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CONSTITUTIONAL TORTS AND THE FEDERAL TORT CLAIMS ACT

*Michael W. Dolan**

I. INTRODUCTION

The relatively recent expansion of the liability of federal employees for so-called constitutional torts and the accompanying contraction of the immunity of those employees against suits for such torts have resulted in significant problems for the federal government, its employees, and even for victims of official misconduct. After briefly describing the law of constitutional torts and official immunity, this article will examine a proposal to amend the Federal Tort Claims Act to make the Government the exclusive defendant in constitutional tort suits.

II. EMPLOYEE LIABILITY FOR CONSTITUTIONAL TORTS—THE *Bivens* CASE

Much has been written¹ about the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Nar-*

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The opinions contained in this article are those of the author and do not necessarily represent those of the United States Department of Justice.

1. See, e.g., 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 articles cited at 531 n.2.

cotics,² which held that a specific congressional authorization was not needed to make individual employees liable to persons whose fourth amendment rights had been violated.

Prior to 1971, when *Bivens* was decided, plaintiffs had little success convincing courts that government employees should be liable in damages to individuals whose constitutional rights were violated by the actions of those employees. For example, the plaintiffs in *Bell v. Hood*,³ sought to recover damages in excess of \$3,000 against a number of agents of the Federal Bureau of Investigation alleging that plaintiffs' rights under the fourth and fifth amendments were abridged by defendants' warrantless searches and arrests. The Supreme Court held that, contrary to the ruling of the district court and the court of appeals,⁴ plaintiffs' claims could not be dismissed for want of federal jurisdiction. Justice Black, speaking for the Court, stated that while the issue of whether money damages could be obtained against federal officers violating the fourth and fifth amendments had never been decided by the Court, when federally protected rights have been violated, "courts will be alert to adjust their remedies so as to grant the necessary relief."⁵ On remand, however, the district court ruled that neither the fourth or fifth amendment nor any federal statute created a cause of action for damages.⁶

Whenever a federal officer or agent exceeds his authority, in so doing he no longer represents the Government and hence loses the protection of sovereign immunity from suit. . . . But inasmuch as the prohibition of the Fourth and Fifth Amendments do not apply to individual conduct, the Amendments themselves, when violated, cannot be the basis of any cause of action against individuals.⁷

In *Bivens*, the Court ignored this seeming dilemma by holding that a plaintiff could recover damages for any injuries suffered as a result of a violation of the fourth amendment by federal agents; the

2. 403 U.S. 388 (1971).

3. 327 U.S. 678 (1946).

4. *United States v. Bell*, 48 F. Supp. 986 (S.D. Cal. 1943), *aff'd sub nom*, *Bell v. Hood*, 150 F.2d 96 (9th Cir. 1945).

5. 327 U.S. at 684 (footnote omitted).

6. 71 F. Supp. 813, 820-21 (S.D. Cal. 1947).

7. *Id.* at 817 (citations omitted).

question of immunity was remanded to the court of appeals.⁸ The apparent problem of recovering from a government that can violate constitutional rights, but can also assert sovereign immunity, or from individuals who cannot assert sovereign immunity, but also cannot, by themselves, violate constitutional rights, was never addressed.⁹

The effect of *Bivens*, and its recognition of a "constitutional tort," was immediate and substantial. The Department of Justice has estimated that several thousand *Bivens*-based lawsuits have been filed since 1971.¹⁰ Indeed, the effect of *Bivens* may not be limited to constitutional tort suits. Former Attorney General Griffin B. Bell has written that federal employees are being increasingly sued as individuals on common law tort theories for acts performed within the scope of their duties.¹¹ The recent increase in the number of tort claims against government employees has been described as "dramatic."¹²

Interestingly, on remand in *Bivens*, the Second Circuit foresaw the development of the law of government employee immunity which culminated in *Butz v. Economou*,¹³ by holding that federal law enforcement agents were entitled to qualified, but not absolute, immunity.¹⁴

III. OFFICIAL IMMUNITY—*Butz v. Economou*

The law of immunity for torts committed in connection with official functions is not new. In *Bradley v. Fisher*,¹⁵ judges were held to be absolutely immune from civil suits regarding their judicial acts,

8. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. at 397-98.

9. See Lehmann, *supra* note 1 for a discussion of the facts and lower court proceedings in *Bivens*.

10. 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 Cong., 1st Sess., 96-19 at 2 (1979) (statement of then Deputy Attorney General Benjamin R. Civiletti) [hereinafter cited as *House 96th Cong. Hearings*].

11. Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. LEGIS. 1, 2 (1979).

12. See Bermann, *Integrating Governmental and Office Tort Liability*, 77 COLUM. L. REV. 1175, 1180 (1977). See also Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501, 501-03 (1977).

13. 438 U.S. 478 (1978).

14. 456 F.2d 1339 (2d Cir. 1972).

15. 80 U.S. (13 Wall.) 335 (1871). See also *Stump v. Spertman*, 435 U.S. 349 (1978).

regardless of motive. State legislators enjoy a similar immunity under *Tenney v. Brandhove*.¹⁶ In *Spalding v. Vilas*,¹⁷ the Postmaster General was sued on an allegation that he had maliciously circulated information which he knew to be false and which was intended to deceive, to the plaintiff's detriment. In sustaining the Postmaster General's argument of absolute immunity, the Court noted: "It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the Government, if [the head of an Executive Department] were subjected to any [inquiry into the motives that control his official conduct in a civil suit for damages]." ¹⁸

The high water mark of government employee immunity occurred with the Court's 1959 ruling in *Barr v. Matteo*.¹⁹ *Barr* involved a claim of libel with malice by employees of the Office of Rent Stabilization against the Acting Director who had issued a press release announcing his intention to suspend the plaintiffs because of their proposed handling of certain agency funds. In a five to four decision, the Court extended the rule of absolute immunity from the *Vilas* application to executive officers of cabinet rank to other employees of the executive branch. Justice Harlan's plurality opinion noted:

The privilege [of absolute immunity] is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.²⁰

Justice Harlan was obviously influenced by the following passage

16. 341 U.S. 367 (1951). Of course, members of Congress are guaranteed an absolute immunity under art. I, § 6 of the Constitution. See *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966). But see *Hutchinson v. Proxmire*, 99 S. Ct. 2675 (1979).

17. 161 U.S. 483 (1896).

18. *Id.* at 498.

19. 360 U.S. 564 (1959).

20. *Id.* at 572-73 (footnote omitted).

in Judge Learned Hand's opinion in *Gregoire v. Biddle*,²¹ which was to become somewhat of a rallying cry for absolute immunity:

[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.²²

But, in a series of decisions involving civil rights violations by state officials, the Court began to move away from the absolute immunity rule of *Barr v. Matteo*. In *Pierson v. Ray*,²³ plaintiffs, who were arrested by local police and tried before a municipal police justice for attempting to use a segregated bus terminal waiting room, brought an action for damages under 42 U.S.C. § 1983²⁴ against the individual policemen and the municipal judge. The Court determined that although the municipal judge retained the absolute judicial acts immunity announced in *Bradley v. Fisher*,²⁵ "[t]he common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one."²⁶ The claims against the individual policemen were remanded for a determination of whether the defendants were entitled to qualified immunity. The Court subsequently defined qualified immunity in *Scheuer v. Rhodes*,²⁷ a section 1983 case holding that a state governor and several high state officials could claim qualified, but not absolute, immunity:

21. 177 F.2d 579 (2d Cir. 1949).

