this rule has been somewhat relaxed.¹⁷⁴

Representation is conditioned on submission of a request for representation by the defendant and a recommendation by the agency to the Department of Justice as to whether it

¹⁶⁹ See *Amendments to the Federal Tort Claims Act: Hearings Before the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure*, 98th Cong. (1983) (statement of J. Paul McGrath, Assistant Attorney General, United States Department of Justice).

¹⁷⁰ *Id.* (citing the testimony of Jerome F. O'Neill on November 13, 1981 before the Subcommittee on Agency Administration of the Committee of the Judiciary, United States Senate.)

¹⁷¹ *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

¹⁷² See *infra* part IV.C.2.a.(1).

¹⁷³ *Id.*

should be granted along with a statement from the agency indicating whether the defendant was acting within the scope of his employment at the time he allegedly committed the acts or omissions. Representation is not available to a federal employee when either the acts for which he desires representation do not appear to have been performed within the scope of employment, or "it is otherwise determined by the Department of Justice that it is not in the interest of the United States to provide representation to the employee." What the "interests" of the United States are is unclear. In one instance, representation was denied where only some of the acts combined of were within the scope of employment.. A second instance was where DOJ believed its ability to defend the case had been prejudiced because of a late request for representation. It is DOJ's position that its decision to deny representation is not subject to judicial review under the Administrative Procedures Act, 5 U.S.C. §§ 701-706.¹⁷⁵ In some instances, DOJ may elect to provide representation by private counsel. For example, where a conflict exists between the interests of the United States and the defendant.

(2) Will Their Case be Removed to Federal Court?

Some civil cases and criminal prosecutions against government personnel in their individual capacities are brought in state court. If the Government believes that their cases involve acts or omissions within the scope of their office or employment, these cases may be removed from the state court to the federal court under a general removal statute, 28 U.S.C. § 1442.^{176 177} Removal is often among the first major issues dealt with by a sued federal employee.¹⁷⁸

¹⁷⁴ *Id.* 28 C.F.R. 50.15 § (a) (4)-(7).

¹⁷⁵ Congress changed this rule in 1988 permitting those denied representation by the Department of Justice to petition the court for a finding that he was acting within the scope of employment, but only with respect to cases involving state law torts.

¹⁷⁶ 28 U.S.C. § 1442, et. seq. The history of § 1442 was explained by Justice Marshall in *Willingham v. Morgan*, 395 U.S. 402 (1969): The first removal provision was included in an 1815 customs statute....It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal court any suit or prosecution commenced because of any act done "under colour" of the statute. The removal provision was an attempt to protect federal officers from interference by hostile state courts. The provision expired at the end of the war. But other periods of national turmoil fostered other similar laws such as the removal laws enacted during the Civil War that led to permanent statutes designed to protect federal officers enforcing the revenue laws. As part of its Judicial Code of 1948, Congress finally passed legislation covering all federal officers. See H.R. rep No. 308, 80th Cong., 1st Sess., A134 (1947).

¹⁷⁷ The authority and procedures for removal of cases from state to federal court are found in 28 U.S.C. §§ 1441-1451. Any officer of the United States or agency thereof, or any person acting under such officer, may, under 28 U.S.C. § 1442(a)(1), remove a civil or criminal prosecution against them for any act under color of their office or on

The need for removal is obvious. As the Supreme Court stated over 120 years ago, the federal Government "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,--if their protection must be left to the action of the State court,--the operations of the general government may at any time be arrested at the will of one of its members."¹⁷⁹

One of the most important reasons for federal employees charged in state courts to remove their cases to federal court is to have defenses such as official immunity tried in federal court.¹⁸⁰

The major concern in removal is demonstrating that the case bears some relation to the federal employee's official duties. A federal defendant, acting under 28 U.S.C. § 1442(a)(1), must show that he is being sued or prosecuted for an act "under color" of his federal office or "on account of any right, title or authority claimed under any [law] for the apprehension or punishment of criminals." Fortunately, courts have construed the language of § 1441(a)(1) broadly.¹⁸¹

After removal, an action proceeds as it would had it been brought in the district court first. It is important to note that the substantive law of the state remains applicable after removal.¹⁸² The invocation of removal jurisdiction by a federal employee does not revise or alter the

account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of revenue, to the district court of the United States wherein the action is pending. In addition to § 1442, there are removal statutes covering other categories of federal employees such as 28 U.S.C. § 1442a which provides a right of removal for members of the armed forces.

¹⁷⁸ The procedure for removal is provided in 28 U.S.C. § 1446, which, apart from the time limits in removal actions based on § 1442(a)(1), requires the party seeking removal to file a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served upon such defendant. Pending state proceedings in civil cases stop as soon as the petition is filed in the district court and a copy is filed with the state court.

¹⁷⁹ See *Tennessee v. Davis*, 100 U.S. 257, 263 (1880); See also *Colorado v. Symes*, 286 U.S. 510 at 517 (1932) ("The various acts of Congress constituting the section [removal statute] as it now stands were enacted to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power.").

¹⁸⁰ *Willingham v. Morgan*, 395 U.S. 402 (1969).

¹⁸¹ See e.g., *Willingham v. Morgan*, 395 U.S. 402 (1969) (The right of removal is made absolute whenever a suit in a state court is for any act "under color" of federal office. At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duties); *Colorado v. Symes*, 286 U.S. 510, 517 (1932) (The federal officer removal statute should be "liberally construed.").

¹⁸² See, e.g., *Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981).

underlying law to be applied. State substantive law applies, but federal law applies to procedure and federal questions. Federal involvement is essential in order to insure a federal forum, but it is limited to assuring that an impartial setting is provided in which federal defenses such as immunity can be considered.

(3) Will They be Liable for Money Judgments Against Them?

Even if represented, the individual defendant remains liable for any money judgement. However, as a matter of regulatory policy, federal agencies will almost always indemnify their employees for tort judgments and settlements entered against them as individual federal defendants.¹⁸³

b. Effects on the Judicial and Executive Branches

Not to be overlooked is that the amount of judicial and executive branch energy expended in defending *Bivens* suits is significant. The number of suits indicates that the courts are expending significant resources and energy in processing these suits. The Civil Division of the Department of Justice lists a *Bivens*-type suit in its monthly workload statistics report among those cases with the most time in each branch.¹⁸⁴ As previously noted, the extremely low success rate of plaintiffs indicates that *Bivens*-type suits are, in almost every case, a waste of time and effort for the courts and executive branch, as well as for plaintiffs.¹⁸⁵

The *Bivens* majority sought to provide a monetary damages remedy for persons injured by constitutional violations of federal employees. Assuming the federal government has sovereign immunity against damage actions, the Court in *Bivens* held that constitutional tort actions could

¹⁸³ See *infra* part IV.C.2.a(3) and note 158.

¹⁸⁴ Memorandum to Acting Assistant Attorney General, Subject: Monthly Workload Statistics – January 2000 (Mar. 8, 2000)(copy on file with the author). The case, *Andrade v. Chojnacki*, included a personal *Bivens*-type suit brought by Isabel Andrade and other plaintiffs against numerous government agents and officials including FBI Special Agent Lon Horiuchi, who was on the scene as a member of the FBI Hostage Rescue Team. The accusation was that SA Horiuchi had fired his weapon at the Branch Dividians' Waco compound during the final day of the 1993 standoff. After years of making serious accusations against the agent and years of discovery, the suit was dismissed on March 28, 2000, because the court found there was no evidence that SA Horiuchi had fired at the compound or committed any violation of a plaintiff's constitutional rights. Since the court found that there was no evidence to support the allegations against the agent, one wonders what the legal and factual basis was for the plaintiff's allegations. For years, the case had consumed the full-time energy of the individually sued agent as well as a large number of government attorneys assigned to represent the agent. The actual cost to the taxpayers to defend against this suit is unknown, but it was likely significant. See *Andrade v. Chojnacki*, Nos. W-96-CA-139 to W-96-CA-147, W-96-CA-373 (D.W. Tx. Mar. 28, 2000) (order 540-1 granting motion to dismiss).

