Loe v. Armistead: The Availability of an Alternative Remedy as a Bar to Extending Bivens

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In the past two decades the federal courts have served, to a virtually unprecedented degree in our history, as a forum for vindicating violations of individual freedoms by various levels of government. Yet, not until recently could federal law enforcement officers be held liable for the results of their tortious conduct. In 1971, the United States Supreme Court, in *Bivens v. Six Unknown Named Agents*, held that the victim of an unconstitutional search and seizure by federal narcotics agents could recover money damages from the officers on a theory of liability based directly on the fourth amendment. Because the Court employed remarkably broad language, further definition and delineation were necessary to create a workable paradigm for the radical new concept of a “constitutional tort.” Although a detailed framework for analysis is essential to guide the lower courts confronting similar actions based on other constitutional rights, the Supreme Court has not addressed the issue of a constitutionally created cause of action in the seven years since the *Bivens* decision. The lower courts have assumed, by default, the task of interpreting the ramifications of the *Bivens* decision. As a result, the federal common law, which has developed from

2. 403 U.S. 388 (1971).
3. Id. at 397.
applying Bivens, has been as variegated as if the matter had been delegated to the individual states.\(^5\)

In *Loe v. Armistead*, a divided Court of Appeals for the Fourth Circuit\(^7\) considered whether Bivens should be extended to include an invasion of a personal interest in liberty protected by the fifth amendment. The court concluded that, in the absence of a legislative remedy, such an action could be maintained against the federal officials responsible for the alleged violation,\(^8\) thereby following the prevailing trend toward expanding Bivens to encompass rights other than those protected by the fourth amendment.\(^9\) This Comment asserts that the court erred in extending Bivens under the facts of *Loe* because an adequate remedy was available to the plaintiff under the Federal Tort Claims Act (FTCA).\(^10\)

**Loe v. Armistead**

In *Loe*, the plaintiff, a federal prisoner awaiting retrial in a local jail under a contractual agreement with federal authorities,\(^11\) was

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5. See generally 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 (1977), and the cases cited therein; see also Davis v. Passman, 571 F.2d 793, 807 n.6 (5th Cir. 1978).
6. 582 F.2d 1291 (4th Cir. 1978).
7. Judge Winter wrote the majority opinion in which Judge Butzner joined. Judge Hall filed a dissenting opinion. *Id.* at 1297-98.
8. *Id.* at 1296.

11. This practice is authorized by 18 U.S.C. § 4002 (1970), which provides:
injured when he accidentally slipped and fell. He was given pills to alleviate his pain immediately at the prison infirmary, but as a federal prisoner he could not be transported to a hospital for further medical treatment until federal marshals arrived to escort him. Although the local authorities later contended the marshals were notified the same day, the plaintiff was not taken to the hospital by the marshals until the next morning; x-rays revealed a fractured right arm. The complaint alleged that the delay constituted deliberate indifference to the plaintiff’s serious medical needs and violated his eighth amendment right to protection against cruel and unusual punishment. In addition to demanding compensatory and punitive damages, the plaintiff sought a declaratory judgment concerning the constitutionality of procedures for transporting federal prisoners in state facilities to hospitals and an order directing the adoption of proper procedures to rectify any inadequacies. The local jail officials and employees, including the treating prison physician, and the federal marshals were named as defendants. The district court summarily dismissed the suit for failure to state a

For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

12. 582 F.2d at 1292.
13. Id. at 1293.
14. U.S. Const. amend. VIII provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”
15. 582 F.2d at 1293.
16. Other claims, not relevant to this inquiry, charged the local jailers with failure to provide prompt medical care for the plaintiff’s injured arm after he returned to jail following a trip out of state for psychiatric treatment, as well as charges against the accompanying marshals. The dismissal of these claims was affirmed by the court of appeals. Id. at 1297. All claims against the local defendants were brought under a provision of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), which provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Both the majority in Loe and the dissent implied that a cause of action against federal officials could be grounded on § 1983. 582 F.2d at 1296 n.3, 1297. Whether these comments were seriously intended or simply an oversight, they are clearly erroneous; federal officials cannot be sued under § 1983. Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971), cert. denied, 404 U.S. 1061 (1972).
claim upon which relief could be granted. On appeal, the Fourth Circuit reversed and remanded the claim with regard to the initial treatment of the broken arm.