22. *Id.* at 581.

23. 386 U.S. 547 (1967).

24. Although more properly described as section 1 of the Civil Rights Act of 1871, 17 Stat. 13, this statute will be hereinafter cited by its popular designation—§ 1983. For a thorough discussion of the law of § 1983, see P. HARDY & J. WEEKS, *PERSONAL LIABILITY OF PUBLIC OFFICIALS UNDER FEDERAL LAW* (1979).

25. 80 U.S. (13 Wall.) 335 (1871).

26. *Pierson v. Ray*, 386 U.S. at 555.

27. 416 U.S. 232 (1974).

"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."²⁸ Other section 1983 cases which have limited state officials to qualified immunity are *Wood v. Strickland*²⁹ (school administrator), *O'Connor v. Donaldson*³⁰ (state hospital superintendent), and *Procunier v. Navarette*³¹ (prison administrator).

In *Imbler v. Pachtman*,³² also a section 1983 case, the Court, following its injunction to conduct "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it,"³³ accorded absolute immunity to a state prosecutor, stating that:

The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.³⁴

The most recent major decision by the Supreme Court involving immunity for federal employees is *Butz v. Economou*.³⁵ The case involves an action by a commodity futures trader against a number of officials in the Department of Agriculture asking damages on a claim that the federal employees had commenced an investigation and administrative proceeding against the plaintiff in retaliation for his criticism of that agency. Among plaintiff's causes of action were claims of violations of the first amendment and of the due process clause of the fifth amendment. Apparently relying on *Barr*,

28. *Id.* at 247-48.

29. 420 U.S. 308 (1975).

30. 422 U.S. 563 (1975).

31. 434 U.S. 555 (1978).

32. 424 U.S. 409 (1976).

33. *Id.* at 421.

34. *Id.* at 422-23 (footnote omitted).

35. 438 U.S. 478 (1978).

the district court ruled that the individual defendants were entitled to absolute immunity.³⁶ The Second Circuit reversed, stating that when the rule of *Barr v. Matteo* is considered in light of the section 1983 cases discussed above, the individual defendant officials were only entitled to qualified immunity.³⁷ Before the Supreme Court, the Government cited *Barr* and argued for absolute immunity.³⁸ Speaking for the Court, Mr. Justice White stated that *Spalding* and *Barr* were not true absolute immunity cases because those decisions never examined whether the defendants acted outside the outer perimeter of their authority. Citing the section 1983 cases, the Court ruled that federal officials should be held to no different standard for constitutional violations than their state counterparts.³⁹ "We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."⁴⁰ The Court noted that such "exceptional situations" included not only situations involving judges and prosecutors, but also those involving agency officials performing analogous functions.⁴¹ Having remanded the question of immunity, the Court made no ruling on whether a cause of action for damages could be implied under the first or fifth amendments. The opinion in *Economou* reflects the view that because of the constitutional nature of a claim, it may not only strike a parallel with the section 1983 cases, but may also make it particularly important for federal officials to be held accountable for their conduct:

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests as liberty, property, and

36. *Id.* at 480.

37. *Economou v. United States Dep't of Agriculture*, 535 F.2d 688 (2d Cir. 1976).

38. *Butz v. Economou*, 438 U.S. at 485.

39. *Id.* at 500.

40. *Id.* at 507 (footnote omitted).

41. *Id.* at 516.

free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.⁴²

IV. CURRENT CONSTITUTIONAL TORT LAW—MORE QUESTIONS THAN ANSWERS?

The law of constitutional torts is still far from clear. On remand in *Economou*, the district court read the Court's opinion as requiring *Barr* absolute immunity for common law claims, even in the face of allegations of malice, if the defendants could establish that their acts were within the outer perimeter of their lines of duty and discretion.⁴³ Four days after announcing its decision in *Economou*, the Supreme Court denied a writ of certiorari in *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*,⁴⁴ an *en banc* decision of the District of Columbia Circuit which held that the absolute immunity of the defendant government employees mandated the dismissal of a common law action for defamation. Judge Leventhal's opinion in *Expeditions Unlimited* indicates, however, that the circuit might have reached a different result if the cause of action were for a constitutional rather than a common law tort.⁴⁵ Other circuits have limited qualified immunity to constitutional torts, while retaining absolute immunity for com-

42. *Id.* at 505-06. See Buxbaum, *Liability of Federal Officials in Damage for Acts Unconstitutional or in Excess of Their Authority: Expanding the Concept of the Rule of Law*, 8 CAP. U. L. REV. 465 (1979).

43. *Economou v. Butz*, 466 F. Supp. 1351, 1358 (S.D.N.Y. 1979).

44. 566 F.2d 289 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

45. While damage to reputation is not inconsequential, and can, under some circumstances, qualify for procedural protection under the due process clause, it is not as basic to a free society as the Fourth Amendment right to be free from arbitrary search and seizure of person or property, a right so precious that a remedy in damages has been inferred from the Constitution itself.

Id. at 294 (footnote omitted).

mon law torts.⁴⁶ But should so decisive a question as absolute versus qualified immunity turn on whether a tort claim is based on common law or the Constitution? In *Paul v. Davis*,⁴⁷ the Supreme Court declared that a defamation tort does not rise to the level of a constitutional violation. When do the common law libel and defamation claims of *Barr*, *Spalding*, and *Expeditions Unlimited* become the constitutional claims of *Economou*, itself a case arising from the public acts and statements of public officials?⁴⁸ And when will plaintiffs' counsel begin to plead common law claims as constitutional? Certainly, the Court in *Economou* was aware of the dangers of "artful pleading": "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss."⁴⁹

But what is a "compensable claim for relief under the Federal Constitution?" *Economou* sought to answer the official immunity

46. See *Granger v. Marek*, 583 F.2d 781, 784 (6th Cir. 1978); *Evans v. Wright*, 582 F.2d 20, 21 (5th Cir. 1978).

47. 424 U.S. 693 (1976).

48. Judge Robinson's concurrence in *Expeditions Unlimited* points out the inconsistencies well:

Of course, congressional specification in Section 1983 of a right to monetary relief rules out judicial interposition of absolute immunity, save only where a court may infer that Congress did not intend the statute to operate. On the other hand, damage actions against federal officials for transgression of common law norms, such as the defamation action that was *Barr*, do not encounter any manifestation of legislative will that might stifle judicial implication of unlimited and unqualified immunity. What brings this doctrinal consonance to the point of discord is the still-developing body of law shaping the suability of federal functionaries for damages charged to unconstitutional depredations. There, as in the situation *Barr* epitomizes, the judicial hand is unfettered by the legislature's command; yet, since the Section 1983 immunity decisions have been deemed authoritative, the immunity in vogue in that area may be either qualified or absolute. The upshot is that one kind of judicially-fashioned immunity is available to federal officials in fending off damage suits founded on constitutional claims, and quite another—the *Barr*-type—to such officials in repulsing suits invoking the common law.

The incongruity between immunities available to the same officer exercising the same functions, depending only upon the genesis of the legal standard by which his behavior is to be measured, strikes at the very foundations of the *Barr* rule. Many if not most constitutional torts have analogues in the common law.