¹⁸⁵ See *infra* part IV.B.

be brought against government officials only in their individual capacities. It has also been argued, however, that individual liability under *Bivens* is fictional because the federal government in practice functions as the real party in interest, providing or paying for legal representation and reimbursing the sued individuals in those rare cases where there is a monetary settlement or judgment.¹⁸⁶ Unwarranted belief in the notion that federal employees are personally liable has led the Court to support qualified immunity and other doctrines that would be unavailable if the government itself were the acknowledged defendant.¹⁸⁷ Additionally, in *Bivens* suits, the interest of the individually-sued government employee is the major focus of the litigation. Government counsel are required to reconcile their traditional role [as public attorneys] with one more akin to that normally played by private counsel.¹⁸⁸ With an individual rather than the government as a client, government lawyers who defend *Bivens* actions behave more like "hired guns" with a singular mission of avoiding liability and less like public servants who would also take into account the broader public interests in remediation of constitutional violations.¹⁸⁹

V. THE SUPREME COURT'S INVITATION TO CONGRESS TO ENACT APPROPRIATE LEGISLATION

Presumably, because it recognized that its decision in *Bivens* would dramatically change existing law, and could result in substantial litigation and exposure of federal employees to personal financial loss, the Supreme court in *Bivens* and subsequent decisions expressly invited the Congress to consider the issue and fashion appropriate legislation.

Justice Brennan, in justifying the majority opinion in *Bivens*, noted that "here we have no explicit congressional declaration that the persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be

¹⁸⁶ See Pillard *supra* note 127 (the author concludes that the *Bivens* decision sidestepped the sovereign immunity issue by imposing constitutional tort liability on individual federal employees rather than on the government itself, does not provide an effective monetary damage remedy for victims of constitutional violations, and creates a wasteful and inefficient system for litigating constitutional complaints).

¹⁸⁷ *Id.*

¹⁸⁸ Donald M. Remy, Remarks at the Department of Justice Annual Constitutional Torts Issues Seminar (November 3, 1998) (on file with author).

¹⁸⁹ *Id.*

remitted to another remedy, equally effective in the view of Congress.”¹⁹⁰ Concurring in *Bivens*, Justice Harlan noted “[a]t least absent congressional restrictions, the scope of the equitable remedial discretion is to be determined according to the distinctive historical traditions of equity.”¹⁹¹ The dissents were even more clear. Justice Burger stated that “[w]e would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power,”¹⁹² and “[r]easonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act....Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of respondeat superior in our tort law provides an entirely appropriate conceptual basis for this remedy.”¹⁹³ Justice Black in his dissent saw the “[t]he fatal weakness is that Congress has not enacted legislation creating such a right of action.”¹⁹⁴ Justice Blackmun succinctly noted that “[i]t is the Congress and not this Court that should act.”¹⁹⁵

In *Butz v. Economou*,¹⁹⁶ decided in 1978, the Court stated: “[I]n the absence of Congressional direction to the contrary, there is no basis for according federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials for the identical violation under § 1983.”¹⁹⁷ (emphasis added).

In permitting plaintiffs to bring actions under the FTCA as well as personal *Bivens* suits against federal officials alleged to have infringed their constitutional rights, the Court has specifically noted that Congress has not taken action on other bills that would expand the exclusivity of the FTCA.(citations omitted)¹⁹⁸

¹⁹⁰ *Id.* at 2005.

¹⁹¹ *Id.* at 2009.

¹⁹² *Id.* at 2012.

¹⁹³ *Id.* at 2017.

¹⁹⁴ *Id.* at 2020.

¹⁹⁵ *Id.* at 2021.

¹⁹⁶ 438 U.S. 478 (1978).

¹⁹⁷ *Id.*

¹⁹⁸ *Carlson supra* note 89, at 19 (“Our inquiry...is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy.”) *Id.* at 20, n.5 (“The question whether...actions for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution. Plainly FTCA

More recently, in 1988, the court stated that “the scope of absolute official immunity afforded federal employees is a matter of federal law, ‘to be formulated by the courts in the absence of legislative action by Congress.’”¹⁹⁹(emphasis added)(citations omitted).

By excluding *Bivens*-type constitutional torts from the Employees Liability Reform and Tort Compensation Act of 1988, Congress walked only half the distance to the cure. The Congress should recognize the Court’s prodding that it enact legislation to remedy this situation.

VI. THE IMPORTANCE AND BENEFITS OF LEGISLATION

The creation of a constitutional tort scheme is a job for Congress, not the courts. Putting aside the debate over whether such new right can, under the Constitution and common law, be created by the courts, in its *Bivens* decision the Court in fact entered into an area that traditionally has been left to the citizens through their elected representatives. American federal courts hesitated for two hundred years before finding that a right to bring constitutional tort suits against federal employees existed.²⁰⁰ The Court hesitated for good reason. Court decisions often affect the general population and not merely the litigants before it, and result in social and economic micro-regulation by the courts.²⁰¹ In addition, the courts are less well suited than legislatures to consider how much money it will cost to comply with any law they make, when it should apply, and to what exceptions should be made.”²⁰²

Any legislative fix by Congress should, to the extent practical, resolve the sharp conflict between two important considerations: protection of individual citizens against damage caused by oppressive or malicious action on the part of public officers, and protection of public interest by shielding responsible government officials against harassment and inequitable hazards of

is not a sufficient protector of the citizens’ constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated responsibility to the FTCA remedy). *Id.* at 23. Given the Supreme Courts concern over the FTCA being an adequate remedy for constitutional violations of citizens’ rights, Congressional action to make the FTCA the exclusive remedy may be inadequate.

¹⁹⁹ *Westfall v. Erwin*, 484 U.S. 292 (1988), in which the Court cited its own prior decisions in *Barr v. Matteo*, 360 U.S. 564 (1959) and *Howard v. Lyons*, 360 U.S. 593 (1959) for the proposition that Congressional action may negate the necessity for the Court to fashion a remedy for injuries by federal officials. *Id.* at 597.

²⁰⁰ See *infra* part II.

²⁰¹ *Breaking the Litigation Habit: Economic Incentives for Legal Reform*, Statement of the Committee for Economic Development 3 (2000).

²⁰² *Id.* at 3.

vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities. Using the FTCA as a model for the handling of constitutional torts would reform the current litigious *Bivens*-based system and would help restore civil justice to its intended purpose – to function as a rational, predictable, and equitable means of providing compensation to the victims of constitutional torts while leaving in place adequate means to deter undesirable conduct.

