

March 1981

Carlson v. Green: The Inference of a Constitutional Cause or Action Despite the Availability of a Federal Tort Claims Act Remedy

Gregory P. Williams

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

Gregory P. Williams, *Carlson v. Green: The Inference of a Constitutional Cause or Action Despite the Availability of a Federal Tort Claims Act Remedy*, 22 Wm. & Mary L. Rev. 561 (1981), <https://scholarship.law.wm.edu/wmlr/vol22/iss3/6>

COMMENTS

CARLSON V. GREEN: THE INFERENCE OF A CONSTITUTIONAL CAUSE OF ACTION DESPITE THE AVAILABILITY OF A FEDERAL TORT CLAIMS ACT REMEDY

By enacting the Federal Tort Claims Act (FTCA),¹ Congress waived the sovereign immunity of the United States for the negligent or wrongful acts of its employees. A 1974 amendment² broadened the government's liability by allowing suits based on certain intentional torts committed by federal law enforcement officers.³ This action came just three years after the Supreme Court, in *Bivens v. Six Unknown Named Agents*,⁴ had inferred a similar federal common law right to recover damages from federal officials who violate a plaintiff's constitutional rights.⁵

1. Federal Tort Claims Act, ch. 753, § 410(a), 60 Stat. 843-44 (1946) (current version at 28 U.S.C. § 1346(b) (1976)). Section 1346(b) provides:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury . . . 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.

28 U.S.C. § 1346(b) (1976).

2. Act of March 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (amending 28 U.S.C. § 2680(h) (1970)).

3. Section 2680(h) excepts most intentional torts from the government's waiver of liability. The 1974 amendment to § 2680(h) limited this exception by adding the following language:

[W]ith regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

28 U.S.C. § 2680(h) (1976). For a history and analysis of the 1974 amendment, see Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497 (1976).

4. 403 U.S. 388 (1971).

5. *Id.* *Bivens* involved the inference of a cause of action for violations of the fourth

A problem arises when a particular tortious act creates causes of action under both the *Bivens* rationale and the FTCA. In such a situation, a plaintiff may prefer to proceed against the United States under the FTCA, seeking the obvious advantages of a deep-pocketed defendant. Yet certain elements of the *Bivens*-style action, such as the availability of punitive damages⁶ and a jury trial,⁷ are absent in an FTCA suit.⁸ Should a plaintiff find these features attractive, he may choose to sue the individual employees, despite the available remedy against the government.⁹ Facing such a choice, Marie Green chose the *Bivens* remedy, and in *Carlson v. Green*,¹⁰ the Supreme Court addressed the propriety of judicial inference of a constitutional cause of action against federal employees when an FTCA remedy against the United States is also available.¹¹

The controversy in *Carlson* began when Joseph Jones, Jr., a prisoner at the Federal Correction Center in Terre Haute, Indiana received inadequate medical care that allegedly caused his death.¹² Marie Green, Jones' mother and the administratrix of his estate, filed suit against the responsible prison officials alleging that they

amendment. Courts have expanded the *Bivens* rationale to allow such suits based on violations of other constitutional provisions. See Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 *HASTINGS CONST. L.Q.* 531, 566-72 (1977).

6. In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court stated that "our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit." *Id.* at 1473.

7. See *id.* at 1474.

8. 28 U.S.C. § 2674 prohibits punitive damages in FTCA suits. 28 U.S.C. § 2674 (1976). Section 2402 of the same title disallows jury trials in FTCA suits. 28 U.S.C. § 2402 (1976). For a comparison of the FTCA and *Bivens* remedies, see Comment, Loe v. Armistead: *The Availability of an Alternative Remedy as a Bar to Extending Bivens*, 20 *WM. & MARY L. REV.* 393, 407-12 (1978).

9. The plaintiff could sue the government employee first, and then proceed to sue the United States for any portion of the original judgment that the employee-defendant had not satisfied. Boger, Gitenstein & Verkuil, *supra* note 3, at 537. Under § 2676, however, a judgment against the United States in an action brought under the FTCA bars subsequent actions, based on the same claim, against the offending official. 28 U.S.C. § 2676 (1976).

10. 446 U.S. 14 (1980).

11. *Id.* at 17-23. The Court also addressed the issue of whether a state statute prohibiting the survivorship of an action prevented a *Bivens* claim. The Court held that a uniform federal rule of survivorship was necessary to redress the constitutional deprivation. *Id.* at 23-25. This issue is beyond the limited scope of this Comment.