566 F.2d at 301-02 (footnotes omitted).

49. *Butz v. Economou*, 438 U.S. at 507-08.

questions reserved in *Bivens*.⁵⁰ Although the constitutional claims presented in *Economou* concerned the first and fifth amendments,⁵¹ the Court was careful not to extend its recognition of constitutional torts beyond those for violations of the fourth amendment as declared by *Bivens*.⁵² Lower courts, however, have not proved so hesitant and have expanded the realm of constitutional torts beyond violations of the fourth amendment to violations of the first, fifth, sixth, eighth, ninth, thirteenth and fourteenth amendments.⁵³

The only major post-*Bivens* and *Economou* constitutional tort case to reach the Supreme Court, *Davis v. Passman*,⁵⁴ held that a violation of the due process clause of the fifth amendment may give rise to a cause of action for damages resulting from employment discrimination based on sex. In so holding, the Court applied a tripartite test: (1) whether the plaintiff asserts a constitutionally protected right; (2) whether the plaintiff has stated a cause of action that asserts that right; and (3) whether relief in damages is an appropriate remedy.⁵⁵ In its consideration of the last element, the Court noted that not every tort by a federal official may be redressed in damages and that the need for damages relief might not be necessary if Congress had created an equally effective alternative.⁵⁶ The observation that not every tort by a federal official may be redressed in damages is important. In *Beard v. Mitchell*,⁵⁷ a Seventh Circuit panel observed: "The loss of constitutionally protected rights, whether life, liberty or property, does not automatically translate into a cause of action against a government actor."⁵⁸

50. *Id.* at 486.

51. *Id.* at 483.

52. *Id.* at 486 n.8.

53. See Lehmann, *supra* note 1 at 566-72 and accompanying notes. Interestingly, a Seventh Circuit panel has questioned whether qualified immunity would be available to employees defending against an eighth amendment *Bivens* claim. See *Chapman v. Pickett*, 586 F.2d 22, 28 (7th Cir. 1978).

54. 99 S. Ct. 2264 (1979).

55. *Id.* at 2271.

56. *Id.* at 2278.

57. 604 F.2d 485 (7th Cir. 1979).

58. The Supreme Court recently noted in a § 1983 case: "Just as [m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner, *Estelle v. Gamble*, 429 U.S. 97, 106 (1978), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker v. McCollan*, 99 S. Ct. 2689, 2696 (1979).

The question of an equally effective alternative remedy brings us, of course, to the Federal Tort Claims Act.⁵⁹ The Tort Claims Act makes the government liable for tort claims based on the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment, such liability to be determined "in the same manner and to the same extent as a private individual under like circumstances."⁶⁰ Although Congress has subsequently enacted several specific provisions that make the government the exclusive defendant in certain situations,⁶¹ nothing in the basic Tort Claims Act prevents a plaintiff from bringing suit against the individual employee either directly or as a co-defendant with the government.⁶²

Before 1974, subsection 2680(h) of the Act excluded "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." This exception, which has commonly been assumed to preclude government liability for the intentional torts of government employees,⁶³ was amended in 1974 to exclude from the exception "acts or omissions of investigative or law enforcement officers of the United States Government arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."⁶⁴ Obviously, the actions giving rise to the torts listed in the 1974 amendment are also the stuff of which *Bivens*-type claims are made, and for that reason the origins of the 1974 amendment are linked to the question of whether the coverage of a tort claim under

59. 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680 (1976).

60. 28 U.S.C. § 2674 (1976). See also 28 U.S.C. §§ 1346(b) and 2672 (1976).

61. *E.g.*, 28 U.S.C. § 2679(b) (1976) (drivers of motor vehicles); 10 U.S.C. § 1089(a) (1976), 22 U.S.C. § 817(a) (1976), 38 U.S.C. § 4116(a) (1976), 42 U.S.C. §§ 233(a), 2458a.(a) (1976) (medical personnel employed by the Department of Defense and the Central Intelligence Agency, Department of State, Veterans Administration, Public Health Service, and the National Aeronautics and Space Administration); 26 U.S.C. § 7426(a) (1976) (employees levying on property to collect federal taxes are immune from suit brought by persons other than the taxpayer claiming an interest in the property); 28 U.S.C. § 1498 (1976) (employees sued for patent infringement); 46 U.S.C. § 745 (1976) (employees sued for unlawful seizure of sea going vessels).

62. *Neely v. Blumenthal*, 458 F. Supp. 945, 954 (D.D.C. 1978).

63. See *United States v. Muniz*, 374 U.S. 150, 163 (1963).

64. 28 U.S.C. § 2680(h) (1976), as amended by Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974).

the Act forecloses *Bivens*, or constitutional tort, claims.

In *Torres v. Taylor*,⁶⁵ Judge Weinfeld of the Southern District of New York sustained the government's argument that a *Bivens* action by an injured prisoner for claimed violations of the fifth and eighth amendments was foreclosed by the presence of a remedy under the 1974 amendment to subsection 2680(h) of the Federal Tort Claims Act: "Thus one important limitation upon the scope of *Bivens* is 'that the existence of an effective and substantial federal statutory remedy for the plaintiffs obviates the need to imply a constitutional remedy.'" ⁶⁶ A similar result was obtained in *Hernandez v. Lattimore*⁶⁷ in which Judge Brieant of the same court dismissed an injured prisoner's *Bivens* claim under the eighth amendment noting: "The *Bivens* language that a remedy, to be implied, need not be indispensable or necessary was made in the context of *no existing federal remedy*. . . . For Hernandez, there is an existing federal remedy that protects the rights he asserts."⁶⁸ However, on appeal, a panel of the Second Circuit disagreed, declaring that the existence of a remedy against the government under the 1974 amendment did not foreclose a *Bivens* action against the individual defendants.⁶⁹ Rather than relying on the opinion in *Bivens*, the Second Circuit panel examined the legislative history of the 1974 amendment which it found "demonstrates a congressional intent to provide a remedy against the Federal Government in addition to, but not wholly in the place of, the private cause of action created by *Bivens*. . . ." ⁷⁰ The court went on, however, to deny the plaintiff's claim because of the failure to establish a violation of the eighth amendment. "[W]e recognize, as have other courts, that some common law torts and some statutory torts, although actionable in state forums, do not rise to the level of constitutional

65. 456 F. Supp. 951 (S.D.N.Y. 1978).

66. *Id.* at 953 citing *Mahone v. Waddle*, 564 F.2d 1018, 1024-25 (3d Cir. 1977) (a § 1983 case).

67. 454 F. Supp. 763 (S.D.N.Y. 1978).

68. *Id.* at 769 (emphasis in original).

69. *Hernandez v. Lattimore*, No. 78-2098 (2d Cir. June 7, 1979).

70. *Id.*, slip op. at 2898. The § 2680(h) amendments were clearly a Congressional reaction to a well publicized incident colloquially known as the "Collinsville Raids" which occurred on April 23, 1973. See *Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976); Boger, Gitenstein, and Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497 (1976).

violations.”⁷¹

But should the congressional intent of section 2680(h) control the question of whether a cause of action for damages can be implied by a constitutional violation? Both the majority opinion of Justice Brennan and the concurring opinion of Justice Harlan in *Bivens* noted the lack of an alternative remedy.⁷² Justice Harlan was succinct: “For people in *Bivens*’ shoes, it is damages or nothing.”⁷³ *Bivens* actions have not been implied for claims arising from federal employment discrimination when Title VII of the amended Civil Rights Act of 1964 serves to vindicate the same rights sought to be protected by the damage claims.⁷⁴ In *Economou*, the Supreme Court observed that “[t]he presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution.”⁷⁵ In *Davis v. Passman*, Ms. Davis also lacked “alternative forms of judicial relief” and the Court declared that “were Congress to create equally effective alternative remedies, the need for damages relief might be obviated.”⁷⁶ It is likely that the question of whether a Tort Claims Act remedy precludes a *Bivens* action will be answered by the Court this term when it decides *Carlson v. Green*,⁷⁷ a case involving a claimed violation of the eighth amendment caused by inadequate medical treatment of a federal prisoner.