For more than half a century,²⁰³ the Federal Tort Claims Act²⁰⁴ has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment. The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law has historically recognized the responsibility of an employer for torts committed by its employees within the scope of their employment. All of the benefits currently enjoyed by application of the FTCA to common law tort claims can also apply to constitutional tort claims by the simple expedient of a minor legislative amendment of the FTCA.²⁰⁵

The 1971 *Bivens* decision has seriously eroded the tort immunity previously available to Federal employees. This judicial erosion of immunity of federal employees from constitutional tort liability has created a serious problem involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire federal workforce. Since 1971, well over 30,000 constitutional tort lawsuits have been brought against federal employees in their individual capacities for acts and decisions made by them as part of their official duties with their federal government.

When a federal employee or official is personally sued for an alleged constitutional violation, notwithstanding the unlikelihood that the individual will be held liable or suffer an actual financial loss, from the defendant's perspective, personal liability and potential financial loss are all too real. The prospect of such liability seriously undermines the morale and well being of Federal employees, impedes the ability of agencies to carry out their mission, and

²⁰³ The Federal Tort Claims Act was enacted by Congress in 1946.

²⁰⁴ 28 U.S.C. §§ 1346(b), 2671 et seq.

²⁰⁵ For a general description of the benefits of applying the FTCA to common law tort claims, see generally, *Legislation to Amend the Federal Tort Claims Act: Hearings on H.R. 4358, H.R. 3872, and H.R. 3038 Before the Subcomm. On Administrative Law and Governmental Relations, 100th Cong. 2nd Sess. 40, 86-87 (1988)* (statement of Robert L. Willmore, Deputy Assistant Attorney General, Civil Department of Justice.)

diminishes the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

As previously noted, in its opinions in *Bivens* and subsequent cases, the Supreme Court has clearly hinted that an adequate statutory remedy might negate the necessity for its *Bivens* remedy.²⁰⁶

The scheme created by the Supreme Court in *Bivens*, as a means for injured persons to recover monetary damages caused by the harm of federal employees, is incongruous: the Constitution addresses abuses of uniquely governmental power, but *Bivens* allows constitutional tort claims to be brought only against persons in their individual capacity.

Professor Cornelia Pillard²⁰⁷ has identified numerous benefits that would inure from a constitutional tort regimen that imposed monetary liability on the government rather than the individual official or employee.²⁰⁸ Professor Pillard notes that most constitutional violations are committed by employees and officials promoting the government's interests, however misguided.²⁰⁹ Since the government is usually the beneficiary of the official's conduct, it is only fair that the government should pay any damages resulting from overstepping the constitutional line.²¹⁰ Additionally, constitutional violations require governmental action; therefore, if an official abuses the government's power, it is the government that should be held accountable to financially remedy the injured person.²¹¹ Pressure to fix the causes of constitutional violations can best come from holding the government agency or institution accountable for paying damages to victims of constitutional violations.²¹² For example, the government can provide training, change systems and methods of operation, add resources, discipline employees and take other preventive, corrective or remedial actions.²¹³ In cases where

²⁰⁶ See *infra* part V.

²⁰⁷ Associate Professor of Law, Georgetown University Law Center, currently on leave from the Law Center to work as Deputy Assistant Attorney General, Office of Legal Counsel, in the United States Department of Justice.

²⁰⁸ See Pillard *supra* note 127, at 74-103 (discussing the positive benefits of governmental liability and how the *Bivens* decision has had significant negative doctrinal, economic, symbolic, institutional, and political effects). *Id.* at 75 n.47, citing Schuck, *supra* note 13, for a persuasive argument that the deterrent potential of a system that imposes individual liability on the part of government employee is limited "because so much wrongdoing is rooted in organizational conditions and can only be organizationally deterred." *Id.* at 98. See also Christiana B. Whitman, Government Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225, 226 (1986) (discussing how "structures and contexts" rather than individuals can create constitutional violations).

²⁰⁹ Pillard, *supra* at note 127, at 75.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

the individual defendant might be judgment proof, only the federal government can compensate a victim of a constitutional tort.²¹⁴

A. Fair and Adequate Remedy for Injured Plaintiffs

The purpose of amending the FTCA is foremost to provide persons injured by the constitutional torts of Federal employees with an appropriate remedy against the United States. It would provide a fair, uniform, expeditious, and adequate remedy for injured plaintiffs. Second, and equally important, it would protect Federal employees from personal liability for constitutional torts, but only those determined to be committed within the scope of their employment.

A waiver of sovereign immunity would provide plaintiffs, for the first time, a meaningful remedy. Additionally, unlike the personal assets of individually sued employees, federal funds would be available for damage payments, providing a much more reliable source of funds.

The Supreme Court believes that absolute immunity is justified only when "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens."²¹⁵ Providing an adequate statutory remedy against the United States, for Constitutional torts committed by federal employees for acts committed within the scope of their official duties, would fix this problem.

Using FTCA-like procedures to effectively establish government rather than individual liability would go a long way toward meeting the Court's desire to see a constitutional tort system in place that made reimbursement "sufficiently certain and generally available" for those cases where actual violations are found to have occurred.²¹⁶

Legislation would insure that individuals harmed have a remedy.

Legislation, even if it contained the qualified immunity defense currently available to individually sued federal employees, would result in many benefits, without diminishing the rights of anyone who might be injured by a constitutional tort.²¹⁷

²¹⁴ *Id.*

²¹⁵ *Westfall v. Erwin*, 484 U.S. 292, 295-96 (1988) *citing* *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

²¹⁶ *See Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (*citing* 28 C.F.R. § 50.15(c)).

²¹⁷ In representing employees in *Bivens* suits, the government can use both defenses available to the government and those only available to personally sued employees, such as qualified immunity. *Butz v. Economou*, 438 U.S. 478 (1978). Thus, a statute that retained a qualified immunity defense for the government would put plaintiffs in no better or no worse position than exists under current practice. A statutory scheme that retained qualified immunity would, however, provide worthwhile benefits to those injured by constitutional torts.

B. To Retain or Remove Qualified Immunity as a Defense?

No discussion of legislation would be complete without a discussion of qualified immunity. Whether a statutory replacement for the *Bivens* remedy should or should not retain the defense of qualified immunity appears to have been the only major impediment to new legislation. In essence, the government wants to retain qualified immunity as a defense, whereas the America Civil Liberties Union believes that it would be inconsistent to retain the defense in a waiver of sovereign immunity for constitutional torts.

The government sees "qualified immunity" as a defense that simply gives the United States the opportunity to defend the conduct of its employees as having been reasonable. Previous administrations have laid out the government's view in testimony during Senate hearings considering legislation amending the FTCA. Their arguments in favor of retaining qualified immunity in any statute waiving sovereign immunity for constitutional torts appear logical and reasonable.