Judge Winter, writing for the majority, noted that the conduct of the local prison authorities was linked inextricably to the conduct of the federal marshals; therefore, the court initially had to decide whether an action could be maintained against the marshals named in the complaint. The court's analysis involved three basic questions. The court first examined whether the complaint alleged a violation of a federally protected right. The court answered this inquiry in the affirmative. Although the complaint asserted that the conduct constituted cruel and unusual punishment prohibited by the eighth amendment, the court decided that the plaintiff's status as a federal pretrial-detainee made the due process clause of the fifth amendment a more appropriate basis for relief. The court avoided defining the scope of this due process protection by noting

17. 582 F.2d at 1292.
18. Id. at 1297.
19. Id. at 1293.
20. Id. at 1293-94.
21. The court noted that pretrial-detainees, because they have been convicted of no crime, may be subjected only to such restrictions as are reasonably necessary to ensure their presence at trial. See generally Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941 (1970). Any restriction that exceeds these bounds violates the detainee's right to due process. This reasoning, however, is not relevant to the instant case. Three of the cases cited by the court deal with general prison conditions for pretrial-detainees as a class distinct from prisoners actually convicted. Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974). Loe is distinguishable on the basis that it concerns the individual act or omission of a few persons, rather than general prison policy. The fourth case cited, Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972), although brought by a pretrial detainee, does not focus on the plaintiff's status in the decision. Why the court chose to adopt the Second Circuit's position that the cruel and unusual punishment clause is not applicable to a prisoner until after conviction and sentencing, Rhem v. Malcolm, 507 F.2d 333, 337 (2d Cir. 1974); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), is unclear given that other courts have held the eighth amendment directly applicable. E.g., Johnson v. Lark, 365 F. Supp. 289, 301-03 (E.D. Mo. 1973); Collins v. Schoonfield, 344 F. Supp. 257, 264-65 (D. Md. 1972); cf. Dellums v. Powell, 566 F.2d 216, 227 n.38 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 3146 (1978) (for convenience, referring to pretrial detainee's complaint as an eighth amendment claim, but not resolving the issue).

The eighth amendment also contains a prohibition against excessive bail, which obviously could be applicable only to pretrial detainees. Possibly, the court, having previously recognized a Bivens cause of action under the fifth amendment in States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974), felt more secure following precedent than in extending Bivens to eighth amendment violations.
that it was "at least as co-extensive as the guarantees of the eighth amendment"22 and that the allegations were sufficient under the eighth amendment to avoid summary dismissal.23

The court then addressed whether the alleged violation justified extending Bivens to provide a damage remedy for invasion of the fifth amendment's protection of personal interest in liberty.24 Finding no explicit declaration against granting monetary relief to one whose due process rights have been violated, and considering that the injury alleged was one for which damages normally would be appropriate, the court concluded that an action against the marshals could be maintained because Congress had provided no other remedy.25 The court noted that in a recent decision, Davis v. Passman,26 the Fifth Circuit had refused to extend Bivens to include fifth amendment violations, but it characterized the decision as mistakenly premised on a superfluous concern that a deluge of new litigation might result and as inconsistent with prior decisions of the Fourth Circuit.27

This characterization, however, was not a fair recitation of the Passman holding. In Passman the court considered whether a congressman who dismissed his administrative assistant on the basis of sex could be sued under a Bivens claim for violation of the woman's right to due process protected by the fifth amendment.28 Construing Bivens to suggest that an implied cause of action was not wholly of constitutional dimensions, the court concluded that it must consider both the intent of Congress and the necessity of a damage remedy to vindicate the right asserted.29 Congress had provided extensive remedies for various kinds of federal employees but purposely had excluded those persons like the plaintiff in noncompetitive jobs.30 This exclusion was viewed by the court as an explicit expression of congressional intent to deny protection to this category

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22. 582 F.2d at 1294.
23. Id.
24. Id. at 1294-95.
25. Id. at 1294.
26. 571 F.2d 793 (5th Cir. 1978).
27. 582 F.2d at 1294 n.2.
28. 571 F.2d at 795.
29. Id. at 797.
30. 42 U.S.C. 2000c-16(a) (Supp. V 1975). The statute under which the plaintiff had been hired provided that members of a congressman's personal staff are removable "at any time . . . with or without cause." 2 id. § 92 (1970).
of federal employees. In addition, the court in Passman asserted that, given the breadth of the due process clause of the fifth amendment, to expand Bivens protection to include due process rights would have the effect of condoning an action for damages based on any constitutional violation. This concern was reflected in the statement regarding the potential impact that recognition of a due process cause of action would have on the volume of litigation in federal courts. Although equitable relief was not available to the plaintiff because the defendant was no longer in office, the court refused to create a cause of action where Congress had declined to provide one. Unlike the court in Loe, the Fifth Circuit chose to emphasize the importance of legislative intent as a determinative factor; the analysis is consistent with recent Supreme Court pronouncements that imply causes of action from statutes.