Certainly *Bivens* actions do not lie against the United States.⁷⁸ As Justice Harlan noted in his *Bivens* concurrence: “However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.”⁷⁹ Nevertheless, constitutional torts claims other than those specifically mentioned in 28 U.S.C. § 2680(h) have been made under the Tort Claims Act. In *Founding Church of*

71. *Hernandez v. Lattimore*, slip op. at 2898, 2899. A similar result has been obtained with respect to § 1983 cases. See *Baker v. McCollan*, 99 S. Ct. 2689 (1979).

72. 403 U.S. at 397, 410.

73. *Id.*

74. *Neely v. Blumenthal*, 458 F. Supp. 945, 947 (D.D.C. 1978).

75. 438 U.S. at 503.

76. 571 F.2d 793 (5th Cir.), cert. granted, 439 U.S. 925 (1978).

77. 581 F.2d 669 (7th Cir. 1978), cert. granted, 99 S. Ct. 2880 (1979).

78. *Crain v. Krehbiel*, 443 F. Supp. 202, 211 (N.D. Cal. 1977).

79. 403 U.S. at 410.

Scientology of Washington, D.C. v. Director, Federal Bureau of Investigation,⁸⁰ Judge Richey of the district court for the District of Columbia allowed a plaintiff to proceed against the United States under the Tort Claims Act for claimed violations of plaintiff's first, fourth, fifth and ninth amendment rights. However, an inspection of the opinion,⁸¹ in which the court states that a constitutional tort theory is sufficient to sustain a Tort Claims Act action, shows primary reliance on *Norton v. United States*,⁸² a case in which tortious conduct was already specifically covered by the Tort Claims Act under 28 U.S.C. § 2680(h), and on the district court opinion in *Birnbaum v. United States*,⁸³ the reasoning of which was specifically rejected by the court of appeals as described below. Some courts have held the government vicariously liable in *Bivens* actions under the doctrine of respondeat superior; others, noting that a *Bivens* action is a federal analogue to a section 1983 suit which bars the doctrine of respondeat superior, have not.⁸⁴

Revelations of a Central Intelligence Agency program of mail openings which operated from approximately 1953 until 1973 resulted in a number of Tort Claims Act lawsuits.⁸⁵ In *Cruikshank v. United States*,⁸⁶ the United States District Court for the District of Hawaii quickly found that the plaintiffs could sustain an action for damages for intentional invasion of privacy under 28 U.S.C. § 1346(b), and that the discretionary function,⁸⁷ the postal,⁸⁸ and intentional torts exceptions⁸⁹ to the Tort Claims Act did not relieve the government of liability. District courts of the District of Connecticut and the Eastern District of New York reached the same conclusion in *Avery v. United States*⁹⁰ and *Birnbaum v. United States*,⁹¹ respectively. In a detailed opinion in *Birnbaum*, Judge

80. 459 F. Supp. 748 (D.D.C. 1978).

81. *Id.* at 753.

82. 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978).

83. 436 F. Supp. 967 (E.D.N.Y. 1977).

84. See Lehmann, *supra* note 1 at nn. 258-61.

85. A partial list is found in *Avery v. United States*, 434 F. Supp. 937, 940 (D. Conn. 1977) at n.5. See also Comment, 1978 B.Y.U. L. REV. 355 at n.6.

86. 431 F. Supp. 1355 (D. Hawaii 1977).

87. 28 U.S.C. § 2680(a) (1976).

88. 28 U.S.C. § 2680(b) (1976).

89. 28 U.S.C. § 2680(h) (1976).

90. 434 F. Supp. 937 (D. Conn. 1977).

91. 436 F. Supp. 967 (E.D.N.Y. 1977).

Weinstein found that a violation of plaintiffs' federal constitutional rights was a basis for Tort Claims Act liability under the law of the state in which the tort occurred.⁹² On appeal, however, a Second Circuit panel specifically rejected the motion that the government could be made liable under the Tort Claims Act solely for constitutional torts.

Since congress restricted the basis for liability under the Act to the "law of the place," we think that it would be a *tour de force* to consider direct violations of the federal constitution as 'local law' torts. Such a rule might be tantamount to a bypass of the sovereign immunity of the United States without the consent of Congress.⁹³

The question of when a *Bivens* action should become barred by time has also not been uniformly resolved. While courts generally agree that the most closely analogous state statute of limitations should control in situations in which a federal cause of action lacks a federal statute of limitations,⁹⁴ courts have not agreed upon which type of state statute is the most closely analogous to a *Bivens* action. A reading of two recent opinions, *Regan v. Sullivan*⁹⁵ and *DeMalherbe v. International Union of Elevator Constructors*⁹⁶ will serve to illustrate the complexity of the application of what would otherwise be a relatively simple rule.

V. CURRENT CONSTITUTIONAL TORT LAW—IS THE PUBLIC INTEREST BEING SERVED?

What was once a vague awareness on the part of government employees of their constitutional tort liability has quickly become a fear of entanglement in expensive, time consuming, and possibly bankrupting litigation. Representatives of various federal employee groups have noted that it is not only the threat of an actual judgment which plagues potential constitutional tort suit defendants, but also the exhausting burdens of discovery and the possibility of

92. *Id.* at 983.

93. *Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir. 1978).

94. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975); *Lehmann*, *supra* note 1 at 545-51.

95. 557 F.2d 300 (2d Cir. 1977).

96. 449 F. Supp. 1335 (N.D. Cal. 1978).

pre-judgment liens on bank accounts, personalty, and realty.⁹⁷ Except for several limited situations in which the government is authorized to provide liability insurance,⁹⁸ employees have been unable to obtain liability insurance coverage.⁹⁹ Suggestions have even been made that the fear of civil liability litigation has reached the point where vigorous law enforcement is being adversely affected.¹⁰⁰ Former Attorney General Bell recently described the morale of the federal service as having "suffered as employees have been dragged through drawn-out lawsuits."¹⁰¹

Although the government cannot pay the judgment of an employee successfully sued for actions taken within the scope of his employment, in most situations¹⁰² it can provide legal representation.¹⁰³ Although normally such representation is provided by Department of Justice attorneys,¹⁰⁴ the Department believes itself ob-

97. See *Hearings on the Federal Tort Claims Act Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 2d Sess., 54 (1978) (testimony of John S. McNerney, National President, Federal Criminal Investigators Association, and Assistant Attorney General Barbara Babcock) [hereinafter cited as *House 95th Cong. Hearings*] at 33, 76.

98. See, e.g., 10 U.S.C. § 1089(f) (1976), 22 U.S.C. § 817(f) (1976), 38 U.S.C. § 4116(e) (1976), and 42 U.S.C. §§ 233(f), 2458a(b) (1976) (medical malpractice insurance authorized for employees of the Department of Defense or the Central Intelligence Agency, Department of State, Veterans Administration, Public Health Service, and National Aeronautics and Space Administration respectively).