I think it important to point out to the Subcommittee that, while labeled as an immunity, it is really an affirmative defense that simply gives the United States the opportunity to defend the conduct of its employees as having been reasonable. The Supreme Court, in the case of *Harlow v. Fitzgerald*...defined the test of qualified immunity to be one solely of objective reasonableness. Under traditional tort law analysis, it is the failure to act as a reasonable man in violating a duty owed to an injured person which triggers liability. In the private sector, an employer can assert the reasonableness of the conduct of an employee when the employer is sued for a tort committed by the employee. Retention of the qualified immunity defense would simply echo that legal principle. Elimination of the qualified immunity defense would be a declaration by the Congress that considerations of reasonableness are irrelevant to the conduct of government agents. Taxpayers would pay damages in cases when courts determined with hindsight that technical violations had occurred even though the conduct of the employee was properly motivated and eminently reasonable. I submit that agencies would hesitate to act for fear of damage claims which would reflect adversely upon them because they would be prevented from defending their conduct as reasonable in court. In other words, the government would be placed in a situation of strict liability were the defense to be eliminated, a disadvantage to the United States clearly contrary to existing provisions of the Federal Tort Claims Act and reason and sound policy. I should also add that the elimination of the defense would seriously detract from the ability of the courts to consider fully the allegations of misconduct. That is because the issue of the reasonableness of the conduct would have been

declared to be irrelevant to liability; and thus many of the pertinent facts would be irrelevant. (citations omitted).²¹⁸

C. Benefits to Federal Employees and Officials

Legislation would free federal employees and officials from the fear of personal liability while they pursued day-to-day work activities on behalf of the government. The current Court-created *Bivens* tort suit system fails to provide government officials with assurances that they can act with confidence in carrying out their duties. Uncertainty remains about when an official can or will be personally liable for a constitutional tort under *Bivens*. Government officials are entitled to and deserve peace of mind in this area of the law. Experience under *Bivens* shows us that only a handful of all the 2.7 million full-time federal employees²¹⁹ will ever be found to have committed a constitutional tort.²²⁰ To allow either the potential for a personal lawsuit or an actual lawsuit to remain hanging over the heads of all employees is unfair and unwarranted, particularly in light of other existing deterrents.

D. Adequate Deterrence Will Still Exist After Passage of Legislation

None of this is to say that deterrence of individual employees from violating persons' constitutional rights does not have a place. There is no doubt that in *Bivens* and its progeny the court was creating a method of controlling the discretion and conduct of individual federal officials. After all, the prospect of a personal damages action concentrates the mind in a way that other remedies may not.²²¹ The Court's need to create leverage over erring federal officials, given the absence of legislation, led it to create the *Bivens* remedy. The court clearly understands the coercive power the threat of personal liability has on federal officials.²²² Effective deterrence is essential. But that does not mean individual deterrence must necessarily be through the inefficient and ineffective mechanism of *Bivens* suits, especially if the remedy is

²¹⁸ See e.g., *Title XIII of S. 829: To Amend the Federal Tort Claims Act: Hearings on S. 829 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 98th Cong. 27-38 (1983) (statement of J. Paul McGrath, Assistant Attorney General, Civil Division, United States Department of Justice).

²¹⁹ Table 8 – Statistical Summary of Federal Civilian Employment, Office of Personnel Management [statistics on line] (accessed 24 April 1999); available from <http://www.opm.gov.html>; Internet.

²²⁰ See *infra* part IV.B.

²²¹ Professor Schuck, paraphrasing Dr. Johnson who noted that the possibility of hanging "concentrates the mind" in a way that the possibility of being enjoined does not. See Schuck, *supra* note 13, at 52.

"fictional" in all but name for those suffering damages injury because of the acts of federal employees acting on behalf of the government.²²³

Comparing the miniscule number of recoveries against the large number of constitutional tort suits filed clearly demonstrates that federal workers and officials rarely violate the constitutional rights of their fellow citizens.

Adequate and appropriate level deterrence of official misconduct would continue to exist through other means.

First, we start with the knowledge that most federal officials and civil servants, just like federal judges, perform their duties to our citizens without the incentive or threat of civil suits, and not because of such a threat. Should a federal official stray from the correct path, there remains a virtual cornucopia of incentives to correct and punish the errant official.

Administrative sanctions and disciplinary actions are available to correct official behaviors to include reprimands, suspensions, reductions in grade, and firings. In appropriate and serious cases, the employee or official may face criminal charges with fines and possible jail as punishment and to deter.

Perhaps the Court has placed too much reliance on the deterrence argument as a justification for its *Bivens* decision. From the perspective of a person seeing the problem from a wide-angle, slavish acceptance of deterrence as the driving and single most important rationale for permitting constitutional tort suits "means that the American people and government continue to stumble along with the current inadequate system."²²⁴ Retention of the *Bivens* scheme on deterrence grounds means that we are keeping a system that may lead to personal civil punishment (monetary damages) against a handful of civil servants, in order to hang the threat of personal suit over all of our public servants and at the expense of plaintiffs for whom we have failed to provide an effective remedy.²²⁵ In summary, the deterrent effect of the Court's *Bivens* "remedy" is grossly disproportionate to the problem.²²⁶

²²² "There is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorney's fees...would promptly cease the conduct...whether or not those officials were acting in good faith." Fair Assessment in Real Estate Assn. v. McNary, 454 U.S. 100 (1981).

²²³ See generally Pillard, *supra* note 127.

²²⁴ See *Amendments to the Federal Tort Claims Act: Hearings Before the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure*, 98th Cong. (1983) (statement of J. Paul McGrath, Assistant Attorney General, United States Department of Justice)

²²⁵ *Id.*

²²⁶ *Id.*

All actions normally taken to defend the Government in state and federal court (actions to remove cases from state to federal court, vigorous assertion of defenses, etc.) would, essentially, remain the same, with some notable exceptions. Legal representation of employees would be automatic, and the current process, where employees must request representation when sued individually, would be unnecessary.

The key here is that an appropriate level of deterrence would still be maintained. Given the remaining deterrents, it is unlikely and highly speculative that allowing personal civil suits against federal officials adds, at the most, more than a marginal increase in deterrence.

Out of tens of thousands of *Bivens* suits, only a miniscule of federal officials have ever been found personally liable, and even fewer have ever personally paid a judgment. This puts into question the need to deter official misconduct with the threat of personal civil suits. Additionally, under the current regulatory scheme whereby federal agencies routinely reimburse their employees for *Bivens* judgments made personally against them, places the actual deterrent effect of a *Bivens* suit against an individual federal official in some doubt. Since we have developed a regulatory basis to shift the payment of constitutional tort settlements and judgments from individual employees to the employing federal agencies, "placing liability on the employee may be economically equivalent to placing liability on the employer."²²⁷

The federal government routinely defends most if its employees in *Bivens* suits²²⁸ and indemnifies them in virtually all of the very rare cases where they are determined to be liable in *Bivens* suit settlements or judgment.²²⁹ As a result individual federal employees are not, in practice, liable for constitutional torts under the *Bivens* doctrine.

Under the proposed legislative fix, the government would be substituted only for the employee *whose conduct was determined to be within the federal employee's scope of employment*. In other words, employees committing egregious acts of misconduct, as opposed to mere negligence or poor judgment, would not generally be protected from personal civil liability for the results of their actions.

²²⁷ See Pillard, *supra* note 127, at 76. Some commentators suggest that a system that places liability on the federal employee will cause those employees to pressure the government for protection from that liability in the form of insurance, additional compensation, or indemnification. In order to attract good employees, the government will, as would any other employer public or private, desire to accommodate these demands and "shoulder the cost of employee liability." *Id.* at 76. This appears to be precisely what has occurred between federal employees and the federal government.

²²⁸ See *infra* part IV.C.2.a.(1).

²²⁹ Pillard, *supra* note 127.