12. *Id.* at 16 n.1.

caused his death and violated his due process, equal protection, and eighth amendment rights.¹³ Although neither lower court had addressed the issue, the Supreme Court held that a *Bivens* remedy inferable from the eighth amendment was available even though the plaintiff's allegations also could support a suit against the United States under the FTCA.¹⁴

PRE-*Carlson* TREATMENT OF THE ISSUE

Prior to *Carlson*, several lower federal courts had considered the inference of constitutional remedies when FTCA remedies are available. In *Torres v. Taylor*,¹⁵ the United States District Court for the Southern District of New York held that the compensation provided by the FTCA eliminated any need for a constitutional cause of action.¹⁶ The court stated that "federal courts should not imply causes of action under the Constitution where there is already an adequate remedy for the constitutional deprivations."¹⁷ The court dismissed the claim without prejudice to the plaintiff's right to seek relief under the FTCA.¹⁸

Conversely, in *Hernandez v. Lattimore*,¹⁹ the United States Court of Appeals for the Second Circuit rejected the *Torres* rationale and allowed a direct cause of action against federal prison officials.²⁰ The legislative intent of the 1974 amendment to the FTCA was a key element in the court's analysis.²¹ The Senate Report that accompanied the amendment stated that the amendment "should be viewed as a counterpart to the *Bivens* case."²² Finding this ex-

13. *Id.* at 16. The Supreme Court upheld the finding of both lower courts that Mrs. Green effectively had pleaded a violation of the eighth amendment's cruel and unusual punishment clause. *Id.* at 17-18. The lower courts had relied on *Estelle v. Gamble*, 429 U.S. 97 (1976), in which the court held that "deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment proscribed by the eighth amendment. *Id.* at 104.

14. 446 U.S. at 18.

15. 456 F. Supp. 951 (S.D.N.Y. 1978).

16. *Id.* at 954.

17. *Id.* at 953.

18. *Id.* at 955.

19. 612 F.2d 61 (2d Cir. 1979).

20. *Id.* at 62. The court remanded the case for a determination of the merits of the plaintiff's claim. *Id.* at 68.

21. *Id.* at 66-67.

22. S. REP. NO. 588, 93d Cong., 1st Sess. 3, reprinted in [1974] U.S. CODE CONG. & AD.

pression of congressional intent determinative, the court stated that Congress meant the amendment to "provide a remedy against the federal government in addition to, but not wholly in place of, the private cause of action created by *Bivens*."²³ Consequently, the court granted a *Bivens* cause of action despite the availability of an FTCA suit.²⁴

In *Morani v. Hunter*,²⁵ the United States District Court for the Southern District of New York rejected its previous decision in *Torres* and followed the *Hernandez* analysis. The court noted that constitutional causes of action generally should be inferred only when no alternative remedy exists.²⁶ Nonetheless, the court viewed the language of the Senate Report accompanying the 1974 amendment to the FTCA as a justification for violating the general rule.²⁷ The Report's statement that the FTCA was a counterpart to *Bivens* remedies²⁸ took priority over the rule, and the court inferred an action for damages against the individual officers directly from the Constitution.²⁹

Similarly, the United States District Court for the District of Columbia, in *Thornwell v. United States*,³⁰ inferred a constitutional cause of action notwithstanding the existence of the FTCA.³¹ Legislative intent played a key role in the court's analysis,³² as did the deterrent effect of personal liability.³³ Moreover, the court felt

News 2789, 2791.

23. 612 F.2d at 67.

24. *Id.* at 68.

25. No. 77-1599 (S.D.N.Y., July 16, 1979).

26. *Id.*, slip op. at —.

27. *Id.* After reciting the general rule, the court stated: "But where Congress explicitly states that it does not wish the availability of a particular statutory remedy to enter into the analysis when courts weigh the need for an implied constitutional damage remedy, it would seem that the express instruction controls." *Id.*

28. See note 22 & accompanying text *supra*.

29. No. 77-1599, slip op. at — (S.D.N.Y., July 16, 1979).

30. 471 F. Supp. 344 (D.D.C. 1979).

31. *Id.* at 353-55.

32. *Id.* at 354-55.

33. *Id.* at 355. The court stated: "In addition, an exclusive remedy under the Act provides a less effective deterrent against constitutional violators than a direct action against federal officials." *Id.* Most authorities recognize the deterrent effect of personal liability on potentially tort-feasant government employees. See Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1186-87 (1977); Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U.L. REV. 85, 86-87 (1975).

that it could not categorize accurately the defendants' acts³⁴ as one of the traditional common law torts covered by the FTCA; rather, "the only tort which is capable of describing this course of conduct is one based upon the fifth amendment's guarantee[s]."³⁵

Carlson v. Green

Following *Hernandez*, *Moriani*, and *Thornwell*, the Court in *Carlson* held that the availability of an FTCA remedy does not pre-empt a *Bivens* remedy against federal officials.³⁶ Relying on its earlier decision in *Bivens*, the Supreme Court enunciated a two part test for determining when a court should infer causes of action from the Constitution. Speaking for the Court, Justice Brennan stated that a *Bivens* cause of action

may be defeated in a particular case . . . in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when defendants 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.³⁷

The Court spent little time in determining the absence of "special factors counselling hesitation."³⁸ Offering only one example of a special factor, Justice Brennan found no independent status on the part of the defendants that might render them invulnerable to judicial remedies.³⁹

34. In *Thornwell*, the defendants subjected the plaintiff to an involuntary "covert program in human experimentation." 471 F. Supp. at 346. The program consisted of LSD injections and "physical and mental degradation." *Id.*

35. *Id.* at 355.