99. See *House 95th Cong. Hearings*, *supra* note 97 at 33 (statement of John S. McNerney).

100. See *Amendments to the Federal Tort Claims Act: S. 2117, S. 2868 and S. 3314, Joint Hearing 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. (June 15, 1978) (testimony of John S. McNerney) [hereinafter cited as *Senate 95th Cong. Hearings*] at 399; *House 95th Cong. Hearings*, *supra* note 97 at 36 (testimony of Robert D. Gordan, Secretary-Treasurer, International Conference of Police Associations).

101. See Bell, *supra* note 11 at 6.

102. Some exceptions are 26 U.S.C. § 7423 (1976) (liability for "anything done" in the due performance of official duties under the internal revenue laws); 10 U.S.C. § 1089(f) (1976), 22 U.S.C. § 817(f) (1976), 38 U.S.C. § 4116(e) (1976), 42 U.S.C. §§ 233(f), 2458a(b) (1976) (medical malpractice suits against medical personnel of the Department of Defense and the Central Intelligence Agency, Department of State, Veterans Administration, Public Health Service and the National Aeronautics and Space Administration).

103. As authority for its representation of employees sued for acts within the scope of their employment, the Department of Justice cites 28 U.S.C. § 516 (1976). For a fuller description of this authority see Bell, *supra* note 11 at 7, n.25.

104. See Bell, *DICTA: Federal Tort Claims Act*, *Virginia Law Weekly*, Nov. 17, 1978, at 3, col. 5.

ligated to retain, at government expense, private counsel for employees sued for acts occurring within the scope of their employment whenever individual defendants raise inconsistent defenses, or are under criminal investigation, or when the best interests of the defendant require a defense which conflicts with the broader interests of the government.¹⁰⁵ As former Attorney General Bell has written: "The private counsel program is controversial and costly, extends the duration of cases, makes them difficult to settle, and permits unsupervised private attorneys paid by taxpayers to raise arguments inconsistent with litigation policies of the United States."¹⁰⁶ The Department of Justice is presently defending over one thousand cases against individual government employees.¹⁰⁷

It is questionable whether current constitutional tort law is adequate to compensate the victims of constitutional torts. Only seven of the several thousand constitutional tort suits brought since *Bivens* have resulted in judgments against a federal employee, and six of these seven are still in varying stages of appeal.¹⁰⁸ An obvious reason for a constitutional tort plaintiff's limited opportunity for recovery is the employees' immunity which, even if qualified by *Economou*, permits him to assert the defense of reasonable good faith.¹⁰⁹ Were a plaintiff to successfully plead and prove liability, he still must face the burden of proving damages resulting from the violation of a constitutional right¹¹⁰ and collecting those damages from the government employee who typically has limited financial resources.

Of course, to the extent that the unconstitutional conduct can be reached under the 1974 amendments to 28 U.S.C. § 2680(h), the government would be liable under the Tort Claims Act. Under sec-

105. See Bell, *supra* note 11 at 8. See also, June 20, 1979 statement of then Deputy Attorney General Civiletti, *supra* note 10 at 3.

106. Bell, *supra* note 11 at 9. The Department has retained approximately 75 private law firms under its private counsel program. It has been estimated that the Department has paid out over \$2 million to private attorneys since 1976. June 20, 1979 statement of then Deputy Attorney General Civiletti, *supra* note 10 at 3.

107. Bell, DICTA, *supra* note 104.

108. See Bell, *supra* note 11 at n.5; *House 96th Cong. Hearings*, *supra* note 10 at n.9 (June 20, 1979 statement of then Deputy Attorney General Civiletti).

109. See note 40 *supra*, and accompanying text.

110. For an example of how difficult the proof of damages can be, see the litigation culminating in *Tatum v. Morton*, 562 F.2d 1279 (D.C. Cir. 1977) and *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979).

tion 2680(h), the government has effectively waived sovereign immunity for torts arising from assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process, but only if the tortfeasor is an "investigative or law enforcement officer." The government can defend such a suit by claiming the qualified immunity of the tortfeasor employee.¹¹¹ Interestingly, the limitations of the 1974 amendments were recognized by the amendments' chief sponsor, Senator Sam Ervin, who described them as "a minimal first step in providing a remedy against the Federal Government for innocent victims of federal law enforcement abuses."¹¹² They have subsequently been characterized as "only a partial step toward proper financial accountability by the federal government for the injuries occasioned by its employees."¹¹³ Of course, even if a constitutional tort suit could be maintained under either the 1974 amendments or a constitutional tort recognized by state law, the government could still assert other section 2680 exceptions to the Tort Claim Act, such as the discretionary function exception,¹¹⁴ or the foreign country exception.¹¹⁵

Commentators have already noted that new legislation may be the only means by which the law of government and officer torts can be made to serve the public interest.¹¹⁶

VI. THE LAW OF CONSTITUTIONAL TORTS—A LEGISLATIVE SOLUTION?

Probably the earliest recognition of the possibility of a legislative solution to many of the uncertainties created by *Bivens* is in the opinion itself, in which Justice Harlan's concurrence suggested that constitutional torts committed by federal employees should be compensable "according to uniform rules of federal law."¹¹⁷ In *Pass-*

111. *Norton v. United States*, 581 F.2d 390 (4th Cir.), *cert. denied*, 434 U.S. 831 (1978).

112. S. REP. No. 588, 93rd Cong., 1st Sess. 4 (1973).

113. Boger, Gitenstein, and Verkuil, *supra* note 70 at 539. "The opportunity, while the public was aroused by the Collinsville raid, to get rid of the exceptions of the deliberate torts was missed. Injustice still results, usually in less sensational ways than in Collinsville." K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 25.08-1 (1976).

114. 28 U.S.C. § 2680(a) (1976).

115. 28 U.S.C. § 2680(k) (1976).

116. *See* Bermann, *supra* note 12 at 1189.

117. 403 U.S. at 409. *See* Boger, Gitenstein and Verkuil, *supra* note 70 at 511.

man, as previously noted,¹¹⁸ the Court referred to a need for a congressionally created equally effective alternative remedy. Commentators have suggested that the government should assume more of the liability now borne by employees.¹¹⁹

In 1973, the Department of Justice proposed legislation which would have made the United States exclusively liable¹²⁰ for the constitutional and common law torts of its employees.¹²¹ Although the proposal was the subject of hearings before a House Judiciary Subcommittee, its legislative progress was quickly overtaken by the en-

118. See note 56 *supra*, and accompanying text.

119. 2 F. HARPER AND F. JAMES, *THE LAW OF TORTS* § 29.15 at 1664 (1956). "In the long run, abolishing sovereign immunity for police torts will not be enough. The suit by the injured party against the officer has to be barred." K. DAVIS, *supra* note 113 at § 26.03.

120. The presence of a number of isolated exclusive liability statutes has created a sense of unfairness for employees and confusion for plaintiffs. See, e.g., 28 U.S.C. § 2679(b) (1976) (drivers of motor vehicles); 10 U.S.C. § 1089(a) (1976), 22 U.S.C. § 817(a) (1976), 38 U.S.C. § 4116(a) (1976), 42 U.S.C. §§ 233(a), 2458a.(a) (1976) (medical personnel employed by the Department of Defense and the Central Intelligence Agency, Department of State, Veterans Administration, Public Health Service, and the National Aeronautics and Space Administration); 26 U.S.C. § 7426 (1976) (employees levying on property to collect federal taxes are immune from suit brought by persons other than the taxpayer claiming an interest in the property); 28 U.S.C. § 1498 (1976) (employees sued for patent infringement); 46 U.S.C. § 745 (1976) (employees sued for unlawful seizure of sea going vessels). As then Deputy Attorney General Benjamin R. Civiletti noted:

However, in actual practice the law of Government and employee tort liability provides no coherent whole. From the standpoint of the Government official or employee, the present law is irrational. While the driver of a negligently driven Government vehicle cannot be sued, the President and certain members of the United States Senate have been sued as individuals for monetary damages based on the allegedly wrongful disposal of the Panama Canal. While an employee cannot be sued for the unlawful seizure of a sea going vessel, an employee can be sued for the wrongful seizure of other items. While tax collectors under some circumstances are immune from suit, customs collectors are not. Government lawyers in those instances in which they represent individuals can be sued for malpractice, most Government doctors cannot. Although Government employees cannot be sued individually for patent infringement, Government flight controllers have been sued as individuals for damages arising from airplane disasters.