VII. SIMILAR LEGISLATION IN RELATED AREAS

Congress has passed a significant number of laws to compensate persons injured by government action or personnel. These laws compensate victims whether or not the actual federal employees involved acted negligently. These statutes provide more fair and effective remedies for the specific injuries they address than the *Bivens* doctrine does for those alleging violations of their constitutional rights. This is because the statutory schemes Congress has established can address an entire problem that addresses all of the issues. In contrast, in *Bivens* the Court was limited to announcing a single remedy of opening the court house doors to constitutional tort suits with no ability to provide alternative, and, possibly more effective, remedies. When problems arise and changes or corrections are needed, Congress has the ability to amend laws such as the FTCA, a relatively common process.²³⁰

Two principal legislative waivers of sovereign immunity permit monetary relief from the United States, the Tucker Act²³¹ and the Federal Tort Claims Act.²³² The Tucker Act is both a grant of jurisdiction and a waiver of sovereign immunity for non-tort money claims founded in contract, under the Constitution, an act of Congress, or an executive department regulation.²³³ The Federal Tort Claims Act waives sovereign immunity of the United States for certain types of tort claims.²³⁴ Excluded by the Act are torts arising from the exercise of a discretionary function, and most intentional torts.²³⁵ The law waives immunity only for torts arising under state law, not

²³⁰ For example, the FTCA has been amended several times in response to problems discovered during hearings or in response to court decisions. See e.g., Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in 28 U.S.C. §§ 2671, 2674, 2679.).

²³¹ 28 U.S.C. § 1491.

²³² *Id.* at §§ 1346(b), 2761-80

²³³ *Id.* at § 1502; see also *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

²³⁴ *Id.*

²³⁵ The United States has not waived sovereign immunity from suit for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference of contract rights." 28 U.S.C. § 2680(h). As a result, the United States is not liable for the intentional torts of its employees. *United States v. Muniz*, 374 U.S. 150 (1963); *Kessler v. General Services Administration*, 341 F.2d 275 (2nd Cir. 1964). However, the government has waived its sovereign immunity for certain torts committed by "investigative or law enforcement officers of the United States Government," including claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. 28 U.S.C. § 2680(h).

under federal law, such as constitutional tort claims.²³⁶ Other examples of where Congress has waived sovereign immunity and permitted money damages are the Privacy Act,²³⁷ the Unjust Conviction Act,²³⁸ Title VII of the Civil Rights Act of 1964,²³⁹ and provisions of the Civil Rights Act of 1991.²⁴⁰

Various statutory immunities have been created by Congress. Each of these statutes operates in a similar fashion to protect federal employees from personal suit. Examples include the Federal Employees Liability Reform and Tort Compensation Act,²⁴¹ the Gonzales Act,²⁴² and the legal malpractice statute.²⁴³ If the employee is found to have been acting within the scope of his duties, the United State is substituted as the exclusive defendant.²⁴⁴ If suit is brought in state court, it may be removed to federal district court.²⁴⁵

These waivers of sovereign immunity are clear examples of what can be done in the area of constitutional torts.

VIII. LEGISLATION OPTIONS

Two approaches to legislation are open. One, the FTCA can be amended by deleting the existing specific exclusion for constitutional torts. Two, pass a more comprehensive law specifically focused on constitutional torts.

I recommend option one. It would be fair to plaintiffs and meet the Supreme Court's desires for an "adequate" remedy for injured plaintiffs, protect government officials and employees from harassing suits, conserve tax dollars, and save judicial and executive branch resources and energy. In addition, it would be simple and provide a regimen that has met judicial scrutiny in the arena of common law torts, provide procedures known by both

²³⁶ 28 U.S.C. §1346(b) and case law interpreting it restrict the FTCA to causes of action arising under state law. See e.g., *Van Schaick v. United States*, 586 F. Supp 23 (1983).

²³⁷ 5 U.S.C. § 552a.

²³⁸ 28 U.S.C. § 1495.

²³⁹ 42 U.S.C. § 1981.

²⁴⁰ Pub. L. No. 106-170, xx Stat. Xxx (codified in and amending 41 U.S.C. § 1981).

²⁴¹ Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679) (immunizes federal officials from liability for state torts committed within the scope of their duties).

²⁴² 10 U.S.C. § 1089 (1995) (protects military health care personnel from medical malpractice claims).

²⁴³ 10 U.S.C. § 1054 (1995) (immunizes Department of Defense legal staffs from legal malpractice claims).

²⁴⁴ Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679).

²⁴⁵ 28 U.S.C. § 1442, et. seq.

government and plaintiffs attorneys, and , in general, preserve all of the benefits of FTCA – a rapid, organized system, standard procedures that permits plaintiffs to sue after claims are in administrative procedures over six months, and substitution of the federal government as the defendant for individual federal employees.

The Federal Tort Claims Act (FTCA) can easily be amended to extend to federal employees absolute constitutional tort immunity for acts committed within the course and scope of their employment, whether discretionary or operational, by making the FTCA action against the government the exclusive remedy for constitutional torts committed by government employees in the scope of their employment. Procedurally, this would require only a simple amendment to the existing FTCA. An amendment might read as follows:

A sample public law amending the FTCA might read as follows:

Public Law XXX-XXX

Amendment of Title 28, Section 2679 (b)(2)(A), Defense of certain suits arising out of constitutional torts.

Title 28, Chapter 71, Tort Claims Procedure, Section 2679, United States Code, is amended by deleting the so much of the statute that reads “(A) which is brought for a violation of the Constitution of the United States, or (B)”

Such legislation would put constitutional torts on the same FTCA statutory footing currently applicable to common law torts; i.e., initiation of a claim would be through the FTCA’s administrative claims procedures; a plaintiff could sue the government in federal district court six months after filing a claim, should the claim remain unsettled, and suit against the government would be the exclusive of any other civil remedy.

IX. ANTICIPATED REACTIONS TO PROPOSED LEGISLATION

A. Judicial Reaction

The Supreme Court has regularly commented that it created the *Bivens* remedy for constitutional torts in the absence of Congressional action. It has often strongly hinted that it

would view favorably a Congressional statute that provided an adequate remedy for constitutional violations against citizens by federal officials. We even have help from the Court in drafting a statute. Chief Justice Burger, in his dissenting opinion in *Bivens*, has provided us with the framework of a possible statute.²⁴⁶

The Supreme Court is unlikely to reverse its *Bivens* doctrine without clear legislation from the Congress that it is establishing an FTCA-like remedy for persons injured by constitutional torts.

Some justices on the court may view appropriate legislation as perfectly within Congress' authority. Should this view prevail, undoubtedly such legislation would be upheld, even if it were not exactly what the court would have liked to see in a statutory scheme in lieu of *Bivens* suits.²⁴⁷

That the Supreme Court would find a Congressional statutory remedy for constitutional torts adequate finds support in its decision in *Bush v. Lucas*.²⁴⁸ In *Bush*, the Court refused to find in favor of a federal employee who brought a lawsuit against his federal government supervisor who he alleged demoted him for exercising his First Amendment right to free speech.²⁴⁹ The

²⁴⁶ See *Bivens*, *supra* note 13, at 422-23 (Burger C.J., dissenting).

²⁴⁷ See e.g., *Carlson* *supra* note 89. In discussing *Bivens*, Justice Rehnquist has stated "[i]t is clear under Article III of the Constitution that Congress has broad authority to establish priorities for the allocation of judicial resources in defining the jurisdiction of the federal courts. Congress may prevent the federal courts from deciding cases that it believes would be an unwarranted expenditure of judicial time or would impair the ability of the federal courts to dispose of matters that Congress considers to be more important." "Congressional authority ... [concerning creation remedies for constitutional torts] may all too easily be undermined when the judiciary, under the guise of exercising its authority to fashion appropriate relief, creates expansive damages remedies that have not been authorized by congress." *Id.* at 36-37. In my view, the authority of federal courts to fashion remedies based on the "common law" of damages for constitutional violations ... falls within the legislative domain, and does not exist where not conferred by Congress. *Id.*, at 38. (J. Rehnquist, dissenting).