36. *Carlson v. Green*, 446 U.S. 14, 18-23 (1980).

37. *Id.* at 20 (citations omitted) (quoting *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971)).

38. *Id.* at 19. The Court's application of this part of the test took only four sentences of the opinion.

39. *Id.* Justice Brennan cited *Davis v. Passman*, 442 U.S. 228, 246 (1979), in stating that the case contained no special factors counselling hesitation. In *Davis*, the Court implied a cause of action against a congressman, holding that the Speech or Debate clause protections were sufficient to dispel special factors counselling hesitation. *Id.* at 246.

Justice Brennan also mentioned that to require a federal official to defend a suit might interfere with the performance of official duties, but he dismissed the problem by referring

The Court gave a more lengthy consideration to determining whether Congress explicitly had declared the FTCA to be an equally effective substitute for the *Bivens* cause of action.⁴⁰ The Court commented that Congress need not have uttered any particular words; rather, Congress must have "indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy."⁴¹ Focusing on the 1974 amendment's legislative history, the Court found no indication that plaintiffs must seek relief under the FTCA instead of suing the offending individuals;⁴² rather, the Court found a congressional intent to make both the *Bivens* and FTCA remedies available.⁴³ The Court gave great weight to one statement in the Senate Report:

"[A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progeny [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages"⁴⁴

To add support to its finding of congressional intent, the Court cited several statutory provisions⁴⁵ illustrating that "Congress fol-

to the qualified immunity granted federal officials in *Butz v. Economou*, 438 U.S. 478 (1978). 446 U.S. at 19.

Other "special factors" have been advanced. In *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980), the United States Court of Appeals for the Eighth Circuit stated that "[t]he existence of civil service remedies, coupled with the apparent anomaly of a parallel *Bivens* style remedy" should be treated as a special factor counselling hesitation. *Id.* at 357. One commentator has suggested that the enactment of the 1974 intentional torts amendment should be such a special factor. Comment, *supra* note 8, at 404.

40. 446 U.S. at 19-23.

41. *Id.* at 19 n.5.

42. *Id.* at 19.

43. *Id.* at 19-20.

44. *Id.* at 20. (quoting S. REP. No. 588, 93d Cong., 1st Sess. 3, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791). After quoting from the Senate Report, the Court stated that "[i]n the absence of a contrary expression from Congress," it would interpret § 2680(h) as allowing an action against the United States and individual officials. *Id.*

45. *Id.* at 20. The Court cited the following statutory provisions: 38 U.S.C. § 4116(a) (1976), 42 U.S.C. §§ 233(a), 2458a (1976), 10 U.S.C. § 1089(a) (1976), and 22 U.S.C. § 817(a) (1976), all expressly stating that the FTCA is the sole remedy in cases of medical malpractice by certain government employees; 28 U.S.C. § 2679(b) (1976) (FTCA is the exclusive remedy for injuries caused by the operation of motor vehicles by federal employees); 42

lows the practice of explicitly stating when it means to make FTCA an exclusive remedy."⁴⁶ In addition, noting four advantages of the *Bivens* remedy over the FTCA remedy,⁴⁷ the Court reasoned that Congress did not intend to deprive plaintiffs of the benefits of a *Bivens* remedy.⁴⁸ Consequently, the defendants in *Carlson* not only failed to demonstrate the existence of any special factors counselling hesitation, but they also failed to produce an explicit congressional declaration that an alternative remedy was a substitute for recovery on a *Bivens* claim. Having failed to satisfy either strand of the *Carlson* test, the defendants were subject to personal liability.⁴⁹

The Supreme Court's analysis in *Carlson* contrasts sharply with the district court's reasoning in *Torres*. In *Torres*, the inquiry focused on the existence of adequate and sufficient alternative remedies.⁵⁰ The court determined that the FTCA would compensate the plaintiff for his injuries, and thus, a *Bivens* cause of action was superfluous.⁵¹ The *Carlson* test eschewed such an independent evaluation of alternative remedies; rather, the test focused on determining congressional intent.⁵² Although the Court did compare several aspects of the *Bivens* and FTCA remedies,⁵³ concluding that the "FTCA is not a sufficient protector of the citizens' constitutional rights,"⁵⁴ the Court made this determination solely for the purpose of discovering the legislative intent behind the 1974 amendment.⁵⁵ Therefore, the *Carlson* analysis was not an indepen-

U.S.C. § 247b(k) (1976) (FTCA is the exclusive remedy against manufacturers of swine flu vaccine).

46. 446 U.S. at 20.