House 96th Cong. Hearings, supra note 10 at 3 (citations omitted).

121. Interestingly, neither the executive communication to the Speaker and the Vice President, nor the introductory remarks of Senator Roman Hruska, the sponsor of the Senate version, mentioned the *Bivens* decision which had been handed down two years earlier. Rather than citing any problems created by *Bivens*, the Department appeared to rely on the need to replace piecemeal exclusive defendant statutes with a general statute. See *Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93rd Cong., 2d Sess. § 33 at 81 (1974) (letter of September 17, 1973, from Elliot Richardson, Attorney General, to the Speaker) [hereinafter cited as *House 93rd Cong. Hearings*]. See *id.* at 47.

actment of the March 1974 amendments to 28 U.S.C. § 2680(h) that extended the Tort Claims Act to cover "acts or omissions of investigative or law enforcement officers of the United States Government [based on claims] arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution."¹²² While the Department believed that the 1974 amendments were inadequate because they failed to make the government the exclusive defendant,¹²³ the proposal was not resubmitted to the Ninety-Fourth Congress, and the Department took no position on similar Ninety-Fourth Congress legislation.¹²⁴

In September of 1977, the Department of Justice forwarded an expanded version of its earlier proposal to the Ninety-Fifth Congress.¹²⁵ This legislation would have amended the Tort Claims Act to make the government liable for the constitutional torts of employees acting not only within the scope of their employment, as the present statute does for common law torts,¹²⁶ but also acting under color of their office.¹²⁷ The proposal also would have provided liquidated damages of the higher of \$100 a day or \$1,000, and reasonable attorneys fees and other litigation costs for a constitutional tort.¹²⁸

As soon as the Department's draft bill was introduced, it was criticized as giving constitutional tort victims little in return for depriving them of the opportunity to bring suit against the individual employee—an opportunity which the bill's critics regard as an effective deterrent to unconstitutional employee acts.¹²⁹ The Department responded by submitting a series of amendments which

122. See note 64 *supra*, and accompanying text.

123. *House 93rd Cong. Hearings, supra* note 121 at 15.

124. H.R. 387, 94th Cong., 1st Sess. (1975).

125. See *House 95th Cong. Hearings, supra* note 97 at 26-31 (letter of September 16, 1977, from Griffin B. Bell, Attorney General, to the Vice President).

126. 28 U.S.C. §§ 1346(b), 2672, 2679(b) (1976).

127. *Senate 95th Cong. Hearings, supra* note 100, at 39-40; *House 95th Cong. Hearings, supra* note 97, at 1.

128. *Id.* See 18 U.S.C. § 2520 (1976) which provides a similar civil liability provision for persons whose wire or oral communications are intercepted, disclosed, or used in violation of 18 U.S.C. § 2510 *et seq.* (1976).

129. See *Senate 95th Cong. Hearings, supra* note 100, at 11-12 (remarks of Senator Metzenbaum); *id.* at 70-79 (ACLU letter of Oct. 3, 1977 to Raymond S. Calamaro, Deputy Assistant Attorney General, and letter from Common Cause, ACLU, and others to the Attorney General dated Nov. 21, 1977).

altered the bill to provide for the handling of constitutional tort administrative claims as class actions and to prevent the government from asserting as a defense "the absolute or qualified immunity of the employee (except members of Congress, judges or prosecutors or those performing such functions) or his good faith belief in the lawfulness of his conduct."¹³⁰

The Justice Department subsequently offered another amendment which was to become a focal point for both employee and public interest groups—the so-called discipline proceeding amendment.¹³¹ As introduced, the bills would have required the Attorney General to refer to the head of the employing agency for "such further administrative investigation or disciplinary action as may be appropriate" any matter which results in the payment of damages by the government. The Department and others¹³² believed that such a specific referral provision was an accountability mechanism sufficient to replace the sanctions presumably lost by insulating the employee from civil liability. However, meetings with public¹³³ and private persons¹³⁴ led the Department to suggest a direct discipline procedure which the constitutional tort victim could not only initiate, but in most cases actually participate in.¹³⁵ In the Senate, the Senate Judiciary Subcommittees on Citizens and Shareholders Rights and Remedies and on Administrative Practice and Procedure held joint hearings on S. 2117 on January 26 and June 15, 1978.¹³⁶ Hearings were held in the House by Congressman George Danielson's House Judiciary Subcommittee on Administrative Law and Governmental Relations in February, April, and May, 1978.¹³⁷

On May 3, and July 11, 1978, the Department, in an attempt to make the bill more acceptable to employee and public interest groups, submitted further amendments to the proposed discipline proceeding.¹³⁸ Later in July of 1978, Senator Howard Metzenbaum,

130. *Senate 95th Cong. Hearings, supra* note 100 at 48.

131. *Id.* at 50.

132. *See* Bermann, *supra* note 12 at 1197.

133. *See House 96th Cong. Hearings, supra* note 10, at 2-5.

134. *See House 95th Cong. Hearings, supra* note 97 at 15.

135. *Senate 95th Cong. Hearings, supra* note 100 at 49.

136. *Id.*

137. *See House 95th Cong. Hearings, supra* note 97.

138. *Senate 95th Cong. Hearings, supra* note 100 at 447-49, 454-57.

the Chairman of the Subcommittee on Citizens and Shareholders Rights and Remedies, the subcommittee with formal jurisdiction over the bill, introduced S. 3314, a clean bill which, while including most of the Department's suggested amendments, contained some provisions which proved unacceptable to the Department.¹³⁹ Although S. 3314 was reported out of Senator Metzenbaum's subcommittee, and a full committee report was drafted,¹⁴⁰ the Ninety-Fifth Congress adjourned before the bill was considered by the full Judiciary Committee.

H.R. 9219 was reported from the Danielson subcommittee, but also failed to receive full committee consideration before the adjournment of the Ninety-Fifth Congress. As it emerged from the subcommittee, the House bill did not include the Department's suggested discipline proceeding. Moreover, a subcommittee amendment provided that an employee whose conduct was the subject of an administrative inquiry or disciplinary action would be entitled to be represented by counsel. The House subcommittee also voted to eliminate the current exemption in the Tort Claims Act for claims arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.¹⁴¹

Had either the House or Senate Judiciary Committee had enough time to begin marking up the bills, there undoubtedly would have been a number of controversies—controversies that have accompanied the legislation in the Ninety-Sixth Congress. In March of 1979, Congressmen Danielson and Rodino introduced H.R. 2659;¹⁴² and Senator Kennedy introduced S. 695.¹⁴³ Both bills were based on drafts supplied by the Department of Justice. Like their predecessors, H.R. 2659 and S. 695 would make the government the exclusive defendant in common law tort cases, and expand the Act to cover constitutional torts. If the employee was acting within the scope of his office or employment when the constitutional tort was committed, the United States would be the exclusive defendant. If the employee was not acting within the scope of his office or employment, but was acting under the color of

139. See discussion of S. 3314 at note 148 *infra*, and accompanying text.

140. *Senate 95th Cong. Hearings, supra* note 100 at 827-56.