²⁴⁸ 462 U.S. 367 (1983).

²⁴⁹ *Id.* This case is a clear example of how government officials can be personally sued for "just doing their job." While ultimately successful in defending against the suit, the official certainly suffered all the vexation, anxiety, time and energy commitment, and distraction from other duties caused by being personally sued and four years of litigation as the case made its way up and down the judicial system. Following civil service procedures, the Director of the George C. Marshall Space Flight Center demoted an engineer employed at the Center for making statements to news reporters that were highly critical of NASA. The Director, after conducting an investigation, had found that some of the employee's statements were misleading and or had no basis in fact, impeded government efficiency and economy, adversely affected public confidence in Government service, undermined morale at the Center, and caused disharmony among the Center's employees. *Id.* at 369-70. The employee appealed his demotion to the Federal Employee Appeals Authority which upheld the demotion. *Id.* Two years later, the Civil Service Commission reopened the matter, found that the nature and extent of the employee's disruption of the agency did not justify abrogation of the employee's exercise of free speech, and recommended the employee be restored to his former position and be given back pay. The recommendation was accepted and the employee received \$30,000 in back pay. *Id.* at 370-71. While his administrative appeal was pending, the employee sued the Director personally in Alabama state court seeking monetary damages for defamation and violation of his constitutional rights. The Director removed the case to the United States District Court for the Northern District of Alabama, which, under *Barr v.*

Court reaffirmed federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to a victim of constitutional violations even if Congress has not expressly authorized such a remedy. However, when Congress provides an alternative remedy, as it has done here, it may indicate its intent that this power should not be exercised. The Court opined that the comprehensive procedural and substantive scheme Congress had established for federal government employees to appeal adverse personnel decisions provided a meaningful and adequate remedy. Therefore, it would not permit *Bivens* suits to be brought against government supervisors personally, even if the alleged personnel action of the supervisor was arbitrary or otherwise improper. The question in this case was not what remedy the Court should provide for a wrong that would otherwise go unredressed, but whether a remedial system constructed by Congress, with careful consideration to policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

In deciding *Bush v. Lucas*, the Court assumed that a federal right had been violated and Congress has provided a less than complete remedy for the wrong.²⁵⁰ They also assumed that the plaintiff's remedies under civil service rules were not as effective as an individual damage remedy and did not fully compensate him for the harm he had suffered.²⁵¹ Even so, they found the Congressional scheme for handling federal employee personnel action sufficiently effective.²⁵²

The federal courts, being courts of limited jurisdiction, are subject to Congressional guidance. The federal courts' power to grant relief not expressly authorized by Congress is derived from Congress' general jurisdictional grant found in 28 U.S.C § 1331 which gives federal courts jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States." Given Congress' fundamental authority to determine the jurisdiction

Matteo found the Director absolutely immune from suit. The United States Court of Appeals for the Fifth Circuit affirmed. 598 F.2d 958 (1979). The Supreme Court vacated the judgment and directed the Appeals Court to reconsider the case in the light of its intervening decision in *Carlson v. Green*, 446 U.S. 914 (1980). The Court of Appeals again affirmed the judgment against the employee. See 647 F.2d 573 (1981). In June, 1983, the Supreme Court affirmed the Court of Appeal's decision. *Id.* at 390.

²⁵⁰ *Id.* at 373.

²⁵¹ *Bush supra* note 245, at 372. The Court noted its prior decision in *Carlson v. Green*, *supra* at n.3, wherein it discussed factors making the Federal Tort Claims Act less "effective" than an action under the Constitution to recover damages against an individual official, particularly the unavailability of punitive damages, jury trial, and adequate deterrence. *Id.* at 372, n. 8.

²⁵² See also *Carlson supra* note 89, where the court found money damages under the FTCA to be an adequate remedy (even though not as adequate as a *Bivens*-type suit) for a prisoner's mother whose son died because of

limits of federal courts it follows that Congress may also expand, limit or focus that jurisdiction through legislation, including legislation creating a procedural and substantive scheme for handling federal constitutional torts. In the words of Justice Stevens: "The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation."²⁵³ It is clear that an adequate statutory scheme for constitutional torts would likely be found constitutional by the court and would reverse the Court's belief that it needs to maintain a *Bivens*-type private cause of action as a remedy for constitutional violations by federal officials.

B. The Congress

Professor Pillard tells us that between 1973 and 1985, several efforts were made to obtain a statutory waiver of sovereign immunity for constitutional torts.²⁵⁴ They have all been unsuccessful. No bills to replace the *Bivens* decision with a statutory solution have been introduced since 1985.²⁵⁵ Executive Branch insistence on keeping qualified immunity, a defense normally available only to officials sued individually, as a defense to governmental immunity.²⁵⁶ Except for the executive branch, all interested parties testifying on this kind of legislation gave it support.²⁵⁷ There may be some good reasons for retaining qualified immunity if actions can be brought directly against the government. The fear of massive amounts of litigation may be real.²⁵⁸ However, it seems that any realized fears could be resolved with curative legislation in a manner similar to the way quick passage of the "Westfall Act"²⁵⁹ responded to fears that the

alleged inadequate medical care by federal prison officials, a violation of the prisoner's Eight Amendment rights. *Id.* at 377.

²⁵³ See *Bush supra* note 245, at 378.

²⁵⁴ Pillard, *supra* note 127, at 98.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 98 n.146.

²⁵⁷ *Id.* at 98.

²⁵⁸ *Id.* at 98 n.146.

²⁵⁹ Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679).

Supreme Court's decision in *Westfall v. Erwin*²⁶⁰ would open the floodgates to harassing and unwarranted suits.

A strong argument can be made that the *Bivens* decision has itself also contributed to the failure of legislative efforts to make the government directly accountable for constitutional torts.²⁶¹ Because *Bivens* is perceived as providing a remedy, it has relieved pressure that otherwise might have prompted Congress to pass legislation authorizing damages for constitutional violations.²⁶²

Ironically, the perceived opportunity to obtain damages under *Bivens* may have relieved some of the pressure on Congress to waive sovereign immunity and enact the necessary comprehensive and effective remedial scheme for constitutional torts.²⁶³

The impasse, which perpetuates the current system, does not benefit any of the interested parties, including the executive branch. While tax dollars may be saved, it is at the expense of perpetuating a system that, in reality, provides nothing more than a "fictitious" remedy for real constitutional violations.²⁶⁴

Waiving sovereign immunity for constitutional torts, eliminating qualified immunity as a defense, and instituting an administrative scheme to evaluate such claims would likely result in damage payments greater than the amount federal agencies currently pay in indemnifying federal employees. The real costs are unknown. An estimate might be made of the number of cases, damage settlements, and awards a statutory remedy scheme might generate. An analysis could also compare how much more it might cost the government under a statute that does not retain qualified immunity as a defense with a statute that does retain the defense. Experience under the FTCA might be useful in making these projections.²⁶⁵ Data generated would be more helpful

²⁶⁰ 484 U.S. 292, 297 (1988)

²⁶¹ See Pillard, *supra* note 127, at 97.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ 28 U.S.C. §§ 1346(b), 2761-2780. The FTCA, which waives the sovereign immunity of the United States and provides a jurisdictional basis for a number of state-created tort claims, has proven to be a fair, easy to administer, and accepted remedy for persons injured by the negligent or wrongful acts of government employees. This is so even though the Westfall Act specifically allows the United States to assert any judicial or legislative immunity defenses that would have been available to the employee. See 28 U.S.C. §§ 2671, 2674, 2679. See also, *Legislation to Amend the Federal Tort Claims Act: Hearings on H.R. 4358, H.R. 3872, and H.R. 3038 Before the Subcomm. On Administrative Law and Governmental Relations, 100th Cong., 2nd Sess. 42 (1988)* (letter from of Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights) (information provided by the Department of Justice to the subcommittee noted that in 1987 at least 1,400 pending FTCA cases also had ancillary constitutional tort claims).

than the anecdotal information currently available in making an informed decision about the volume of cases and expected costs. Alternative to the current concept of qualified immunity might also be explored and be acceptable to the executive branch and other interested parties.