47. The Court listed the benefits to a plaintiff of a *Bivens* remedy over an FTCA action: the *Bivens* remedy is a more effective deterrent; punitive damages are allowed only in *Bivens* suits; jury trials are available solely in *Bivens* suits; and FTCA suits are subject to state law, whereas *Bivens* suits are governed by uniform federal law. *Id.* at 21-25. In his dissent, Justice Rehnquist denied either the existence or the importance of each of the advantages listed by the majority. *Id.* at 44-50 (Rehnquist, J., dissenting). See notes 67-68 & accompanying text *infra*.

48. 446 U.S. at 20-21.

49. See *id.* at 18-23.

50. See *Torres v. Taylor*, 456 F. Supp. 951, 953 (S.D.N.Y. 1978).

51. *Id.* at 954.

52. See text accompanying note 37 *supra*.

53. 446 U.S. at 20-23. See note 47 & accompanying text *supra*.

54. 446 U.S. at 23.

55. The Court stated: "Four additional factors, each suggesting that the *Bivens* remedy is

dent judicial decision on the existence of an adequate alternative remedy.

As in *Hernandez*, *Moriani*, and *Thornwell*, the Court in *Carlson* relied heavily on legislative intent in holding that the inference of a *Bivens* cause of action is appropriate despite the availability of the FTCA.⁵⁶ Unlike the earlier cases, however, the Court developed an analytic framework in *Carlson* for determining the availability of constitutional causes of action. Using scattered language from *Bivens*,⁵⁷ the Court created an unambiguous two-prong test for the first time.⁵⁸ Unless defendants satisfy the test's requirements, a *Bivens* remedy always will be available to victims of constitutional torts committed by government officers.⁵⁹

In their separate opinions, Justices Powell and Rehnquist and Chief Justice Burger criticized the majority opinion.⁶⁰ Both Justice Powell and Chief Justice attacked the Court's test. Justice Powell found neither authority nor justification for creating such an absolute standard⁶¹ and found the mechanical nature of the test partic-

more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respondent to an FTCA action." *Id.* at 20-21 (emphasis added).

56. See *id.* at 18-23.

57. In *Bivens*, the Court stated, "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. 388, 396 (1971). Later on, the Court continued:

Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages . . . but must instead be remitted to another remedy, equally effective in the view of Congress.

Id. at 397.

58. See text accompanying note 37 *supra*.

59. The Court's test places the burdens of production and persuasion on the defendants. The *Bivens* cause of action is "defeated" if defendants prove either strand of the test. 446 U.S. at 18-19. In his concurring opinion, Justice Powell noted, "Today we are told that a court must entertain a *Bivens* suit unless the action is 'defeated' in one of two specified ways." *Id.* at 26 (Powell, J., concurring).

60. Justice Powell wrote a concurring opinion, *id.* at 25, and the Chief Justice and Justice Rehnquist filed dissents, *id.* at 30, 31.

61. *Id.* at 27 (Powell, J., concurring). Justice Powell cited two recent Supreme Court decisions that contain language inconsistent with allowing constitutional causes of action, given an alternate remedy. In *Butz v. Economou*, 438 U.S. 478 (1978), the Court held that federal officials, like state officials, are entitled to only a qualified immunity for their discretionary acts. *Id.* at 500. At one point, the Court remarked, "The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question

ularly offensive.⁶² He viewed the test as an unjustifiable infringement of judicial discretion because courts must examine a large number of policy considerations when determining whether to infer a remedy from the Constitution.⁶³

In his criticism of the Court's test, Chief Justice Burger noted that the actual adequacy of the FTCA remedy was an "irrelevancy" in the Court's analysis.⁶⁴ The Chief Justice stated that under the Court's analysis, a *Bivens* cause of action against state officials would be inferred despite the relief afforded by section 1983 of the Civil Rights Act.⁶⁵ Indeed, the language of the *Carlson*

whether to infer a right of action for damages for a particular violation of the Constitution." *Id.* at 503.

In *Davis v. Passman*, 442 U.S. 228 (1979), the Court inferred a constitutional damages remedy for a violation of the fifth amendment's due process clause. *Id.* at 245-48. The Court noted, however, that "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." *Id.* at 248.

62. 446 U.S. at 27 (Powell, J., concurring).

63. *Id.* at 28 (quoting *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring)).

64. *Id.* at 30 (Burger, C.J., dissenting). Chief Justice Burger illustrated that the Court's test does not ask whether the alternate remedy is either adequate or equally effective; rather, the test asks if Congress viewed the alternate remedy as equally effective and explicitly declared it effective.

65. *Id.* (citing 42 U.S.C. § 1983 (1976)). Several lower courts have refused to find a constitutional cause of action and have referred to the existence of a remedy under § 1983. *Cale v. Covington*, 586 F.2d 311 (4th Cir. 1978) (§ 1983 remedy supported the court's refusal to infer cause of action directly from the fourteenth amendment); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977) (no right of action against municipality because of availability of relief under § 1983).