141. See 28 U.S.C. § 2680(h) (1976).

142. H.R. 2659, 96th Cong., 1st Sess., 125 CONG. REC. H. 1101 (1979).

143. S. 695, 96th Cong., 1st Sess., 125 CONG. REC. S. 2919-23 (1979).

his office when the constitutional tort was committed, the plaintiff could elect to sue either the United States or the individual employee. Class action procedures, liquidated damages computed at the rate of \$100 a day or \$1,000, whichever is higher, up to a maximum of \$15,000, a reasonable attorney's fee, and litigation costs would be available to the constitutional tort plaintiff. The government could not assert the good faith of its employee as a defense to a constitutional tort suit.

The discipline proceeding proposed by H.R. 2659 and S. 695 could be initiated by a person who obtained a monetary recovery against the United States on a constitutional tort claim, or by the plaintiff who filed a constitutional claim against the government within 60 and 120 days of the filing of his complaint. A hearing is required to be held if there is a material and substantial dispute of fact which could be resolved with sufficient accuracy only by the introduction of reliable evidence and if the decision of the agency was likely to depend on the resolution of such dispute. In the event of a hearing, the agency head may give to a person or an employee, or both, the opportunity to examine and cross-examine witnesses. A constitutional tort victim unsatisfied with the results of the employing agency inquiry could appeal the matter to an administrative review body, in most cases the Merit Systems Protection Board, which would have the authority to supplement the record by taking additional evidence. A constitutional tort victim could then appeal the decision of the reviewing body to a United States court of appeals. A former employee who has been sued as an individual would have to agree to submit himself to the discipline proceeding for current employees before the government would be made the exclusive defendant. The body responsible for the administrative review of agency discipline proceedings, again in most cases the Merit Systems Protection Board, could inquire into the conduct of Presidential appointees. A recommendation of the appropriate disciplinary action, if any, would then be made to the President.

Critics of the Administration's proposal continue to argue that it fails to provide sufficient recognition of the constitutional tort victim's need to insure that the tortfeasor will receive adequate discipline. These criticisms, and others, are certain to be issues in both

judiciary committees in the Ninety-Sixth Congress.¹⁴⁴ For example, the American Civil Liberties Union has renewed its request that the exclusive defendant provisions be made inapplicable to constitutional tort suits against Presidential appointees and former employees.¹⁴⁵ The Department believes that an election of remedies for plaintiffs, even if limited to constitutional tort suits against Presidential appointees and former employees, would destroy one of the purposes of the bill—to protect federal employees from the threat of a lawsuit challenging an on-the-job decision or action. Of course, removing the immunity for former employees merely provides an incentive for truly culpable employees to remain with the government. Moreover, at the moment, many *Bivens* actions appear to be directed at Presidential appointees—officials who are just as worthy of protection from the threat of harassing lawsuits as other federal employees. And, of course, suits involving Presidential appointees and former employees are just as expensive in terms of the government's private counsel program and just as difficult to settle because of the presence of individual defendants as are cases involving current employees. Finally, the so-called "election" can be easily circumvented in situations involving multiple plaintiffs. One plaintiff moves against the former employee or Presidential appointee individually, and the other plaintiff recovers against the government, thereby obtaining damages from one defendant and retribution from the other.

Another complaint made about the Department's proposal is that making the government the exclusive defendant for torts committed within the scope of the officials' office or employment¹⁴⁶ immunizes too many employees and, indeed, may even immunize employees who act in bad faith or contrary to their agency's interests.¹⁴⁷ Senator Metzenbaum's 1978 proposal, S. 3314, provided that for the government to be exclusively liable, the employee must have been acting "within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct."¹⁴⁸ The

144. *See id.* (statement of Senator Kennedy on S. 695).

145. *House 95th Cong. Hearings, supra* note 97 at 131; *House 96th Cong. Hearings, supra* note 10 at 41 (statement of Karen Christensen).

146. H.R. 2659, §§ 1 & 2.

147. *See, e.g., Senate 95th Cong. Hearings, supra* note 100 at 408.

148. S. 3314, § 6.

Department resisted this language as unduly restricting employee immunity, pointing out that one of the purposes of the proposal was to eliminate the endless and expensive disputes over the state of the employee's mind and the actual authority delegated by the government to its employee. If the Department's "scope of employment" test is adopted, and if the Department's elimination of the good faith defense is accepted, then the only issues that would stand in the way of plaintiff recovery would be whether a constitutional tort was committed, and whether the employee was acting within the scope of his employment or under color thereof when the tort was committed.

On the other hand, making the government potentially liable for constitutional torts committed under color of the employee's office, but not within the scope of his employment,¹⁴⁹ has raised questions whether the United States should be liable for a tort occurring when the employee was not acting in the government's interests. Indeed, one may question whether the Constitution can be violated by an employee acting in his own and not his governmental employer's interests.

The Department's proposed discipline proceeding¹⁵⁰ will continue to be a focal point of congressional consideration—as it should be. Critics of the Department's bill contend that for the discipline proceeding to be an effective replacement for the accountability strictures assumed to be inherent in a civil liability proceeding,¹⁵¹ it must insure that the tort victim participate to the maximum extent possible and that he be able to obtain administrative review of the administrative proceedings.¹⁵² Although the Department agrees,¹⁵³ it continues to insist that the legislation not alter the rela-

149. An example of a constitutional tort committed under color of the employee's office, but not within the scope of his employment, would be a law enforcement employee who uses his badge to gain entry into dwellings for the purpose of committing a crime or tort therein. See *House 96th Cong. Hearings, supra* note 10 at 8 (testimony of then Deputy Attorney General Civiletti).

150. S. 695, 96th Cong., 1st Sess., 125 CONG. REC. S. 2921 (1979).

151. Although evidence of the relative deterrent effect of tort liability and administrative discipline is lacking, several authorities appear to lean toward administrative discipline as the more effective deterrent. See, e.g., K. DAVIS, *supra* note 113 at § 26.03; Bermann, *supra* note 12 at 1198. But see Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U. L. REV. 85, 107 (1975).

152. See, e.g., *Senate 95th Cong. Hearings, supra* note 100 at 397.

153. See, e.g., *House 95th Cong. Hearings, supra* note 97 at 75.

tionship between the government and its employees. In other words, the victim-initiated discipline procedure should not present the employee with any procedural advantage that he could not obtain in the agency's current discipline procedure, and it should not prevent the agency from, at least in the initial proceeding, disciplining the employee as it sees fit. The public has the right to expect agencies to control employee abuse of constitutional rights. Insuring that the victim has an opportunity to participate should not destroy the agency's ability to conduct that discipline.¹⁵⁴ Of course, some employee groups oppose the discipline proceeding provisions;¹⁵⁵ others argue that if a discipline procedure is to be legislated, the employee should enjoy protections that are not available in current discipline procedure.¹⁵⁶

Proposals have been made to authorize the administrative review body to conduct de novo review of, or substitute its judgment for, the employing agency's discipline proceeding.¹⁵⁷ The Department of Justice has opposed any substitution-of-judgment standard of administrative review, arguing that if Congress is serious about requiring agencies to discipline employees responsible for constitutional torts, it should not allow the agency proceeding to be so meaningless as to be completely ignored on appeal.¹⁵⁸

A more troublesome difficulty with the Department's proposed amendments has been raised by Professor George Bermann who believes that enactment of the legislation would increase, rather than decrease, our dependence on the largely unworkable distinction between constitutional and common law torts.¹⁵⁹ If the section 2680 exceptions and the employee's qualified immunity are to be waived for constitutional torts, he argues that they should be waived for nonconstitutional torts as well. And, if attorneys fees, liquidated damages and discipline proceeding participation are to

154. *House 96th Cong. Hearings, supra* note 10 at 59 (statement of Nancy Drabble, Congress Watch). "History has plainly demonstrated that we cannot allow agencies the right to discipline or not discipline their employees." *Id.* at 58.