X. OPTIONS IN THE ABSENCE OF LEGISLATION

Discussed in this section are various options that have been fully or partially implemented or looked at and rejected as responses to *Bivens*-type constitutional tort suits against individual federal employees. A review of them leads to the inescapable conclusion that only Congressional legislation creating a comprehensive remedy and constitutional tort protection for federal employees will fix the problems created by *Bivens*.

A. Insurance for Individual Federal Employees

A government official sued in his or her individual capacity faces a direct attack on his personal assets. Fortunately, in cases involving common law torts, under the Westfall Act the suit is converted to a lawsuit against the United States.²⁶⁶ Even in cases where a government official is sued in his or her individual capacity for acts not covered by the Westfall Act, e.g., a constitutional tort, and the government cannot be substituted for the individual official, the government will usually arrange for no-cost personal legal representation of the employee by the Department of Justice.²⁶⁷ The official would be personally liable for any monetary damages. Fortunately, the chances of any federal official having a monetary judgment against them is extremely unlikely.²⁶⁸ In the rare instance where it might occur, many agencies have regulatory provisions that permit them to indemnify their employees, provided the conduct giving rise to the verdict was taken within the scope of employment.²⁶⁹ Since an employee sued individually for "in scope" acts will be provided a free attorney, is extremely unlikely ever to have a monetary award adjudged against them and may be indemnified for a monetary award, professional liability insurance for "in scope" actions is unnecessary and a waste of employees' funds.

²⁶⁶ Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988)(codified at and amending 28 U.S.C. §§ 2671, 2674, 2679).

²⁶⁷ See *infra* part IV.C.2.a.(1).

²⁶⁸ See *infra* part IV.B.

Professional liability insurance that would provide an attorney, pay legal fees, and pay damages for judgments determined to be outside an employee's scope of duties might be worth considering, depending on the specific duties and exposure of the employee. Insurance for "non-scope" actions of employees does not appear to be currently available.²⁷⁰

The Administrative Office of the United States Courts has informed its federal judges that under current law as interpreted by the Comptroller General, public funds are not available to buy or fund personal liability insurance for federal judges.²⁷¹ They do note that private commercial liability insurance policies are available.²⁷²

B. Options for the Executive Branch (Departmental)

We have noted several routine actions that the government undertakes on behalf of a federal employee sued in their individual capacity for a constitutional tort: provision of representation,²⁷³ removal from state to federal district court,²⁷⁴ and indemnification.²⁷⁵ But are there other actions that could be taken to more aggressively represent employees and to deter

²⁶⁹ See *infra* part IV.C.2.a.(3) and note 158.

²⁷⁰ At least one commercial firm markets professional liability insurance for federal employees. For a premium of about \$350 per year, this firm will provide a policyholder with legal representation and \$1 million in liability coverage for actions that are "within the scope of your employment." For the reasons stated above, e.g., employees get free legal representation for in-scope claims, and are highly unlikely ever to face a personal monetary loss, this coverage does not appear to be of any significant value, at least to the extent it applies to constitutional tort suits. An attorney representation rider may be available to provide representation for actions as a federal manager. See generally *The Federal Manager's Guide to Liability*, *supra* note 168; Information Paper on Professional Liability Insurance, U.S. Army Legal Services Litigation Center (Oct. 13, 1999) (on file with the author). The Treasury, Postal Service and General Government Appropriations Act of 1997 authorized but did not require federal agencies to reimburse up to one-half of the cost of professional liability insurance for federal law enforcement officers, supervisors, and management officials of executive and legislative agencies for liability and litigation expenses resulting from tortious acts, errors, or omissions whether common law, statutory, or constitutional, occurring while in the performance of the individual's official duties. See generally Memorandum from Constitutional and Specialized Tort Litigation, Civil Division, Department of Justice on General Provisions, Treasury/Postal Appropriations, Fiscal Year 1997, (undated)(on file with the author). More recent legislation requires that agencies requires federal agencies to "...reimburse any qualified employee for not to exceed one-half the costs incurred by such employee for professional liability insurance." See Treasury, Postal Service and General Appropriation Act for FY 2000, Section 636. See also memorandum from Stephen R. Colgate, Assistant Attorney General for Administration to Heads of Department Components, United States Department of Justice (March 30, 2000) (on file with author). The Attorney General approved a Department of Justice policy for reimbursement. Effective October 1, 1999, the Department will reimburse law enforcement officers, attorneys, and supervisors and managers for up to one-half the cost of professional liability insurance, not to exceed \$115.00. *Id.* at 2.

²⁷¹ Office of Judges Programs, Administrative Office of the United States Courts, Judges Information Series No. 7, *The Risk of Personal Liability for Federal Judges* (1998).

²⁷² *Id.*

²⁷³ See *infra* part IV.C.2.a.(1).

²⁷⁴ See *infra* part IV.C.2.a.(2).

²⁷⁵ See *infra* part IV.C.2.a.(3) and note 158.

suits that are filed without a legal or factual basis? Given that less than a fraction of one percent of *Bivens* suits result in judgment against federal employees,²⁷⁶ one might surmise that many suits are brought on less than sufficient factual or legal grounds.²⁷⁷

Affirmative government action in the form of counterclaims against plaintiffs;²⁷⁸ sanctions under Rule 11 of the Federal Rules of Civil Procedure;²⁷⁹ and actions for attorneys' fees against plaintiffs²⁸⁰ are possible. In the defense of specific suits, their use may be appropriate and justified. To date, it does not appear that the Department of Justice has embraced affirmative actions in its defense of *Bivens* suits. It may be that Department attorneys assigned to defend individual employees are constrained by Department policies.²⁸¹ It may also be that the government fears that aggressive affirmative actions against plaintiffs and their attorneys would be viewed as fundamentally unfair, or as overreaching.

²⁷⁶ See *infra* part IV.B.

²⁷⁷ See *infra* part IV.A. and note 127.

²⁷⁸ See e.g., 28 U.S.C. § 1346.