The Fourth Circuit's final inquiry was whether the allegations in the complaint were sufficient to state a cognizable claim. Relying primarily on the Supreme Court's decision in Estelle v. Gamble, which held that a prisoner who alleged acts or omissions sufficiently harmful to indicate deliberate indifference to serious medical needs had stated a cognizable claim under the eighth amendment, the

31. 571 F.2d at 800.
32. Id. at 797. The court noted that "[t]he concept of due process encompasses virtually all of the civil liberties derived from the Constitution." Id. The court also stated that "[b]ecause of the breadth of due process, a decision implying an action for money damages from the fifth amendment Due Process Clause alone would extend an action for damages to any constitutional guarantee." Id. at 799-800.
33. Id. at 800.
34. Id.
35. Legislative intent and the consistency of congressional purpose behind the statute has been determinative in a number of recent cases. Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977); Cort v. Ash, 422 U.S. 66 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974). Given that two of the five members who voted with the majority in Bivens are no longer on the Court, this trend could reflect a disinclination to favor unlimited expansion of the Bivens doctrine. See note 45 infra.
36. 429 U.S. 97 (1976). This case involved an inmate who was injured in a state prison and, complaining of the medical treatment he received, brought a civil rights action under 42 U.S.C. § 1983.
37. Justice Marshall wrote the majority opinion, which held that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care . . . . Regardless of how evidenced,
court found that the unusually long delay between the injury and the treatment the next day at the hospital raised an issue as to whether some or all of the defendants deliberately were indifferent to the plaintiff's medical needs. The court concluded, therefore, that the complaint stated a cause of action and remanded the case to the district court for consideration of the merits.

Judge Hall dissented on the ground that the creation of a Bivens action for an alleged violation of a due process right was unnecessary based on the facts in the complaint. He asserted that the creation of such an action would serve only to overburden the federal courts with a flood of unmeritorious claims, particularly by federal prisoners who could find some official to sue for violation of the plethora of possible rights encompassed by the fifth amendment due process clause.

The Fourth Circuit's holding in Loe reflects the same analytical problems that characterize other lower court decisions applying Bivens. The lack of a clear analytical formula has generated a range of inconsistent holdings, with one court asserting that Bivens is limited to fourth amendment actions against officers and others reading it as "sweeping approbation of constitutionally-based causes of action." Moreover, by focusing on whether a remedy had been provided to compensate the denial of the constitutional right, the court in Loe failed to recognize that a remedial scheme had been created to compensate a federal prisoner injured while incarcerated.

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deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983. 429 U.S. at 104-05 (citations and footnotes omitted). The Court also noted that allegations of deliberate indifference are essential to raise the injury to the level of a constitutional violation; mere malpractice would not be sufficient. Id. at 105-06, 106 n.14.

38. 582 F.2d at 1296. The court expressed no view on the merits of Loe's claim. Id.
39. Id. at 1296-97.
40. Id. at 1297-98.
41. Id. at 1298. Judge Hall noted caustically that the danger of unmeritorious claims was fully evident in the case at bar, considering that the plaintiff had filed twelve cases in the district court and taken seven appeals to the Fourth Circuit. Id. at n.1.
43. Brault v. Town of Milton, 527 F.2d 730, 734 (2d Cir. 1975); see Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978).
44. See text accompanying notes 71-74 infra.
CONSTITUTIONAL TORTS

In Bivens, the Supreme Court held in a divided opinion that federal officers could be sued for damages for violation of fourth amendment rights. The case involved a peculiar fact situation which, if proved true, would have left the victim with no sufficient remedy for the injuries he suffered at the hands of federal investigators. Although the Civil Rights Act of 1871 provides for a cause of action against persons who violate a citizen's constitutional rights, this section 1983 remedy is applicable only if the persons are acting under color of state law. The Federal Tort Claims Act offered no protection because at that time the United States was immune from suit for intentional torts committed by federal employees. Likewise, another judicially created remedy for fourth amendment violations, the exclusionary rule, was inapplicable because Bivens was never charged with a crime. Consequently, the Court concluded that a remedy could be provided to the plaintiff only by implying a cause of action directly from the fourth amendment.

46. Id. at 397.
49. See note 10 supra.
51. 403 U.S. at 410 (Harlan, J., concurring).
52. Id. The Court was unwilling to consider the actions that might have been available on
The Court’s decision in *Bivens* was premised on two assumptions. "[W]here federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief." The Court also recognized that money damages historically have been the common remedy for invasions of personal liberty.

Unlike the broad concept of due process involved in *Lae*, the violation of the fourth amendment guarantee against unreasonable searches and seizures involved a more narrow right for which the Court had evolved a set of specific guidelines to govern police conduct. The warrantless search and arrest alleged in *Bivens* was made without probable cause and clearly violated established judicial strictures governing such activity. The Court concluded that, in the absence of either an alternative remedial scheme enacted by Congress to enforce the constitutional right violated, or other "special factors counseling hesitation," the remedy of money damages was necessary to enforce the commands of the fourth amendment. Because Congress had not prohibited explicitly recovery by persons injured by illegal police conduct, the petitioner was entitled to redress his injuries in federal court in a damage action based directly on the fourth amendment.

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53. *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Ironically, this often-quoted passage was written by Justice Black, who dissented in *Bivens*. *Id.* at 427-30.