The case of *Turpin v. Maillet*, 579 F.2d 152 (2d Cir. 1978), *vacated and remanded sub nom.* *City of West Haven v. Turpin*, 439 U.S. 974 (1978), *rev'd per curiam*, *Turpin v. Maillet*, 591 F.2d 426 (2d Cir. 1979), illustrates the problems of inferring a constitutional cause of action despite the existence of § 1983. In its first handling of the case, the Second Circuit allowed suit under the fourteenth amendment against a municipality. *See* 579 F.2d at 168. Noting that municipalities were not subject to liability under § 1983, the court created a constitutional cause of action because no remedy for violations of constitutional rights was available to the plaintiffs. *Id.* at 161-63. In *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), however, the Supreme Court held that plaintiffs may sue municipalities directly under § 1983. Therefore, when *Turpin* was appealed to the Supreme Court, the Court vacated the Second Circuit's decision and remanded the case for further consideration in light of *Monell*. *City of West Haven v. Turpin*, 439 U.S. 974 (1979). In vacating and remanding the case, the Court apparently thought that the statutory remedy recently made available by *Monell* negated the need for a constitutional cause of action. Accordingly, on remand, the Second Circuit held that, in light of the relief available under § 1983, it need not infer a cause of action from the Constitution. 591 F.2d at 427.

test need not apply only to cases involving *Bivens* and FTCA causes of action. Rather, a court could apply the test whenever defendants assert *any* federal statutory scheme as a bar to the inference of a *Bivens* cause of action.⁶⁶

Justice Rehnquist not only questioned the four alleged advantages of the *Bivens* remedy,⁶⁷ but also attacked the validity of the entire process of judicial inference of constitutional causes of action.⁶⁸ He asserted that in both *Bivens* and *Carlson* the Court had

66. Courts have denied *Bivens* causes of action because of available statutory remedies other than § 1983. *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980) (constitutional cause of action for damages denied because of existence of civil service remedies); *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977) (refused to infer *Bivens* cause of action directly from the fourteenth amendment because a cause of action under 42 U.S.C. § 1981 was available); *Neely v. Blumenthal*, 458 F. Supp. 945 (D.D.C. 1978) (constitutional cause of action for damages denied because of relief available under Title VII of the Civil Rights Act).

In *Bush v. Lucas*, 598 F.2d 958 (5th Cir. 1979), *vacated and remanded*, 100 S. Ct. 1846 (1980), the Fifth Circuit denied a constitutional cause of action based on a federal employee's retaliatory demotion. The court based its holding on the existence of an alternate remedy under civil service regulations. *Id.* at 961. The Supreme Court vacated and remanded the case to the Fifth Circuit for further consideration in light of *Carlson v. Green*, demonstrating that *Carlson* will not apply solely to cases involving the FTCA as an alternate remedy.

67. See 446 U.S. at 44-51 (Rehnquist, J., dissenting). In a dissent twice as long as the majority opinion, Justice Rehnquist attacked the four additional factors mentioned by the majority as supporting the conclusion that Congress did not intend the FTCA as a substitute for a *Bivens* action.

First, recovery against an individual in a *Bivens* action is insupportable according to Justice Rehnquist. In addition, even if a *Bivens* action deterred, he continued, other policy considerations, notably the paralyzing effect on employees, could offset any marginal deterrence. *Id.* at 44-45. Second, Justice Rehnquist maintained that because the Court has never reached the question whether punitive damages are available in either a *Bivens* or a § 1983 action, the failure of Congress to provide for punitive damages in the FTCA was meaningless. *Id.* at 47. Similarly, Justice Rehnquist noted that preventing a plaintiff from opting for a jury trial in an FTCA action sheds no light on congressional intent because the majority offered no reason why a judge is preferable to a jury. *Id.* at 48. Finally, Justice Rehnquist observed that uniform rules need not govern liability of federal officers for violations of constitutional rights. He pointed to the congressional determination to defer to state procedural rules in the § 1983 context as illustrating that deterrence is not a significant federal interest compelling uniformity. *Id.* at 48-49.

68. *Id.* at 34-44. Justice Rehnquist leveled his sharpest attack against inferring *any* constitutional causes of action. He noted that although the majority relied on *Bivens*, the Court provided neither reasoning on how *Bivens*, a fourth amendment case, supports the inference of an eighth amendment cause of action nor guidance for deciding "when a constitutional provision permits an inference that an individual may recover damages and when it does not." *Id.* at 35.