155. *House 95th Cong. Hearings, supra* note 97 at 27.

156. *Senate 95th Cong. Hearings, supra* note 100 at 400.

157. *See, e.g., id.*, at 449. *See House 96th Cong. Hearings, supra* note 10 at 46.

158. *See House 95th Cong. Hearings, supra* note 97 at 95-104 (testimony of William H. Webster, Director of the Federal Bureau of Investigation).

159. *See House 96th Cong. Hearings, supra* note 10 (Aug. 1, 1979 statement of George A. Bermann, Professor of Law, Columbia University School of Law).

be provided for constitutional tort claims, they should also be provided for nonconstitutional tort claims. Certainly, as long as constitutional tort plaintiffs receive better treatment under the statute, plaintiffs will argue that their claim is based on the Constitution. However, to extend to nonconstitutional tort plaintiffs the benefits that the legislation seeks to provide constitutional tort plaintiffs would ignore the qualitative and historical differences between the nature of common law and constitutional torts¹⁶⁰ and would amount to all but a complete waiver of sovereign immunity for nonconstitutional torts. Besides, such an important distinction between constitutional and nonconstitutional torts as the difference between absolute and qualified immunity has already been made by the courts.¹⁶¹

The draft legislation has always limited its description of a constitutional tort to "a claim sounding in tort for money damages aris[ing] under the Constitution of the United States"¹⁶²—an imprecision which has apparently been accepted by both the proponents and opponents of an expanded notion of constitutional torts, both sides presumably preferring a judicially developed explanation to a legislatively imposed definition. Such an inexact definition may be unwise from the government's standpoint. For example, a number of plaintiffs have already used a constitutional tort claim as a collateral remedy against a government employer or an administrative officer.¹⁶³ If courts were subsequently to abandon the

160. As the Seventh Circuit observed in *Beard v. Robinson*, 563 F.2d 331, 338 (7th Cir. 1977):

Like civil rights claims, *Bivens* claims for the deprivation of constitutional rights cannot be equated with state tort claims. Both the elements of the two types of claims and the underlying rights asserted are distinctly different. The Supreme Court recognized these differences in *Bivens* itself:

[A]s our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.

The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against searches and seizures, may be inconsistent or even hostile.

(citations omitted).

161. See note 46 *supra* and accompanying text; Friedman, *supra* note 12 at 515.

162. S. 695, 96th Cong., 1st Sess., 125 CONG. REC. S. 2920 (1979).

163. See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978) (collateral attack on administrative proceedings); *Barr v. Matteo*, 360 U.S. 564 (1959) (employee claim of libel against em-

lack-of-an-alternative-remedy-requirement, thereby permitting constitutional tort claims to be used as collateral remedies, the Department's legislative proposal with its imprecise definition of a constitutional tort could have a severe adverse affect on the orderly progression of government litigation and administrative proceedings.

The Department's proposed waiver of the employee's good faith defense has been criticized by employee groups¹⁶⁴ and others.¹⁶⁵ Questions have also been raised about waiving the section 2680 exceptions for constitutional torts. The waiver of the employee's good faith defense is intended to make the opportunity for plaintiff recovery more meaningful and to avoid prolonged litigation over the state of the employee's mind at the time the tort was committed.¹⁶⁶ The section 2680 exceptions would be waived to make the proposed constitutional tort remedy as extensive as that already available under *Bivens* and *Passman*. Admittedly, waiving the employee's good faith defense and the section 2680 exceptions will result in a substantial increase in government liability. But that should hardly be surprising in legislation designed to absorb employee liability. The Court in *Economou* reasoned that because section 2680(a) insulated the government from liability for discretionary acts, a plaintiff would have no defendant if the employee was insulated from liability by a claim of absolute immunity.¹⁶⁷ To make the government liable for constitutional torts, but limit that liability by the section 2680(a) discretionary acts exemption, would invite courts to imply a cause of action against individual employees who abused that discretion.

Two Tort Claims Act cases illustrate the uncertainties which will continue to accompany the distinction between constitutional and common law torts. The plaintiff in *Kiiskila v. United States*¹⁶⁸ sought damages under the Act on a claim that a military officer

ployer); *Neely v. Blumenthal*, 458 F. Supp. 945 (D.D.C. 1978) (employee claim of racial discrimination).

164. See *House 96th Cong. Hearings*, *supra* note 10 at 94 (statement of John S. Mc-Nerney, National President, Federal Criminal Investigators Association).

165. See *House 96th Cong. Hearings*, *supra* note 10 at 88 (statement of Ordway P. Burden, President, Law Enforcement Assistance Foundation).

166. See Department of Justice Section-by-Section Analysis of S. 695 at 5.

167. 438 U.S. at 505.

168. 466 F.2d 626 (7th Cir. 1972).

permanently excluded her from Fort Sheridan where she was a civilian employee because of her alleged anti-war activity. The Seventh Circuit, after noting that the exclusion may be "constitutionally repugnant,"¹⁶⁹ held that the discretionary function exception of section 2680(a) barred government liability. However, the discretionary function exception did not preclude government liability in *Myers and Myers, Inc. v. United States Postal Service*,¹⁷⁰ which involved a claim that the Postal Service had acted "in disregard of its own applicable regulations and of the Constitution."¹⁷¹ Under the Department's proposal, which would waive the section 2680(a) exception, plaintiffs in both cases would prevail if they could successfully argue a constitutional tort. Deprived of the discretionary acts exception, the government would probably argue the absence of a constitutional tort. If the enactment of the Justice Department proposal were to lead to any unforeseen or unintended consequences, they would surely develop from the waiver of the good faith defense and the waiver of the section 2680 exceptions. For if the new Tort Claims Act is not strictly construed by the courts which will shape the contours of a "constitutional tort," then the government will become an insurer of constitutional torts victims rather than the accessible defendant intended by the Department of Justice proposal.

VII. CONCLUSION

The current law of constitutional torts creates expensive, unproductive litigation for the government and needless anxiety for the government's employees, while failing to provide relief for constitutional tort victims. Although amending the Tort Claims Act to make the United States the exclusive defendant for constitutional torts will alleviate these current problems, the legislative processing of such amendments will have to be watched closely to insure that an amended Tort Claims Act does not create a new set of problems in the often complex area of liability for constitutional torts.

169. *Id.* at 627.

170. 527 F.2d 1252 (2d Cir. 1975).

171. *Id.* at 1261. Both *Kiiskila* and *Myers and Myers* are discussed in Comment, 1978 B.Y.U. L. Rev. 355, 362-65.