54. *Id.* at 395.


57. 403 U.S. at 396.

58. *Id.* at 397. Justice Harlan noted: "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

59. *Id.*
The persuasive simplicity of the Court's reasoning has made *Bivens* difficult to apply with any consistency. Several observations, however, are worthy of note. The Supreme Court appeared to suggest that Congress is the primary source of remedies for constitutional violations and, that in the absence of congressional action, the Court should imply such remedies only where necessary or otherwise appropriate.  

Because the Court focused on the constitutional dimensions of the wrongful conduct, however, the fact that a common law analogue in tort also may exist became obscured and often is overlooked. Lower court decisions that likewise have focused on the constitutional dimensions of the torts have ignored Congress' explicit answer to wrongs such as that which occurred in *Bivens*: the intentional torts amendment to the FTCA, which is couched in common law tort terms. Moreover, unlike traditional common law torts, which have specific prima facie elements that must be pleaded and proved, constitutional torts are broader in scope; the due process clause, for example, is so fluid as to defy precise definition. The recognition given a cause of action predicated upon a deprivation of property under the due process clause could extend, by incorporation, to all claims based on any of the civil liberties encompassed by that right, or it merely might authorize future decisions on a case-by-case basis. Finally, *Bivens* provides no rigid analysis for determining which constitutional rights demand money damages and which do not; nor does it articulate which factors courts should focus on in recognizing a *Bivens* action. In *Loe*, one of the factors relied on by the court in recognizing a cause of action based on the fifth amendment was its previous recognition of such an action, even though the earlier case involved property interests while *Loe* dealt with personal interests in liberty.

**The Federal Tort Claims Act**

A cause of action based directly on the violation of constitutional

60. See id. at 397. The "necessary" or "appropriate" standard has been applied by lower courts in considering whether *Bivens* should be extended to other constitutional rights. See, e.g., Owen v. City of Independence, 560 F.2d 925, 932 (8th Cir. 1977), vacated, 438 U.S. 902 (1978); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1157 (4th Cir. 1974).

61. See notes 68-69 infra & accompanying text.

62. See note 32 supra.


64. Id. at 1147. *Shultz* dealt with whether the plaintiff-shipping lines could recover damages for cargo seized by customs agents without a warrant. Id.
EXTENDING BIVENS

rights is essentially a judicial tool to be used only in those circumstances in which the injured plaintiff has no other federal remedy available. The courts should defer to the remedial scheme provided by Congress for alleged wrongful conduct regardless of whether that remedy is designed to protect the specific constitutional right claimed to have been violated.65 In Loe, such a remedy was available in the Federal Tort Claims Act, which provides that a person injured by the act of a federal employee may bring suit directly against the United States. The Act recognizes claims based on negligence, and, if the tortfeasor is a federal investigative officer, claims for intentional misconduct.66

Three years after Bivens, in response to that decision and to a series of highly publicized illegal searches and seizures by federal narcotics officers,67 Congress passed a major amendment to the FTCA.68 The amendment waives the defense of sovereign immunity and makes the United States independently liable for intentional torts committed by federal law enforcement agents, defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."69 Reflected in the legislative history of the amendment is

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65. By focusing on the right violated, the injury suffered tends to be overlooked. If that injury can be compensated within the existing remedial framework provided by Congress, then, accordingly, the violation of the victim's constitutional right has been redressed. To ignore this rationale would condone an entirely new set of judicially created collateral remedies, to the exclusion of those provided by Congress, because a constitutional right allegedly has been violated.


68. 28 U.S.C. § 2680(h) (Supp. V. 1975) (amending 28 U.S.C. § 2680(h) (1970)). The amendment became effective on March 16, 1974. It supplements § 2680(h) as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with 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, on or after the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

69. Id.
Congress' skepticism whether the remedy afforded by Bivens to victims of law enforcement abuses was satisfactory. Because the agents responsible were likely to be judgment-proof, the amendment was considered a more viable alternative to assure recovery. This affirmative action by Congress creating a remedy for exactly the type of conduct alleged in Bivens represents one of the "special factors counseling hesitation" absent in the Bivens case, and is, in fact, a direct response to that omission.

The FTCA and the Federal Prisoner

Congress has enacted two pieces of legislation that together create a pervasive regulatory scheme protecting injured federal prisoners. The Federal Prison Industries Fund provides a remedy to federal prisoners injured while performing assigned prison tasks. If the prisoner is not engaged in prison industries at the time the injury is sustained, he may recover under the FTCA.