In addition, Justice Rehnquist explained that the Court does not have the authority to

overstepped its constitutional authority, stating that "the creation of constitutional damage remedies involves policy considerations that are more appropriately made by the Legislative rather than the Judicial Branch of our Government."⁶⁹

THE PROBABLE EFFECTS OF *Carlson*

To properly evaluate the effect of *Carlson v. Green*, an examination of the pre-*Carlson* legal environment is necessary. In recent years, the number of *Bivens* actions has increased dramatically.⁷⁰ Moreover, although originally most plaintiffs brought *Bivens* suits against law enforcement or intelligence officials, plaintiffs increasingly bring claims against other types of government employees.⁷¹ As a result of these increases in the quantity and scope of suits against government officials, many government employees allegedly live in constant fear of personal liability.⁷² Government officials claim that with this rise in apprehension has come a decline in employee morale, productivity, and effectiveness.⁷³

Inconsistent with the fear alleged by government employees is

grant damage relief for constitutional violations absent congressional authorization. Justice Rehnquist contrasted the majority's approach of inferring a constitutional cause of action unless specifically prevented by Congress with recent cases declining to imply a statutory cause of action unless Congress expressly provided it. *Id.* at 33-40 n.5 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979)). The court in *Touche Ross* and *Transamerica*, noted Justice Rehnquist, declined to imply a damage remedy from the statutes' broad language, reversing the trend of inferring such private rights of action, see, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Given the vitality of *Borak* at the time of *Bivens*, Justice Rehnquist doubted "that Mr. Justice Harlan would today reach the same conclusion that he did in *Bivens* in 1971." 446 U.S. at 39-40 n.5. Similarly, Justice Rehnquist rejected the argument that equitable authority of the federal courts to grant necessary relief extends to damage awards for constitutional violations. *Id.* at 42.

These and other issues raised by Justice Rehnquist are beyond the limited scope of this Comment. Nonetheless, the problems discussed by his dissent reinforce the need for a legislative solution. See notes 86-104 & accompanying text *infra*.

69. 446 U.S. at 53 (Rehnquist, J., dissenting).

70. See Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. LEGIS. 1, 1 (1979); Bermann, *supra* note 33, at 1180.

71. See Bell, *supra* note 70, at 1.

72. See *id.* at 7; Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 295-96 (1980). According to one commentator, federal employees fear not only the threat of actual liability but also the "exhausting burdens of discovery and the possibility of pre-judgment liens on bank accounts, personalty and realty." *Id.*

73. See Bell, *supra* note 70, at 6; Dolan, *supra* note 72, at 296.

the relative lack of success of plaintiffs in obtaining compensation through the courts for injuries caused by federal employees.⁷⁴ A plaintiff must overcome several significant barriers if he is to gain a judgment against either the individual official or the government. Specifically, a plaintiff who sues the individual official must prove that actual, compensable injuries resulted from the defendant's unlawful acts.⁷⁵ Should the plaintiff prove such injuries, the defendant still may avoid liability by asserting the qualified immunity of government employees recognized in *Butz v. Economou*.⁷⁶ Finally, if the plaintiff should overcome all of these obstacles, he still faces the task of collecting a judgment from a defendant who, because of limited financial resources, may be judgment-proof.⁷⁷

The chances of recovery against the government on a similar claim are also discouraging.⁷⁸ The discretionary function exception of the FTCA⁷⁹ protects the government from liability for the discretionary acts of its agents.⁸⁰ In addition, under *Norton v. United States*,⁸¹ the government may avoid liability for the torts of its employees by asserting the qualified immunity possessed by the tortfeasor employees.⁸²

74. See Bell, *supra* note 70, at 2 n.5; Dolan, *supra* note 72, at 297.

75. Bell, *supra* note 70, at 6; Dolan, *supra* note 72, at 297; Vaughn, *supra* note 33, at 107.

76. 438 U.S. 478 (1978). Scheuer v. Rhodes, 416 U.S. 232 (1974), defined the qualified immunity available to state government officials:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48. *Butz* held that, in most cases, federal officials are entitled to the qualified immunity defined in *Scheuer*. 438 U.S. at 507.

77. See Bermann, *supra* note 33, at 1190; Dolan, *supra* note 72, at 297.

78. See Bell, *supra* note 70, at 4; Dolan, *supra* note 72, at 298.

79. 28 U.S.C. § 3680(a) (1976).

80. Section 2680(a) provides in part that the United States does not waive sovereign immunity for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1976).

81. 581 F.2d 390 (4th Cir. 1978).

82. *Id.* at 393. For a discussion of *Norton v. United States*, see Note, *Norton v. United*

Though all of *Carlson's* effects are unclear, some predictions can be made. After *Carlson*, injured citizens no longer should be uncertain of their ability to bring personal liability suits against culpable federal employees. The test enunciated in *Carlson* will leave little doubt as to the existence of a constitutional cause of action in any given case.⁸³ Another positive effect of *Carlson* should be that the increased threat to government employees of substantial personal liability will further the deterrence interest served by *Bivens* suits.⁸⁴

Several negative effects of *Carlson* are also likely, however. As plaintiffs become more certain of their ability to maintain *Bivens* actions, the number of such suits will increase even more rapidly than at present. This increase will not be limited to cases in which plaintiffs seek *Bivens* remedies despite the existence of an FTCA remedy; rather, the number of cases in which plaintiffs seek recovery against the offending government official despite the availability of any statutory remedy also will rise.⁸⁵ This increase in litigation obviously will add to the already overwhelming workload of the federal courts.