²⁷⁹ Rule 11 provides for the striking of pleadings and the imposing of disciplinary sanctions to check abuses in the signing of pleadings. The rule permits courts to deal with the problem by awarding expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. Since the purpose of the rule is to discourage abusive tactics and improve the litigation process by lessening frivolous claims, it may be an ideal mechanism for defending specific *Bivens* suits. See Advisory Committee Notes, Fed. R. Civ. P. 11, West Group, at 86-87 (2000 ed.). See also *Siegert v. Gilley*, 279 U.S. 226 (1991) (sanctions may be appropriate where plaintiff pleaded violations of constitutional rights in abstract and broad fashion); *Rizzo v. Goode*, 423 U.S. 362 (1976) (sanctions may be appropriate where plaintiff makes undifferentiated pleading, naming individual defendants who had no personal involvement with the events giving rise to the action); Court sanctions may also be appropriate where a *Bivens* suit is filed for the purpose of harassing a public official, or to advance economic or political objectives, or philosophical beliefs. See e.g., *Chevron v. Hand*, 763 F.2d 1184 (10th Cir. 1985); *WSB Electronic Co. v. Rank & File Committee to Stop 2-Gate System*, 103 F.R.D. 417, 421 (N.D. Cal. 1984); *Lepucki v. Van Wormer*, 587 F. Supp. 1390, 1395 (N.D. Ind. 1984), *aff'd*, 765 F.2d 86 (7th Cir.), *cert. denied*, 474 U.S. 827 (1985); *Eskey v. Hynes*, 601 F. Supp. 142, 144 (E.D. Wis. 1985) (*pro se* litigant's claim unambiguously contradicted the United States Constitution, therefore the "one purpose of plaintiff's action is to harass and intimidate government officials."). While these cases were decided under an older version of Rule 11, such conduct would also violate current Fed. R. Civ. P. 11(b)(1).

²⁸⁰ While there is no statutory provision that permits the award of attorney's fees in personal liability cases, in *Alyeska Pipeline Co. v. Wilderness Society*, the Supreme Court recognized they may be available to a prevailing litigant in cases where there is a finding of bad faith. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Moon v. Smith*, 523 F. Supp. 1332 (E.D. Va. 1981) (federal government may benefit from the bad faith exception to the American rule and recover attorney's fees); *Copeland v. Martinez*, 603 F.2d 981, 987 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

²⁸¹ A Department of Justice attorney who represents an employee has an attorney-client relationship with that employee. See 28 C.F.R. § 50.15(a)(3). However, it is Department of Justice policy "[t]hat the Department of Justice will not assert any legal position or defense on behalf of an employee sued in his individual capacity which is deemed not to be in the interest of the United States." 28 C.F.R. § 50.15(a)(8)(ii).

XI. CONCLUSION

The current state of federal constitutional tort law, as developed under *Bivens v. Six Unknown Named Agents*, is unsatisfactory to all interested parties.

Bivens has not provided the remedy for constitutional torts envisioned by the Court, yet *Bivens* suits continue to be filed at a high rate even though the chances of meaningful recovery for plaintiffs is almost non-existent.

Plaintiffs need a remedy that evaluates constitutional tort claims in a relatively efficient and fair manner. The federal administrative claims process, currently institutionalized to compensate injured parties for torts grounded in state common law, is an ideal model. Its pre-suit administrative claims process works. It is an efficient system with a good track record going back decades. Thus, the most efficient solution to the *Bivens* dilemma for potential plaintiffs is to support amendment of the Federal Tort Claims Act (FTCA) to make a claim against the United States the exclusive remedy for persons who believe that they have had their constitutional rights violated by a federal employee or official. The administrative claims process would be an inexpensive institutional method of resolving constitutional tort claims without the need for litigation in most cases. Plaintiffs would be able to deal with a consistent and uniform system. The right to file suit would be retained for the rare situations where administrative procedures do not resolve the claim.

All the benefits of the FTCA would be realized. Importantly, experience with the FTCA's administrative claims requirements has proven to be an extremely effective pretrial screening mechanism for claims against the government. Should a lawsuit be filed for a constitutional violation, the plaintiff's constitutional claim would already have been evaluated by the government, it's likely that a fair amount of discovery already would have taken place, and a settlement offer probably would have been made and rejected. To some extent, the parties positions would have crystallized, allowing the court to focus on the remaining key issues. The courts would be enabled to deal with the serious questions that arise in constitutional tort cases in an expeditious and meaningful way and could award damages to deserving plaintiffs. By limiting contingency fees, more dollars would be available to pay judgments. These would all be improvements for plaintiffs over the current *Bivens*-based litigation.

Even though the *Bivens* remedy has proven ineffective, it provides a continuous source of litigation and aggravation, at great personal cost to federal employees, and wasted expenditure of tax dollars, time, and energy by the executive branch in defending thousands of these suits, and for the courts in litigating these cases. To provide protection to federal government workers, the law should be amended to make any scope of employment constitutional tort suit against a federal government employee or official a claim against the United States under the Federal Tort Claims Act the exclusive remedy.

Federal civil servants and officials should be able to work under the assumption that they are immune from personal suit for constitutional tort liability for acts within the scope of their official duties. Such protections should at least parallel the protection from common law torts federal workers receive under other federal laws.²⁸² Experience shows us that these statutes work. There are no logical reasons for treating common law suits differently from constitutional torts, assuming in both cases that the employee's conduct was performed within the scope of the employee's official duties.

The deterrent effect of *Bivens* lawsuits is unnecessary to maintain integrity within the federal workforce. Looking at experience under the FTCA since 1946 (when the FTCA substituted the federal government for individual federal employees in common law tort suits), there have been no indications that federal employees have become more reckless or more liable to injure fellow citizens than before that legislation existed. Adequate deterrence would remain available through other administrative and criminal sanctions.

It's time Congress provided a fair, more efficient, and less costly system to adjudicate the claims of alleged victims of constitutional torts by federal employees and officials committed in the course of their employment; protect federal employees and decision-makers from what has proven to be, in almost every case, unjustified and wasteful litigation; reduce the litigation burden on the courts; and introduce a more efficient use of government resources.

There does not appear to be any good reason for not replacing *Bivens*-based suits for an FTCA-like scheme. There is nothing controversial about making suits against the United States the exclusive remedy. In many cases, the conduct giving rise to the action could be plead as a

²⁸² See e.g., 28 U.S.C. §§ 1346(b), 2671-2680 (Federal Tort Claims Act), 28 U.S.C. §§ 2671, 2674, 2679 (Federal Employees Liability Reform and Tort Compensation Act) ("The Westfall Act") (immunizes federal employees from liability for many common law torts); 10 U.S.C. § 1089 (1995) (The "Gonzales Act") (protects certain federal health

common law tort, a constitutional law tort, or both.²⁸³ Indeed it is often difficult to distinguish one from the other, the only difference often being in the way the plaintiff articulated the complaint.

The United States should compensate victims of constitutional torts committed in the scope of federal employees' official duties. Legislation would make the law operate the way *Bivens* was intended to operate -- as an effective remedy for the victims of constitutional torts. Legislation would not infringe on any legal rights of the individual. Under legislation, the United States would merely be substituted as the defendant in cases alleging that a federal employee committed a constitutional tort within the scope of his or her office or employment.

For many years following *Bivens*, it was a priority of the Department of Justice to obtain a Congressional amendment of the FTCA that would make the government the exclusive defendant for actions taken by employees in the scope of their employment, including a waiver of sovereign immunity for constitutional torts.²⁸⁴

The Department of Justice should resurrect constitutional tort reform as a legislative goal. The Department's Office of Legislative Affairs may be the appropriate office to coordinate development of a legislative proposal that waives sovereign immunity for constitutional torts while retaining qualified immunity as a defense, substitutes the federal government for individual federal defendants, and makes suit against the government the sole source of monetary damages involving government constitutional torts.

care personnel from medical malpractice claims); 10 U.S.C. § 1054 (1995) (immunizes DOD legal staffs from legal malpractice claims).

²⁸³ In practice, it is often difficult to characterize specific conduct of a federal employee as either a common law tort or constitutional tort, to the exclusion of the other.

²⁸⁴ See Annual Report of the Attorney General (1971 through 1998).

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