70. S. Rep. No. 588, 93d Cong., 1st Sess. 3, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2789, 2790. Congress undoubtedly was aware of the widespread criticism that the effectiveness of § 1983 was similarly limited because the individual officials often were judgment-proof and because, at that time, under Monroe v. Pape, 365 U.S. 167 (1961), municipalities could not be held liable under § 1983. This limitation was one of the primary arguments for extending liability under Bivens to municipalities, which are more attractive defendants. See Hundt, Suing Municipalities Directly Under the Fourteenth Amendment, 70 NW. U. L. REV. 770 (1975); Note, Damage Remedies Against Municipalities for Constitutional Violations, 99 HARV. L. REV. 922 (1976); Comment, Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine, 36 MD. L. REV. 123 (1976). This problem has been resolved in Monell v. Department of Social Serv., 436 U.S. 658 (1978), which overruled Monroe and held that local governments are not wholly immune from suit under § 1983. Id. at 663.

71. Existing statutory law concerning federal prisoners reference herein makes no distinction between pretrial-detainees and convicted prisoners. Typically, the statutes refer only to those "charged with or convicted of offenses against the United States, or held as witnesses or otherwise." 18 U.S.C. § 4042(2) (1970). Except as otherwise noted, the term "prisoner" in the text includes both pretrial-detainees and convicted prisoners.

72. 18 U.S.C. § 4126 (1970). This statute creates a fund that is set aside in part to compensate inmates "for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." Id. Recovery under this statute is the exclusive remedy available for such injuries, and a prisoner injured while performing an assigned prison task is barred from suing under the FTCA. United States v. Demko, 385 U.S. 149 (1966). See generally Annot., 17 L. Ed. 2d 929 (1967).


74. United States v. Muniz, 374 U.S. 150 (1963). The Supreme Court held that the absence of an express exclusion of prisoners' claims by Congress indicated a deliberate choice to include such persons within the ambit of the FTCA. Id. at 156-58; See Garza v. United States,
EXTENDING BIVENS

The Supreme Court, in *Logue v. United States*, 75 confronted the issue of the government’s liability under the FTCA to a federal pretrial-detainee incarcerated in a local jail under a lease agreement while awaiting trial. 76 In *Logue*, a prisoner with a history of suicidal tendencies killed himself while unattended in his cell. 77 The Court found that the United States was insulated from liability under the FTCA for the negligent acts or omissions of the local prison officials because in such circumstances the local officials are independent contractors. 78 To subject the United States to liability, the prisoner must establish that his injury occurred as a result of the conduct of a federal employee, as distinguished from that of an employee of the local jail. 79

The allegations in Loe’s complaint asserted that the federal marshals’ deliberate indifference to his medical needs subjected him to cruel and unusual punishment. 80 The federal marshals qualify as investigative or law enforcement officers of the United States under the FTCA intentional torts amendment. 81 Therefore, based on the allegations in the complaint, Loe would have a cause of action against the marshals under the FTCA on a theory of intentional infliction of emotional distress. 82 Alternatively, should he be unable to prove the necessary intent on the part of the officers, he could recover on a negligence theory under the FTCA. 83 Congress has im-


75. 412 U.S. 521 (1972).
76. Id. at 523.
77. Id. at 524-25.
78. Id. at 530-32.
79. Id. at 526.
80. *See* notes 11-14 *supra* & accompanying text.
82. Intentional infliction of emotional distress is not one of the intentional tort actions specifically enumerated in the 1974 amendment to the FTCA. For the text of the amendment, see note 68 *supra*. However, because such an action has not been exempted explicitly from liability under 28 U.S.C. § 2680(h), and because courts generally have assumed, in the absence of contrary legislative intent, that the list is comprehensive, see note 50 *supra*, a cause of action for intentional infliction of emotional distress is cognizable under the FTCA. Crain v. Krehbiel, 443 F. Supp. 202 (N.D. Cal. 1977). In addition, the law of the state where the wrongful act takes place governs for actions brought under the FTCA, 28 U.S.C. § 1346(b) (1970), and the tort of outrage has been recognized in Virginia in Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974). *See generally* RESTATEMENT (SECOND) OF TORTS § 46 (1965).
83. The FTCA was intended originally to provide remedies for victims of the negligent acts
posed by statute a duty on the federal government to protect and care for all prisoners convicted of or charged with crimes against the United States.\textsuperscript{84} If federal officers negligently breach that duty, the Supreme Court has held that the injured party has a cause of action under the FTCA.\textsuperscript{85}

Lower courts have construed a cause of action under the FTCA to be the exclusive remedy and, therefore, to preclude an action against the federal employees individually.\textsuperscript{86} Generally, however, the FTCA is not considered to be the exclusive remedy available to the injured plaintiff except in the limited circumstances specified by statute.\textsuperscript{87} The Justice Department, moreover, had suggested that the draft of the intentional torts amendment be changed to provide an exclusive remedy against the United States.\textsuperscript{88} The question unanswered by \textit{Bivens} and raised by \textit{Loe} is not whether an action can be maintained simultaneously against the individual wrongdoers of governmental employees. Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955).