Certainly *Carlson* will not relieve the fears of federal employees. The possibility of personal liability will be even more threatening. Moreover, from a plaintiff's prospective, *Carlson* will do little to eliminate the impediments to compensation through *Bivens*-type suits. In sum, *Carlson* seems to have made a bad situation worse. By allowing more personal liability suits against government employees, the Court has intensified many of the previously existing problems of constitutional tort litigation.

States: *Federal Government's Liability Coterminous with That of Its Agents Under Federal Tort Claims Act Amendment*, 57 N.C. L. Rev. 350 (1979).

83. See Bermann, *supra* note 33, at 1189. Bermann remarks:

[P]rospective plaintiffs need a clearer idea than they can possibly have today of the monetary responsibility of government and their officials. The current proliferation of defendants in damage actions against public authorities may not be due entirely to nuisance value, but may owe something to litigants' honest uncertainty over what relief if any can be expected from whom.

Id.

84. See note 33 *supra*.

85. See notes 65-66 & accompanying text *supra*.

A LEGISLATIVE SOLUTION?

After *Carlson*, a judicial solution to the problems of the current situation appears unlikely. In any event, the task of designing an effective remedial scheme to compensate victims of the tortious acts of government officials is more legislative than judicial in character.⁸⁶ Several advantages of a legislative solution are cognizable. Congress has access to a wider range of remedies than the judiciary; Congress designs remedies to handle general problems, not particular fact situations; and the choice of judicial remedies is often merely a choice between those presented by the contesting parties.⁸⁷ Though Congress did resolve many inequities with its 1974 FTCA amendment, that progress represented "only a partial step toward proper financial accountability by the federal government for the injuries occasioned by its employees."⁸⁸ A comprehensive federal statutory scheme allocating liability for the tortious acts of government employees is necessary.⁸⁹

In 1979, the Justice Department drafted legislation to solve some of the inadequacies of the current remedial system.⁹⁰ Sponsored by Senator Kennedy and Representatives Danielson and Rodino, the legislation would provide that the United States be the exclusive defendant in all suits based on common law or constitutional torts committed by officers acting within the scope of their office or employment.⁹¹ When the employee was not acting within the scope of

86. Bermann, *supra* note 33, at 1189.

87. Comment, *supra* note 8, at 412.

88. Boger, Gitenstein, and Verkuil, *supra* note 3, at 539. The authors conclude that [t]he amendment provides a useful means for obtaining financial compensation in the wake of certain grievous abuses by law enforcement officials, but Congress should not be led by this action to believe that it has dealt with the inequities of sovereign immunity, and the question of a citizen's right to redress for constitutional wrongs, in any final or comprehensive way.

Id. at 542-43.

89. *Id.* at 539, 543; Dolan, *supra* note 72, at 309.

90. S. 695, 96th Cong., 1st Sess., 125 CONG. REC. S2919-23 (daily ed. March 15, 1979); H.R. 2659, 96th Cong., 1st Sess., 125 CONG. REC. H1101 (daily ed. March 6, 1979). For a discussion of similar bills previously proposed by the Justice Department, see Dolan, *supra* note 72, at 299-302.

91. S. 695, 96th Cong., 1st Sess. § 6, 125 CONG. REC. S2920-21 (daily ed. March 15, 1979); see 125 CONG. REC. H1101 (daily ed. March 6, 1979) (remarks of Rep. Rodino). Congress has provided for exclusive governmental liability for several classes of tortfeasors. See note 45 *supra*.

his office or employment, but was acting under color of his office, an injured plaintiff could sue either the government or the employee.⁹² A plaintiff-instituted administrative disciplinary proceeding usually would be available against the offending employee,⁹³ and in an action against it the government could not avoid liability by asserting the good faith defenses of its agents.⁹⁴

Generally, exclusive governmental liability for most torts committed by federal agents would serve the interests of all affected parties.⁹⁵ One major point of controversy surrounding the legislation, however, is the scope and breadth of the protection of government employees. The proposal would require exclusive government responsibility for *all* acts committed by its employees within the scope of their office or employment.⁹⁶ Under this standard, government officials may incur no personal liability even though they acted either particularly offensively or in bad faith.⁹⁷ Justice Department officials argued that the proposed legislation's administrative disciplinary procedures would punish offending officials sufficiently and deter further unconstitutional acts by government employees.⁹⁸ Though internal disciplinary systems have significant positive features,⁹⁹ the threat of personal liability seems a more certain

92. S. 695, 96th Cong., 1st Sess. § 7, 125 CONG. REC. S2921 (daily ed. March 15, 1979). See Dolan, *supra* note 72, at 305 n.149. One example of such a tort is the situation wherein "a law enforcement employee . . . uses his badge to gain entry into dwellings for the purpose of committing a crime or tort therein." *Id.*

93. See S. 695, 96th Cong., 1st Sess. § 12, 125 CONG. REC. S2921-23 (daily ed. March 15, 1979); Dolan, *supra* note 72, at 303.