\textsuperscript{84} 18 U.S.C. § 4042 (1970). This statute provides in appropriate parts that:

The Bureau of Prisons, under the direction of the Attorney General, shall—

\begin{itemize}
  \item[2.] provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
  \item[3.] provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.
\end{itemize}


\textsuperscript{86} Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969) (citing United States v. Muniz, 374 U.S. 150 (1963), and Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966)). Although these cases refer only to negligence actions, the same analysis would be applicable to intentional torts under the FTCA.

\textsuperscript{87} The remedy against the United States is exclusive with regard to: (1) claims against government agencies, 28 U.S.C. § 2679(a) (1970); (2) claims arising out of the operation of motor vehicles on official business, 28 U.S.C. § 2679(b) (1970); and (3) malpractice claims against physicians, dentists, nurses, and certain other medical personnel employed by the government, 38 U.S.C. § 4116(a) (Supp. V 1975); 42 id. § 233(a). The complaint in Loe contained a number of allegations that would appear to be actionable as medical malpractice claims. The doctor that treated Loe is an employee of the local prison, however, and cannot be sued under the FTCA. \textit{See} note 78 \textit{supra} & accompanying text. Also, a malpractice action is not actionable under § 1983. \textit{See} note 119 \textit{infra}.

\textsuperscript{88} Undated draft of a Department of Justice bill, \textit{cited in} Boger, Giterstein & Verkuil, \textit{supra} note 67, at:512.
and the United States; such an action always has been permitted. The real issue in *Loe* is whether the courts can create a new cause of action based on a violation of the plaintiff's constitutional rights if Congress expressly has provided a remedy that derives directly from the defendant's conduct.

**ALTERNATIVE REMEDIES: BIVENS VS. THE FTCA**

A comparison of the two alternative remedies affords an opportunity to evaluate the necessity and appropriateness of the judicially created remedy under the particular facts of *Loe*. Examination of the key features of the FTCA and the corresponding elements of a *Bivens* claim reveals that the FTCA action is preferable. The important differences appear in provisions for administrative settlement, proper defendants, defenses, punitive damages, and equitable relief.

**Administrative Settlement**

The FTCA does not require any minimum amount to be put in controversy, although each claim must be submitted to the appropriate federal agency for administrative settlement before a remedy can be pursued in the courts. Similarly, under a *Bivens* cause of action a recent amendment to the jurisdictional requirements for federal courts waived the $10,000 minimum requirement for cases involving the United States, including those brought against any federal employee action in an official capacity. An attempt at

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89. See generally L. Jayson, supra note 74, at § 178.02 (points out that the federal employee who causes the injury is answerable primarily in tort and the government's liability, based on respondent superior, is derivative); see also Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693-94 (1949); Butler v. United States, 365 F. Supp. 1035, 1043 (D. Hawaii 1973). Although the FTCA has never been viewed as a bar to an action against the employee, judgment in an FTCA action is a complete bar to an action against the individual government agent. 28 U.S.C. § 2676 (1970). See also Boger, Gitenstein & Verkuil, supra note 67, at 537.


92. 28 U.S.C.A. § 1331(a) (1976). This section eliminates the requirement of any specific amount in controversy if the action is brought against the United States, any federal agency,
administrative settlement, however, need not precede an action under *Bivens*. Public policy, which encourages out-of-court settlements, would be served better by an action under the FTCA. In addition, those who have expressed fears of a possible deluge of new suits in federal courts would be somewhat pacified by a remedy that offers the opportunity of administrative settlement.

**Defendants**

FTCA actions are limited to suits against the federal government and create no cause of action against the employees individually. *Bivens*, however, allows an action against the individual offenders but not against the United States, the latter being immune from suit under the doctrine of sovereign immunity. At least one commentator, recognizing that the doctrine has no constitutional basis, has suggested that the immunity could be abrogated judicially under appropriate circumstances. The Supreme Court, however, when offered the opportunity to do so in *Bivens*, showed no such propensity. Thus, a plaintiff in a *Bivens*-type claim may recover only against the individual defendants, who are least likely to be able to satisfy a judgment. If brought under the FTCA, Loe's claim should not be prejudiced by the exclusion of the individuals from liability under that Act because the United States is obviously a
more attractive defendant. As noted earlier, one reason for the intentional torts amendment to the FTCA was congressional concern that because the individual agents were usually judgment-proof, the plaintiff had little chance of recovery.

Defenses

Under Bivens, a defense of qualified immunity is available to the federal marshals contingent upon their ability to show that they acted in good faith and that they reasonably believed that their conduct was lawful. Once established, the defense is a complete bar to their monetary liability. Although few courts have interpreted the liability of the United States under the new FTCA amendment, a recent decision in the Fourth Circuit, Norton v. United States, held that the United States could assert the good-faith defense of its agents. This holding is highly suspect and seems to contradict the legislative history of the amendment. Two other defenses, however, are available to the government under the FTCA. Section 2680(a) excludes all claims based upon any act or omission of a government employee either exercising due care or

98. In Bivens the Supreme Court seemed more concerned with providing the plaintiff a remedy than with the adequacy of the remedy itself, given that the names of the defendants were not known by the plaintiff. Also, the likelihood of recovery was diminished by the Second Circuit's decision on remand to allow the agents to assert a qualified immunity defense. Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972).

99. See note 70 supra & accompanying text.


101. 581 F.2d 390 (4th Cir. 1978).

102. Id. at 397.

103. The Fourth Circuit was unwilling to consider a Senate Memorandum of which it did not have a copy, id. at 396 n.11, but which was quoted in a law review article referred to by the plaintiff. The memorandum explicitly stated:

Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not co-terminous [sic] with that of the individual defendants.

performing a discretionary function.\textsuperscript{104} Neither of these defenses would bar recovery under the FTCA for conduct such as that alleged in \textit{Loe}, involving deliberate indifference to serious medical needs.

\textbf{Punitive Damages}

Punitive damages are not recoverable under the FTCA.\textsuperscript{105} This factor ordinarily would be significant in suits in which the intentional harm alleged is an affront to personal dignity rather than any physical injury. In \textit{Loe}, however, the importance of punitive damages is diminished in two respects. First, although the availability of punitive damages under \textit{Bivens} is unsettled, Justice Brennan’s concurring opinion, which asserts that the victim “is entitled to recover money damages for any injuries he had suffered as a result of the agent’s violations,”\textsuperscript{106} has been interpreted to disallow punitive damages for \textit{Bivens} actions.\textsuperscript{107} Similarly, a recent Supreme Court decision, \textit{Carey v. Piphus},\textsuperscript{108} arising out of a civil rights claim brought under section 1983,\textsuperscript{109} denied recovery of punitive damages and held that in the absence of proof of actual injury, the litigant could recover only nominal damages.\textsuperscript{110} Citing \textit{Bivens}, the Court stated that the cardinal principle governing the award of damages in cases involving the violation of constitutional rights is that of compensating the victim for the injury caused by the defendant’s breach of duty.\textsuperscript{111}

The second factor minimizing the importance of punitive dam-

\begin{itemize}
\item \textsuperscript{104} 28 U.S.C. \S\ 2680(a) (1970); \textit{see} Hatahley v. United States, 351 U.S. 173 (1956) (due care); Dalehite v. United States, 346 U.S. 15 (1953) (discretionary function).
\item \textsuperscript{106} 403 U.S. at 397. Punitive damages generally are justified on the basis that they deter antisocial conduct. Justice Harlan stated in his concurrence, however, that compensating the victim for the invasion of his constitutional rights is the overriding concern, even if the result has no effect on deterring future illegal conduct. \textit{Id.} at 408.
\item \textsuperscript{108} 435 U.S. 247 (1978).
\item \textsuperscript{109} \textit{See} note 16 \textsuperscript{supra}.
\item \textsuperscript{110} 435 U.S. at 248.
\item \textsuperscript{111} \textit{Id.} at 255. The Court stated in dictum that under certain circumstances punitive damages may be awarded with the specific purpose of deterring or punishing the violation of constitutional rights. \textit{Id.} at 257 n.11. The Court seemed to suggest, however, that malicious intent to violate constitutional rights would have to be demonstrated. \textit{Id.} Whether the wrong-doer would have to intend specifically to violate a constitutional right or only intend the conduct that results in such a violation is unclear.
\end{itemize}
ages in *Loe* is the situation of the defendants themselves. As noted above, the individual federal agents are often judgment-proof, and the chances of receiving substantial punitive damages are minimal, particularly if the defendant demands a jury trial. The history of section 1983 civil rights' actions indicates that juries are unsympathetic toward federal prisoners suing law enforcement officials, especially if the award of substantial damages would threaten the officials' livelihood. FTCA actions, in contrast, must be tried by the court; a jury trial is not an option available in an action against the United States.

**Equitable Relief**

The one significant obstacle to Loe's claim if asserted under the FTCA appears to be the unavailability of equitable relief. The plaintiff requested both a declaratory judgment on the constitutionality of federal procedures for transporting federal prisoners from local jails to hospitals and an injunction mandating the adoption of procedures to ensure adequate care in the future. Declaratory relief apparently is available under the FTCA on the grounds that "if the basic claim is within the coverage of the Tort Claims Act, a suit for declaratory judgment is simply a procedural step toward the ultimate determination of a claim for money damages." Injunctive relief, which is available under *Bivens*, may not be pursued under the FTCA. The plaintiff in *Loe* would not be prejudiced, however, if barred from injunctive relief because if he succeeds in proving the unconstitutionality of the existing procedures, changes necessary to make those procedures comply with constitutional standards would naturally follow, thereby eliminating the need for additional injunctive relief.