94. S. 695, 96th Cong., 1st Sess. § 7, 125 CONG. REC. S2921 (daily ed. March 15, 1979). This provision would negate the effect of *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978), in which the court held that the United States can avoid liability by asserting the qualified immunity of its agents.

95. See Bermann, *supra* note 33, at 1194-95, 1201-03.

96. S. 695, 96th Cong., 1st Sess. § 6, 125 CONG. REC. S2920-21 (daily ed. March 15, 1979); see 125 CONG. REC. H1101 (daily ed. March 6, 1979) (remarks of Rep. Rodino).

97. See Dolan, *supra* note 72, at 304 (citing *Amendments to the Federal Tort Claims Act: S. 2117, S. 2868 and S. 3314: Joint Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies and the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess., 408 (1978) (statement of John Graecen on behalf of the ABA)).

98. See Bell, *supra* note 70, at 12.

99. See *id.* at 13; Bermann, *supra* note 33, at 1197-98. Despite these advantages, one commentator has criticized the administrative disciplinary procedures proposed in H.R. 2659. See *Amendment of the Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th

deterrent to egregious unconstitutional acts.¹⁰⁰ In sum, shielding government officials from liability for particularly offensive conduct would further neither social nor governmental interests.¹⁰¹

In contrast to the Justice Department proposal, earlier legislation specifically recognized the necessity of ensuring personal liability for egregious acts of government agents. Senator Metzenbaum introduced legislation in the 95th Congress that would have made the government exclusively liable only for torts committed by the agent "within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct."¹⁰² Although this standard would make the United States liable in most cases, employees who act outside the scope of their authority or in bad faith would incur personal liability. The proposed Justice Department legislation, however, would protect the employee who acted beyond the scope of his authority or in bad faith.¹⁰³ Consequently, although one should not overlook the positive aspects of the proposed Justice Department legislation, the bill extends exclusive governmental liability too far. Even the Senate sponsor of the legislation, Senator Kennedy, recognized this problem in remarks made prior to introducing the bill:

[t]he debate has focused on the breadth of the "scope of office or employment" standard, and whether the United States should be exclusively liable in cases where the improper conduct is willful and wanton. I, too, am troubled by the prospect of immunizing employees who have committed egregious constitutional violations. In committee, we will explore this question thoroughly

Cong., 1st Sess., 120-21, 124-26 (1979) (statement of George A. Bermann).

100. See *Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 2d Sess., 129-30 (1978) (testimony of John H.F. Shattuck and Pamela S. Horowitz, American Civil Liberties Union). The American Civil Liberties Union maintained:

We have no quarrel with giving the agency the "first crack" at disciplining its own. Based on past experience, however, we are extremely skeptical about the willingness of agencies to take meaningful disciplinary action against their employees. Too often conduct which would be condemned by an outsider is tolerated, or even approved, within the agency itself. For this reason, we submit that the review and appeal procedures are wholly inadequate.

Id. at 130.

101. See Bermann, *supra* note 33, at 1196-97.

102. S. 3314, 95th Cong., 2d Sess., 124 CONG. REC. S11,048-49 (daily ed. July 18, 1978).

103. See authorities cited at notes 91, 97 & accompanying text *supra*.

and weigh the competing concerns so that an equitable solution is fashioned, consistent with the basic scheme of the legislation.¹⁰⁴

Congress could amend the proposed legislation to provide for personal liability in cases such as the ones that trouble Senator Kennedy, thus giving an effective, equitable solution to the many problems currently plaguing litigation over the tortious acts of government officials.

CONCLUSION

Prior to *Carlson*, neither injured plaintiffs nor government employee defendants were content with the ability of the legal system to protect their rights. The absolute test enunciated in *Carlson* for determining the availability of *Bivens* remedies against individual officers likely only will exacerbate the situation by increasing the number of suits against government employees, without increasing the likelihood of recovery.

Relief must come in the form of a statutory scheme that recognizes the legitimate interests of the injured plaintiffs, culpable government employees, the United States Government, and the general public. Devising such a comprehensive remedial framework is a considerable task, but the legislation proposed by the Justice Department is a partial solution. Should Congress amend this proposed legislation to allow personal liability in cases involving egregious tortious acts of government employees, the Justice Department's proposal would solve many of the problems of the current remedial system.

G. P. W.

104. 125 CONG. REC. S2920 (daily ed. March 15, 1979) (remarks of Sen. Kennedy).