112. *See* note 70 *supra* & accompanying text.
115. *See* note 15 *supra* & accompanying text.
116. 1 L. *Jayson*, *supra* note 74, at § 211.02.
117. Some courts erroneously have read *Bivens* to provide, for the first time, equitable remedies against federal officials acting unconstitutionally. *See* Lehmann, *supra* note 5, at 562 n.203, and the cases cited therein. Federal courts long have exercised their equitable powers, as evidenced by the Supreme Court decision in Brown v. Board of Educ., 347 U.S. 483 (1954). *See* Bivens v. Six Unknown Named Agents, 409 F.2d 718, 723-24 (2d Cir. 1969), rev'd on other grounds, 403 U.S. 388 (1971).
FTCA As The Appropriate Remedy

As the preceding discussion indicates, the plaintiff in *Loe* had access to a congressionally authorized remedy similar to that provided by *Bivens*. Recognition of negligence liability under the FTCA would have provided a wider range of options than *Loe* had under *Bivens* or in a comparable civil rights action under section 1983. Language in *Bivens* suggests that if a similar remedy had been available to the plaintiff, the outcome might have been different. Yet one of the anomalies of the constitutional tort concept is that its primary focus is protection of the right violated by compensating the victim, using concepts that are imprecise and alien to the mainstream of traditional tort law. Although the conduct involved may be defined by both common law tort concepts and rights guaranteed by the Constitution, *Bivens*, in effect, recognizes the latter without reference to the former. The inevitable result is that congressionally provided remedies, incorporating common law tort concepts and intended to compensate invasions of federally protected rights, are ignored in favor of a collateral remedy created by the judiciary.

Such an approach to judicially created remedies is fraught with hazards. Congress has access to a wider range of remedial techniques than the courts and to an administrative machinery better suited to deal with essentially legislative functions. Congressional remedies are developed to handle the general problem rather than a particular fact situation. When the courts assume a legislative role, the results are colored by the limitations inherent in the adversary system particularly the tendency to limit possible solutions to those presented by the opposing parties. Neither party in *Loe* raised the possibility of a solution under the FTCA, though it would have benefited both to do so. Arguably, therefore, the court had no duty to raise the issue on its own initiative. But when the court seeks to create a previously unrecognized cause of action, it is obligated to evaluate all the possible alternatives before deciding whether the exigencies of the situation warrant such a remedy. If the wrong that

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120. Defendants, since they were being sued individually in their official capacity, could have impleaded the United States under the FTCA. United States v. Yellow Cab Co., 340 U.S. 543 (1954); see Boger, Gitenstein & Verkuil, *supra* note 67, at 535.
has injured the plaintiff can be remedied by existing legislative provisions, the court's inquiry need go no further, regardless of whether that remedy is aimed specifically at protecting a particular constitutional right.

Constitutional torts possibly may be considered not inconsistent with but complementary to the FTCA. This view comports with the spirit of the legislative history of the 1974 intentional torts amendment; however, certain factors counsel hesitation. First, although the legislative history reflects an explicit congressional intention to correct the type of wrong found in *Bivens*, Congress nonetheless phrased the amendment in terms of common law, rather than constitutional, torts. Had Congress intended to address constitutional torts, section 1983 could have been amended to include federal law enforcement officers. The failure of Congress to amend section 1983 could reflect an understanding that *Bivens* was to be limited to fourth amendment violations which could be encompassed within the common law analogues of trespass, invasion of privacy, assault, battery, and false imprisonment. Congress' decision to waive sovereign immunity for intentional conduct only for acts of federal law enforcement agents likewise reflects a conscious decision to limit the FTCA to something less than all constitutional violations. In addition, the jurisdictional provision of the FTCA provides that rules of liability of the state where the incident occurred govern the substantive aspects of the suit. The basic test is whether under the same circumstances a private individual would be liable under state law. Constitutional torts are based upon federal common law and have no counterpart on the state level; accordingly, the "private person" analogy under the FTCA would exclude a *Bivens* claim because private persons, by definition, cannot commit constitutional torts.

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122. See note 68 *supra*.
123. 28 U.S.C. § 1346(b) (1970) provides in part that the United States is liable 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. *See also* Richards v. United States, 369 U.S. 1 (1962).
Conclusion

The court in *Loe* erred when it extended *Bivens* to a fifth amendment due process claim. The plaintiff had access to an adequate remedy under the Federal Tort Claims Act that should have been pursued in lieu of the constitutional claim. The courts are, of course, the final arbiters of constitutional guarantees, but the creation of new judicial remedies should be limited to those occasions in which Congress either has failed to provide a remedy or has provided one that is inadequate. This approach preserves the integrity of the separation of powers between the legislative and judicial branches without weakening the courts’ ability to protect the constitutional rights they so jealously safeguard.

R.G.S.